A critical analysis of the legislation governing the acquisition of organisational rights

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I, Kelebogile Patience Madibo, hereby declare that the mini-dissertation entitled:

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That I herewith submit in the partial fulfilment of the requirements of the LLM degrees is my own original work, in which no plagiarism has been committed and it has not been submitted by me or any other person for purposes of a higher degree at this or any other institution.

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Declaration by supervisors

I, Professor MLM Mbao, hereby declare that this mini-dissertation by Kelebogile Patience Madibo submitted in partial fulfilment of LLM degree was carried out under my supervision and that it can be accepted for examination

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Co-supervised by Mr. RWM Nkhumise

Supervisor's signature: 

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Dedication

This mini-dissertation is dedicated to:

My late grandmother, Mmaditshuti Madibo

My late grandfather, Molebeledi Madibo

My mother, Sellwane Madibo

My sister, Motshedisi Madibo

My aunt, Gaitsiwi Madibo

My daughter, Boitshepo Madibo

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To friends and family not mentioned, your presence is highly appreciated.

List of abbreviations

AMCU	Association of Mineworkers Construction Union
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
COM	Chamber of Mines
CWU	Communication Workers Union
EEA	Employment Equity Act
ICA	Industrial Conciliation Act
ILO	International Labour Organisation
NUMSA	National Union of Mineworkers of South Africa
OCGAWU	Oil, Chemical, General and Allied Workers Union
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SAA	South African Airways
SACCAWU	South African Commercial Catering and Allied Workers Union
SACTWU	Southern African Clothing and Textile Workers Union
SANDU	South African National Defense Union
SAPWU	South African Postal Workers Union
TES	Temporary Employment Services
UIF	Unemployment Insurance Act

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Abstract

The purpose of this mini-dissertation is to critically analyse the legislation governing the acquisition of organisational rights. To be specific, the study is on the second requirement for the acquisition of organisational rights, namely, that the union must enjoy a certain level of representation in the workplace it wants to exercise such rights. The study submits that two keywords in this requirement, namely "representation (sufficient representation) and workplace" have some practical challenges which makes it difficult for trade unions to exercise organisational rights in a given workplace. This challenges includes, *inter alia*, the silence of the *Labour Relations Act 66 of 1995* on what is meant by "sufficient representation"; the different decisions and the unequal treatment of unions regarding their sufficient representativeness; the need for a flexible definition of the term 'workplace" in order to be in line with the Fourth Industrial Revolution which has entailed integration of digital technology into everyday life and has allowed workers to work anywhere at any time and the need to raise awareness on what constitutes a workplace where two or more operations are concerned. The study submits that as long as these two keywords are not dealt with accordingly, conflicts between employers and trade unions regarding the exercise of organisational rights, will never cease to exist.

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

This chapter introduces the study and provides an overview of the dissertation. The focus of this study is on unpacking the preconditions for utilising section 21 of the *Labour Relations Act (*hereafter the LRA*)*,[1]which sets out the procedure to be followed for a trade union to acquire organisational rights in the workplace.

In terms of section 21 of the LRA, where a registered union is entitled to organisational rights and not in terms of sections 19 and 20 of the LRA and the employer refuses to recognise or grant such rights to the union, the latter may utilise section 21 procedure in order to obtain such organisational rights.[2]

However, although the LRA is clear on the fact that a registered union can utilise the section 21 procedure where the employer refuses to grant certain organisational rights, there are requirements which must be met before such a union can utilise this procedure in terms of the LRA, which are outlined in the subsequent segment.

Section 11 of the LRA provides that "a representative trade union means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the workers employed by an employer in a workplace"[3] This section looks deceptively straightforward. The first part of the section means that the registration of a trade union is the first requirement as the LRA grants organisational rights to registered unions only. However, the second requirement that the union must be sufficiently representative is more problematic as elucidated herein. The study will now provide a thorough discussion of these requirements in the following paragraphs.[4]

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1 66 of 1995.

2 Section 19 of the LRA deals with certain organisational rights for trade union party to council and provides that "registered trade unions that are parties to a council automatically have the rights contemplated in sections 12 and 13 in respect of all workplaces within the registered scope of council regardless of their representativeness in any particular workplace". Section 20 on the other hand, deals with organisational rights in collective agreements and provides that "nothing in this part precludes the conclusion of a collective agreement that regulates organisational rights". See also Gibson and Flood Everyone's Guide to Labour Law 104.

3 See also Basson *et al "*Organisational Rights" 48 regarding the requirements for the exercise of organisational rights

4 Basson *et al* "Organisational Rights" 48.

1.1.1 The registration requirement

It is important to note that trade unions are not obliged to register but the LRA encourages the registration process as it refers to "registered unions" regarding most of the rights such as organisational rights, conclusion of collective agreements, the establishment of a bargaining council, statutory council or a workplace forum, authorizing a picket by its members and representing members at CCMA proceedings.[5]

Section 95 of the LRA provides for the requirements (to be discussed in chapter three) which must be met by any trade union seeking registration. Once the union complies with such requirements, the Registrar must register the union or organisation.

Basson[6] *et al* mentions that once, the Registrar is satisfied that the union has met all the prescribed preconditions, then the register will be obliged to register the trade union or employer's organisation by entering the union's or the employers' organisation's name in the register and issue a certificate of registration.

1.1.2 Representation requirement

It is submitted that once it has been established that the union is registered, it must be determined whether the trade union in question is sufficiently representative in the workplace in which it seeks to exercise organisational rights.[7]

The LRA refers to sufficient representation in terms of sections 12, 13, and 15 and majority representation in terms of sections 14 and 16. Bassoon[8]*et al* adds that there are two forms of representation in this regard, namely majority representation which is the full form of representativity based on a simple majority of members employed in a given workplace and sufficient representation which is the partial representivity of employees in a given workplace.

It is important to distinguish between majority representation and sufficient representation in order to understand which organisational rights can be exercised by any given registered trade union as two organisational rights depend on majority representation,

5 Sections 11, 23, 27, 39, 78, 69 and 115 (3) of the LRA.
6 Basson et al "Organisational Rights" 38.
7 Own emphasis provided on the procedure after registration of unions.
8 Basson *et al* "Organisational Rights" 49.

namely, the right to elect trade union representatives and the right to the disclosure of information but as regards the other rights, namely access to the workplace, deduction of subscriptions and leave for union office bearers, the LRA requires only that the registered union be sufficiently representative of the employees in the workplace.[9]What is not clear is the meaning of "sufficient representivity", which problem is at heart of this study.

Once it has been established that both the requirements are met, meaning that the trade union is registered and that it has a certain level of representativeness in any given workplace, such a union may utilise section 21 procedure to obtain organisational rights.[10]

It is submitted that the first requirement of registration does not pose practical difficulties since only registered unions can claim organisational rights and the procedure thereof is relatively simple, it is a matter of evidence if in a given case, a claimant union is in fact registered.[11]

Therefore, this study is concerned mainly with the emerging challenges brought about by the second requirement (a certain level of representation at a workplace).It is submitted that even decided cases indicate that the second requirement, presents some practical difficulties.[12] The question here is what is meant by "sufficient representativity" in the workplace? Given the evolving nature of work itself, as will be shown in Chapter three, even the definition of "workplace" is now not certain. Therefore, the requirement has two key concepts to be discussed herein, namely, the concepts of "representativeness" and "workplace". These two concepts are the contested issues privileged this study.

1.1.2.1 Representativeness

It has already been mentioned that the issue of majority representation does not present practical problems since it is quite easy to determine the majority of workers belonging to a certain trade union in a given workplace. However, it is difficult to establish

9 Basson *et al* "Organisational Rights" 49.

10 Basson *et al* "Organisational Rights" 48.

11 See Sections 11, 23, 27, 39, 78, 69 and 115 (3) of the LRA, Basson *et al* "Organisational Rights" 37.

12 See *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA) par 18, *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 BLLR 662 (CCMA) par 1420, *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA) par 1411.

what is meant by "sufficient representation" of a trade union in a work place since the LRA does not define or indicate with the necessary degree of precision or wording what degree of representivity is regarded as sufficient representivity.[13]

Israelstam[14] posits that a trade union can only be recognised in a workplace if it can prove its sufficient representation to the employer or the CCMA. The question is, what constitutes sufficient representation as the term "sufficient representation" as the LRA lacks the definition thereof, thus leaving it open to the arbitrators of the CCMA to decide whether the union is sufficiently representative in a given set of circumstances? The LRA provides the CCMA arbitrators with some broad guidelines that are not very helpful as will be discussed in Chapter three of this study.

Since the LRA is silent on what constitutes sufficient representation, Basson *et al*[15] puts the question this way: if a union represents 35% of all the employees in the workplace, is that sufficient representation? And can it also be said that a registered trade union is sufficiently representative if it represents 10% of all the employees in a workplace?

In *UPUSA v Komming Knitting,*[16] the Commissioner granted the right of access and the deduction of union subscriptions to a trade union which, at the time of the award, represented 7 employees out of a total of thirty-one (23%). The CCMA emphasised the fact that this was because there was no other union organising and recruiting in the workplace except for UPUSA. In contrast, in *SACTWU v Marley*,[17] the CCMA ruled against the granting of organisational rights to a union with 42% representivity. The CCMA indicated that the reason for this refusal included that another union represented approximately 56% of the employees in the same workplace.

Clearly, according to Israelstam,[18] the question whether a registered trade union is sufficiently representative is a matter which must be determined according to the merits of each case as the guidelines provided by the LRA are not entirely helpful in this

13 Basson*et al* The New Labour Law Handbook 292.
14 Israelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand-recognition-at- your-workplace-2012-01-05 accessed 22 May 2017.
15 Basson *et al* "Organisational Rights" 49.
16 [1997] 4 BLLR 508 (CCMA).
17 (2000) 21 ILJ 425 (CCMA).
18 Israelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand-recognition-at- your-workplace-2012-01-05.

regard and should be amended in such a way as to indicate what degree of representivity could be regarded as sufficient so that there should be equal treatment of trade unions when organizational rights are considered.

1.1.2.2 Workplace

Basson *et al* state that what constitutes a workplace may appear to be very simple, but there are some considerable difficulties in establishing just what constitutes a workplace in any given case.[19]Section 213 of the LRA defines the term 'workplace" under two categories, namely private and public sector. The definitions are as follows:

1.1.2.2(a) Public sector

> For the purposes of collective bargaining and dispute resolution, the workplace is the registered Public Service Coordinating Bargaining Council or a Bargaining Council in a sector in the public service. For any other purpose, a national department, provincial administration, provincial department or any other part of the public service after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace.

1.1.2.2(b) Private sector, here, the term workplace means

> the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

The former definition does not pose practical challenges, therefore, it will not be discussed in this study. However, the definition in the private sector on the other hand, will be critically analysed on three bases, namely based on the changing meaning of the work, when two or more operations are concerned and finally with regards to Temporary Employment Services (hereafter TES).

According to the joint International Labour Organisation (ILO)-Eurofound Report,[20] advances in digital technology which allows workers to work anywhere at any time are rapidly transforming the traditional model of work. The use of technology such as laptops, tablets and smartphones has made it possible for employees to work anywhere,

19 Basson *et al* "Organisational Rights" 49.

20 ILO 15 O2 2017 http://www.annuallabourlawconference.co.za/news/24-02-2017/working-anywhere-anytime-effects-technology-world-work accessed 30 May 2017.

at any time. According to the ILO Report referred to above, employers now encourage this type of flexibility as it is perceived to increase productivity and performance and employees are also in favour of such development as it gives them greater spatial and temporal flexibility.[21]

The above Report[22] indicate that the concept of work has changed due to advances in digital technology. It is common cause or axiomatic that we are at the cusp or threshold of the Fourth Industrial Revolution with its concomitant digitalization of society which, in turn, has entailed integration of digital technologies into everyday life. This intersection of technical changes and transformation of society has meant, for instance, that the nature of work itself is undergoing fundamental changes. Not only in the old ways of doing things changing as the result of the emergence of new business models such as the gig economy, but many countries are fast "informalizing" with what was previously known as the informal sector now being regarded as the "new norm" which in turn call for the re-imagining of new types of labour law, whereas the LRA currently favors majoritarianism as opposed to minority unions, the new social milieu calls for pragmatic and innovative ways of empowering individual workers. The question therefore, is how should labour law evolve to accommodate these challenges and opportunities in the labour market?

In the case of the emerging "gig economy" involving the engagement of a worker for a specific form of work or where end-result is contracted for, the employee performs the work in order to produce the result and the relationship between the parties ends after that performance. These, often platform-based services, often across borders, involve an infinite number of workers and employers spread over large geographical distances, for instance, transportation provider such as Uber and Taxify drivers, home repairs etc. The question still remains: Are persons who perform services to end-users recognised as employees?

In the case of *Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and others*[23] the question was whether the Uber drivers were the employees of Uber SA or Uber BV in the Netherlands? Although the

21 See also Whitear N http://www.hrpulse.co.za/editors-pick/235103-working-anywhere-anytime-the-effects-of-technology-on-the-world-of-work accessed 30 May 2017.

22 ILO 15 O2 2017 http://www.annuallabourlawconference.co.za/news/24-02-2017/working- anywhere-anytime-effects-technology-world-work.

23 [2018] ZALCCT 1 (12 January 2018).

question was left open on a technicality in that the wrong party was cited (Uber BV should have been cited), by supplying the APP, the tools of the trade, Uber drivers should be treated as employees because they are economically dependent on the Uber SA who also provides them with the tools of the trade and the manner in which they worked is also under the control of Uber SA.

It is submitted that this has an impact on the definition of a workplace in the private sector which is defined as the place or places where employees of an employer work. The central question for this study is what constitutes a workplace for an employee who works from home? Does the home of the employee automatically become the workplace as per the definition of the LRA?

Difficulties can arise in determining just what a workplace is in cases where the employer conducts two or more operations that are independent of one another. This is graphically illustrated by the case of *Association of Mineworkers Construction Union (AMCU) v Chamber of Mines (*AMCU and COM hereafter*)*,[24] the Court had to decide whether individual mines constituted separate workplaces to establish the constitutionality of the extension of collective agreements to non-parties in terms of the LRA. This case will now be discussed in detail.

(a)Facts of the case

AMCU, the first applicant, represented the majority of workers at five individual mines of the employer. However, AMCU was not the majority union overall.[25]

“In 2013, the COM (acting on behalf of mining companies) had concluded a wage agreement with three majority unions, the National Union of Mineworkers (NUM), Solidarity and the United Associations of South Africa (UASA). However, AMCU was not a party to the agreement. On 10 September 2013 the COM and these three unions concluded a collective agreement. The agreement was applicable to all the companies’ employees including those not members of the majority unions”.[26]

24 *Association of Mineworkers Construction Union v Chamber of mines* [2017] ZACC 3 (CCT 87/16) para 27.

25 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 10.

26 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 6 and 7.

"AMCU was not a party to the agreement, therefore, it did not regard itself as being bound. As such, On 20 January 2014, it notified the three companies that its members would go on strike from 23 January 2014. The COM urgently applied to the Labour Court to interdict the strike. On 30 January 2014, the Labour Court granted an interim interdict against AMCU and its members".[27]

(b) The legal issues calling for solution were as follows:

- whether members of AMCU could go on a strike in the existence of a prohibitory agreement, to which they were not parties?";
- the validity of extension of collective agreement to members of a union not party to collective agreement empowered by section 23 of the LRA";
- what was the meaning of the term "workplace" with reference to section 23 (i) (d) of the LRA? "Did it mean all the mines of the Chamber member companies overall, where AMCU was in the minority? Or the individual goldmines, where it had a majority?"[28]

(c) Decision of the Court

In deciding the validity of the extension of the collective agreement and the right to strike of AMCU members, the Constitutional Court firstly emphasized the meaning of the term "workplace" in the second proviso by stating that despite the fact that employees can work from numerous places, "different operations could be different workplaces only if they were independent of each other by reason of their size, function or organisation". The Constitutional Court further indicated the geographical location was not the key question as the pivotal concept was "independence". If there were two or more operations and they were "independent of one another by reason of their size, function or organisation, then the place or places employees worked from in connection with each independent operation, constituted the workplace for that operation".[29]

The Constitutional Court indicated that there was no reasonable justification to deviate from the statutory definition in order to adopt the broad interpretation of a workplace

27 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 8.

28 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 10.

29 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 27 and 28.

by AMCU, which would hold in favour of AMCU and each mine declared a workplace.[30] Therefore the Court concluded that the individual mines did not constitute separate workplaces, consequently, the collective agreement was validly extended to AMCU members.[31]

(d) *Ratio decidendi/* legal principle

The rulling confirms the second provision of the definition of the term "workplace" in section 213 of the LRA, that more than one operation by the same employer may constitute separate workplace as long as the "independence" element is present. This case also illustrates that conflicts can arise between employers and trade unions where two or more operations are concerned.

Finally, the definition can also cause problems in the context of labour brokers. When labour brokers deploys employees to a client wherein a period of three months has not lapsed at a salary below the prescribed threshold in terms of section 6 of the Basic Conditions of Employment Act, (hereafter BCEA),[32] what is the nature of the employment relationship? Is there a sole employment relationship in terms of the deeming provision under the 2014 amendments[33] to the LRA or the dual employer continues until post three months period?

Before the Constitutional Court judgment in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa (NUMSA) and Others*, 2018, (hereafter Assign case)[34] there was a wide variety of disputes regarding the interpretation of the deeming provision and this is shown by the conflicting judgments of the Labour Court and Labour Appeal Court. The material facts of the case were as follows:

(a)Facts of the case

"The applicant was Assign Services (Pty) Limited (Assign Services/Assign), a registered TES in terms of the LRA. The respondents were: the National Union of Metalworkers of South Africa (NUMSA, the first respondent), which was a registered trade

30 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 38.
31 Association of Mineworkers Construction Union v Chamber of mines [2017] ZACC 3 (CCT 87/16) para 40.
32 75 of 1997.
33 Labour Relations Amendment Act 6 of 2014.
34 [2018] ZACC 22.

union, the CCMA (second respondent), which was approached by the applicant and first respondent to provide an interpretation of section 198A (3) (b) of the LRA, Commissioner Abdool Carrim Osman (third respondent), who was appointed by the CCMA to determine the dispute that gave rise to the application and Krost Shelving and Racking (Pty) limited (the fourth respondent), Krost company was the client with whom Assign Services placed its workers".[35]

The 1983 amendment[36] to the old LRA provided for the TES to be the true employer of the placed employees.[37] This provision became section 198(2) of the LRA, 1995. However, the 1995 LRA was amended in 2004 to allow for the protection of employees in precarious employment.[38] These included section 198A, which came into operation on 1 January 2015.[39]

Section 198A regulates temporary service employment, which is limited to a period not exceeding three months. Section 198A(3)(b) explicitly provides another deeming provision which states that "an employee not performing a temporary service for a client is deemed to be an indefinitely employed employee of that client and the latter is regarded as the employer".[40]

"On 1 April 2015, Assign Services placed 22 workers with Krost. The workers rendered services at Krost on a full time basis for a period in excess of three consecutive months. This continued employment, post the three-month period of a temporary employment service, triggered section 198A (3) (b) of the LRA. Several of the placed employees were members of NUMSA".[41]

"A dispute arose between Assign Services, Krost and NUMSA regarding the interpretation and effect of section 198A (3) (b). Assign contended that the deeming provision meant that they remained employers of the employees for all purposes and Krost was also deemed the employer for purposes of the LRA. Assign termed this the "dual employer" interpretation of section 198A (3) (b). NUMSA disagreed, its view was that Krost became the only employer of the placed workers when section 198A (3) (b) was

35 [2018] ZACC 22 par 4-8.
36 Labour Relations Amendment Act 2 of 1983.
37 Section 28 of the LRA ,1956.
38 Labour Relations Amendment Act 6 of 2014.
39 [2018] ZACC 22 par 10.
40 [2018] ZACC 22 par 11.
41 [2018] ZACC 22 par 13.

triggered, NUMSA termed this the “sole employer” interpretation. On 23 April 2015 Assign Services referred the dispute as a stated case for arbitration to the CCMA in terms of section 198D[42] of the LRA”.[43]

(b) The legal issue calling for the solution was:

> What happens to the employment relationship under the LRA between the placed employee and the TES once this deeming provision kicked in, in particular, did section 198A (3) (b) give rise to a dual employment relationship where a placed employee to be employed by both the TES and the client? Or did it create a sole employment relationship between the employee and the client for the purposes of the LRA?[44]

(c) Decision of the Court

The case started with CCMA, where the Commissioner held in favour of the sole employer relationship, then proceeded with review to the Labour Court, which aslso held in favour of sole employer. The case then proceeded on appeal to the Labour Appeal Court, which held in favour of the dual employment relationship. The case further went on appeal to the Constitutional Court which held in favour of sole employer relationship.

The majority of the Court, Per Dlodlo AJ found in favour of the sole employer relationship on a textual purposive and contextual interpretation of the LRA as amended.[45] However, the minority judgment by Cachalia AJ in favour of the dual employment relationship is more persuasive. He arrived at this conclusion having analysed the purpose, language and content of the deeming provision in section 198A (3) (b) as aligned with section 1 of the BCEA.[46]

Given these strong divergent views, it is doubtful whether in fact the highest Court in the land did indeed settle the law as to the correct interpretation of section 198A (3) (b), thus giving credence to the need for further investigation in this area of the law. It is against this background that this study proceeds to analyse the meaning of the term

42 Section 198D provides that “any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.”
43 [2018] ZACC 22 par 14-15.
44 [2018] ZACC 22 par 1.
45 [2018] ZACC 22 par 84.
46 [2018] ZACC 22 par 86-99.

"workplace" for employees employed under the TES, wherein a period of three months has not passed.

(d) Legal principle

This case illustrates that section 198A (3) (b) supports the sole employer interpretation and that after a period of three months, placed workers earning below the prescribed threshold are deemed employees of the client not TES.

1.2 Problem Statement

It has been mentioned in section1.1.2.1 above that the LRA lacks the definition of the term "sufficient representation" of a trade union which leaves it to the discretion of the arbitrators and Commissioners of the CCMA to decide whether a registered union claiming organisational rights is sufficiently representative in any given case.

The question is what constitute "sufficient representation" since the LRA does not define this concept? Consequently arbitrators and Commissioners have awarded certain organisational rights to trade unions with a higher percentage of representativeness whilst in some other cases, recognition has been accorded to unions with a less percentage of representativeness as illustrated by the case of *UPUSA v Komming Knitting* and *SACTWU v Marley* above.[47] Therefore there is a need for legislative reform to provide valuable guidelines which will assist the courts and arbitrators in determining the degree of sufficient representation of a registered trade union in a given workplace for that claimant union to be entitled to organisational rights. At the heart of this study is therefore the question of what is meant by the phrase "sufficient representation" in the workplace.

Secondly, the concept of workplace also poses three theoretical and practical problems as was underscored in section 1.1.2.2 (b) above, namely, the changing nature and scope of work makes it difficult to define a workplace for an employee who works from home or any place in platform economies and new business models other than the employer's workplace; The *AMCU* case indicates that there needs to be more

47 UPUSA v Komming Knitting [1997] 4 BLLR 508 (CCMA), SACTWU v Marley (SA) pty ltd t/a Marley Flooring (Mobeni) (2000) 21 ILJ 425 (CCMA). See also*SACTWU v Sheraton Textiles (pty*) ltd [1997] 5 BLLR 662 (CCMA) par 1420, *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA) par 1411.

awareness of the fact that more operations by one employer can be regarded as different operations and finally section 198 of the LRA[48] which deems the TES as the employer and not the client impacts on the definition of a workplace for employees employed under such circumstances.[49]Furthermore, as indicated in the background to this study, the challenges and opportunities embedded in the Fourth Industrial Revolution call for a thinking or the re-imagining of the nature of work, of the world of law and of society itself so as to engender more flexibility.

Thus, it is submitted that due to the practical challenges bought about by the two key words, namely, "sufficient representation" and "workplace", registered trade unions cannot easily utilise the section 21 procedure. Once these two keywords have been dealt with accordingly as discussed above, conflicts between employers and registered trade unions will be minimised. This study hopes to make a modest contribution in this on-going search for solutions.

1.3 Aims and Objectives of the Study

At the heart of the study is the interrogation of the practical problems inherent in the silence of the LRA as to what it means for a registered union to be sufficiently representative and to critically analyse the meaning of a workplace in terms of the LRA as set out in the second requirement for utilising section 21 procedure. The study seeks to achieve the following objectives:

- to analyse the meaning of the terms "representativeness" and "workplace" in terms of the LRA with a view to obtaining conceptual clarity;
- to examine the difficulties confronted by the labour courts and arbitrators in determining what constitutes sufficient representation and workplace in any given case;
- to compare the South African position to foreign laws in order to borrow from such countries as South African law is still in infancy;
- to consider international laws such as international conventions, standards and recommendations of the International Labour Organisation(hereafter ILO)

48 The section if a person's services have been procured for or provided to a client by a TES, the former will be the employee of that TES and the latter will become the employer of that person.

49 Note that the study started before the Constitutional Court judgement in *Assign Services v NUMSA,* [2018] ZACC 22.

in order to draw important lessons for South African so as to comply with its international obligations; and

- to propose law reform.

1.4 Rationale and Justifications of the Study

The study addresses the need for legislative reform regarding the two keywords in the second requirement for utilising section 21 procedure. This is because the LRA is silent on the definition of the term "sufficient representation" and the practical difficulties brought about by the definition of a workplace regarding employees employed under the TES.

Furthermore this study is significant in that it proposes law reform in order to address practical problems in the current legislation. In that respect the study should be of interest to architects of labour policy, law reformers, the judiciary, academia and to students of law.

1.5 Literature review

Much has been written about organisational rights including how trade unions can acquire such rights. This body of knowledge and innovation in an increasingly virtual world calling for a change in mindset and new ways of working includes the work of Basson *et al*[50]where it is stated that the term "workplace" may appear to be very simple to comprehend but there are considerable difficulties in establishing just what a workplace is. Gibson *et al*,[51]and Grogan[52]provide insightful information on the conceptual difficulties associated with the term "sufficient representation". However, these learned authors do not proffer solutions to these challenges.

One of the methods in which these organisational rights can be acquired is through section 21 procedure of the LRA. However, before a union can utilise section 21 procedure, section 21(2) of the LRA provides for the requirements mentioned in paragraphs 1.1.1 and 1.1.2 to be met by a union.

The second requirement leads us to the concepts of "sufficient representation" and "workplace". These two terms have far-reaching implications since the LRA is silent on what is meant by sufficient representativity and there are practical difficulties in

50 Basson*et al* "Organisational Rights"49.
51 Gibson and Flood Everyone's Guide to Labour Law 104.
52 Grogan J collective Labour Law 35.

establishing what constitutes a workplace where people who are employed under the TES are concerned. As pointed out heretofore, due to the rapidly changing nature of work, there is a pressing need to re-think what is meant by "work and workplace".

Botes[53] provides insight on the issue of the employees employed under the TES by stating that employees in this circumstance are often distinguished from workers of the client as they are often unable to exercise and enforce their rights. It is submitted that this includes the right to strike, because in order to exercise this right, the employees must strike at the premises of the employer. Hence it is difficult to enforce this right as the employees under the TES work at the premises of the client and not that of the agent (TES) who happens to be their employer. The question is how can the law change fast enough to protect such employees? As we saw with the Assign case, the Constitutional Court was divided on the true nature of this employment relationship, an area of law which is supposed to protect the most vulnerable in society.

Botes[54] further states that these employees often encounter problems such as not being members of any trade union as a result of having to move from one workplace to another. Consequently, trade unions always have difficulties in organising them. It is submitted that these are some of the challenges that are brought about by the term "workplace" and such employees remain unrepresented and outside the protected umbrella of the LRA.

Furthermore, there have been some important judicial development such as *SA Commercial Catering and Allied Workers Union v The Hub*,[55]where the court dealt with the term "workplace". The Court was unwilling, in the absence of proof by the trade union, to find that different stores of a retailer constituted different workplaces. It made it clear that the onus rested on the trade union to prove whether two operations were different workplaces. In *SACTWU V Sheraton Textiles Pty) Ltd,*[56] the right to access and the deduction of union subscriptions was granted to a trade union with virtually 30% representativeness in the workplace whereas in *OCGAWU v Total SA*[57] all the employer's 38 distribution depots were held to constitute one workplace. These cases provide

53 Botes 2013 *PER/ PELJ Law Journal* 525.
54 Botes 2013 PER/ PELJ *Law Journal* 525.
55 *SA Commercial Catering and Allied Workers Union v The Hub* (1999) 20 ILJ 497 (CCMA).
56 *SACTWU V Sheraton Textiles Pty) ltd* [1997] 5 BBLR 662 (CCMA).
57 *OCGAWU V Total SA* (CCMA WE 15487).

vital information and serve as precedents on the concepts of "representativity" and "workplace" and underline the uncertain state of the law. However, the literature and case law are not definitive or precise on the meaning of these terms as the recent decision in AMCU demonstrates, hence this mini- dissertation aims to fill in the gaps in the literature.

1.6 Data Collection and Research Methodology

Maree[58] states that there are two main forms of research methodology, namely, the qualitative research method and the quantitative research method.

Creswell[59] notes that the distinction between the two methods is often framed in terms of using words in respect of the qualitative research and using numbers where quantitative research is concerned or using open-ended questions for the former rather than using closed ended questions for the latter.

In a qualitative research, the issue of quality can be addressed by dealing with issues of validity, practicality and effectiveness.[60] The method learns about people and systems by analysing their meanings and interpretations.[61]

On the other hand, quantitative research is empirical in that it deals with statistics and uses statistical procedures to investigate research questions. It is important for the researcher to state the statistical procedure to be used and to determine the level at which statistical significance will be determined.[62]

This study will follow the qualitative research method as the study is doctrinal and does not rely on quantifiable variables as Creswell puts it.[63] This is because the concepts of "workplace" and "sufficient representativity" will be interpreted in textually and purposively. Furthermore, the two concepts will be analysed in their contextual settings in order to gain a deeper understanding of the normative content of these terms. In order

58 Maree First Steps in Research 38-39.

59 Creswell Research Design: Qualitative, Quantitative and Mixed Methods approaches 4.

60 Maree First Steps in Research 38.

61 Maree First Steps in Research 51.See also Creswell Research Design: Qualitative, Quantitative and Mixed Methods approaches 4 where it is explained that a qualitative research is an approach for exploring and understanding the meaning individuals or groups ascribe to a social or human problem.

62 Maree First Steps in Research 39.

63 Creswell Research Design: Qualitative, Quantitative and Mixed Methods approaches 4.

to prosecute this qualitative method, literature, internet sources, case law as well as legislation will be used accordingly.

The study will also compare the South African law with the international labour standards (laid down by the ILO) due to South Africa's membership of the ILO. Further reference is made to four other national jurisdictions in order to borrow from them as the South African law is still in infancy. This is because these jurisdictions, namely, Malawi, Bahamas, Dominican Republic and Belize are member states of the ILO and their domestic laws are more to the point, especially as regards to the notion of "sufficient representation".

The quantitative research method is not appropriate for this study as the study does not require an analysis of numerical data and field work and there will be no need for the conclusions of the study to be supported by quantitative data.

1.7 Scope and chapter outline

This study has five inter-related chapters. Each chapter has its own specific aspect and it has been designed in such a way as to produce an internally coherent and lucid flow of arguments.

Chapter one is the introduction of the study and its purpose is to introduce to the reader as to what the study is all about so that the reader will be able to understand and appreciate the problem under investigation.

Chapter two deals with historical perspectives. Here, the evolution of South African labour law which eventually led to the legislation governing the acquisition of organisational rights will be discussed. Owing to constraints of space in a mini- dissertation, the discussion of historical antecedents will be brief.

Chapter three is an analysis of current legal position. Here, the preconditions for using the section 21 procedure will be discussed in detail. The requirements will be elucidated here as this is the main focus of the study.

Chapter four is the comparative analysis. Here, the study will determine whether the current preconditions for using the section 21 procedure meet international standards or benchmarks. The chapter also brings out important lessons from comparative jurisdictions and the ILO in the hope that our law makers can draw from them.

Chapter five carries our conclusions recommendations. Here the aims and objectives of the study will be evaluated against the study and it will be established whether such aims and objectives have been achieved.

1.8 Ethical considerations

This study will not administer any questionnaires and will not involve field work. Therefore the study does not require the aid of any research respondents/participants such as any individuals, organisations or institutions, hence no research respondent will be subjected to harm whatsoever, be included in the study without their consent or have their confidentiality infringed. However, the usual rules relating to plagiarism and academic dishonesty will be observed.

1.9 Summary

As the introductory chapter, this chapter has introduced the topic under the investigation. The chapter has indicated that the main problem of the study is on the two keywords, namely, “sufficient representation” and “workplace” on the second requirement for the utilisation of the section 21 procedure. Furthermore, the chapter has also indicated that there is a need for a legislative reform in respect of the two keywords in order to minimise practical conflicts between employers and registered trade union.

CHAPTER TWO: THE EVOLUTION OF SOUTH AFRICAN LABOUR LAW

2.1 Introduction

This chapter will discuss the development of South African labour law which consequently led to the evolution of the legislation governing the acquisition of organisational rights. Because this area of the law is adequately dealt with in standard textbooks, our discussion will be brief here.

2.2 The historical development of labour law in South Africa

2.2.1 The South African labour law before 1994

In the mid-19th century, when gold was discovered on the Reef and diamonds in Kimberly, South Africa changed from an agricultural rural society to a rapidly developing industrial society. At this stage, conflicts of interests between employers and employees as well as clashes between groups of employees which were racially-based (wherein white workers were seeking protection from competition by black workers) also emerged, thus giving rise to an emerging system of labour relations.[64]

The historian Buff, indicates that from the beginning of industrial relations in the country, trade unions reflected a racial disunity as the earliest unions were dominated by white workers.[65] The government then saw this labour position, comprising mainly of white workers, as a support base for white supremacy.[66] However, the first signs of instability in the nascent mining industry were marked by the 1922 Rand Riots, when white workers fought against both their employers and the government so as to protect their supremacy in the mine industry.[67]

This industrial conflict led to the passing of the first piece of labour legislation, the *Industrial Conciliation Act*[68](hereafter ICA) which introduced principles and structures that laid the foundations for the further development of the South African labour law.

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64 Basson *et al The New Labour Law Handbook* 4.See also Basson *et al* "Organisational Rights"8.

65 History Buffs Date unknown Trade unions in South Africa http://www.historybuffs.co.za/south-africa/trade-unions-in-south-africa/ accessed 21 January 2018.

66 History Buffs Date unknown Trade unions in South Africa http://www.historybuffs.co.za/south-africa/trade-unions-in-south-africa/ accessed 21 January 2018.

67 Levy *African Trade Unionism in South Africa* 33. See also Manamela*The Social Responsibility of South African Trade Unions* 32.

68 11 of 1924.

The ICA provided for racial discrimination and categories in labour legislation, it prevented the unionisation of black workers and prohibited the registration of Black trade unions and its primary focus was to protect the interest of skilled white workers. The former workers were essentially excluded from the ambit of labour legislation and their trade unions were actively discouraged.[69]

Furthermore, the ICA, further empowered the government to weaken the trade union movement by dividing labour organisations along racial lines, to undermine and destroy the power of collective bargaining and to deprive the trade unions of their rights such as the right to control their own funds; elect their own officials and exercise democratic control over their affairs.[70]

According to Levy,[71] the National Party then came into power in 1948 and implemented a labour policy which was opposed to the system of wage control existing at the time and proposed that collective bargaining should be a state responsibility. Consequently, the *Wage Act*[72] was enacted and provided for wage fixation in the control of the; prohibited any involvement of black workers in the determination of their conditions of work and provided for a sanction of three years for the use of the strike action.[73]

2.2.1.1 The Wiehahn Commission of Inquiry[74]

Although trade unions representing black unions were undermined, such unions continued to exist and during the 1970's, trade unions catering primarily for black employees emerged and soon exercised considerable power in the workplace. This led to a Commission of Inquiry appointed in the late 1970's, a commission better known under the name of its chairperson, Professor Wiehahn which was set up by the government after the Durban riots in 1973 and the Soweto uprising in 1976 to work at industrial relations system in South Africa[75]

69 Basson *et al The New Labour Law Handbook* 5.
70 Basson *et al The New Labour Law Handbook* 5.
71 Levy Date unknown http://www.sahistory.org.za/sites/default/files/DC/asapr61.4/asapr61.4.pdf. Accessed 25 January 2018.
72 5 of 1957.
73 Levy Date unknown http://www.sahistory.org.za/sites/default/files/DC/asapr61.4/asapr61.4.pdf. Accessed 25 January 2018.
74 The Commission of Inquiry into Labour Legislation RP Part 1: 47/1979.
75 See also SAHO http://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament accessed 22 May 2018.

The Wiehahn Commission was appointed as the state realised that there was a need for a more fundamental change if it were to regain control over black power and to make recommendations with regards to labour relations and the use for laws administered by the Departments of Labour and Mines. The Chairman, Prof Wiehahn and his associates were instructed to inquire into, report upon and make recommendations regarding labour legislation which existed at the time.[76] This includes, amongst others, the *Industrial Conciliation Act,*[77] the *Bantu Labour Relations Regulations Act*,[78] the *Wage Act,*[79] the *Factories, Machinery and Building Work Act*, [80] and the *Apprenticeship Act* [81]etc., with specific reference to:

> the adjustment of the then existing labour system with the object of making it provide more effectively for the needs of our changing times; the adjustment, if necessary, of the existed machinery for the prevention and settlement of disputes which changing needs may require; the elimination of bottle-necks and other problems which were at present being experienced within the labour sphere; and the methods and means by which a foundation for the creation and expansion of sound labour relations may be laid for the future of South African workers.[82]

There were other important factors which resulted in the state's decision to appoint the commission of inquiry such as, amongst other things, the economic growth and industrialisation which led to shortages of skilled labour.[83]This shortage of skilled labour was a great concern to the government as it needed a strong economy to maintain white

76 The Commission of Inquiry into Labour Legislation RP Part 1: 47/1979, Terms of Reference. See also Molete RP *The influence of Commissions of Inquiry in the Evolution of Educational Policy for Blacks from 1934 to 1984 166.*

77 Act 28 of 1956.

78 Act 48 of 1973.

79 Act 5 of 1957.

80 Act 22 of 1941.

81 Act 37of 1944.

82 The Commission of Inquiry into Labour Legislation RP Part 1: 47/1979, Terms of Reference. See also Molete RP *The influence of Commissions of Inquiry in the Evolution of Educational Policy for Blacks from 1934 to 1984* 166.

83 Report of the Commission of Inquiry into Labour legislation Part 1 R.P. 47/1979 par 2. Jerome T *et al* 1990 MLR 25 adds that in 1976, the government established an independent commission, headed by Professor Nic Wiehahn, to study burgeoning labour problems.

capitalist and domination. Furthermore, there was a possibility that the increased international pressure as a result of apartheid and racial domination could lead to disinvestments and disrupt trade in South Africa.[84]

The Wiehahn Commission recommended *inter alia*, for the legalisation of the unionisation of black workers, the registration of black unions and the prohibition of race discrimination regarding union membership. The Commission also recommended for the abolishment of the legal reservations of specific occupations for whites and the establishment of an industrial court which would interpret labour laws and adjudicate on issues such as unfair labour practices.[85]

However, the government did not, at the first instance, accept all the recommendations brought about by the Commission and rejected specifically the recommendation regarding which trade unions rights be extended to all black workers and permitting the operation of multiracial unions. These recommendations were accepted after the state had undergone a change in policy, thus, the state warily accepted the Commission's major proposals, and through this the state aimed to co-opt black trade unions into the official industrial relations machinery and to extend its control over the rapidly growing unions.[86]

Therefore the Commission Report resulted in 1979 amendments to the Labor Relations Act that established an Industrial Court and the concept of unfair labour practices, and granted black unions a degree of freedom to organise legally for the first time in decades and recommended amongst other things:

- "that full freedom of association be granted to all employees regardless of race, sex or creed;
- that trade unions be allowed to register irrespective of composition in terms of colour, race or sex;
- that stringent requirements were required for trade union registration; and

84 Intelligence Consultancy Namibia 2012 https://intelliconn.wordpress.com/2012/11/02/reform-vs-oppression-the-impact-of-wiehahn-commission-on-labour-relations-in-south-africa/.
85 Report of the Commission of Inquiry into Labour legislation Part 1 R.P. 47/1979 par 2.
86 Report of the Commission of Inquiry into Labour legislation Part 1 R.P. 47/1979 par 2.

- that labour laws and practices should correspond with international conventions and codes *etc"*.[87]

2.2.1.2 The impact of the Wiehahn Commission of Inquiry

The most important impact is the independence of black trade unions and their ability to organise as a result of these black unions winning the right to organise. Furthermore, there was an increase in the power of the Industrial Court and access to conciliation boards was granted to unregistered unions, this Court delivered a number of judgments that increased the rights of workers in the workplace and as a result increased the strength of unions relative to that of management. Moreover the *Labour Relations Amendment Act*[88] finally abolished the dual nature of the industrial relations system by deleting all reference to race in the Act and repealing the *Black Labour Regulations Act*[89]which was part of the apartheid system of racial segregation and had the effect of prohibiting strike action by Africans.[90]

Thus, it can be said that the Wiehahn Commission and its report marks a defining moment in the history of South African labour relations as it has led to the process of legitimising black trade unions and deracialising labour relations, furthermore, there was a drastic change in the state's approach to black trade unions after decades of coercive and forceful repression as the state had opted for a programme of reform.[91]

Basson[92]*et al* adds that in the course of 1980's, new trade unions consolidated their power base and gradually gained power to bargain effectively at industry level through industrial councils. This meant that such unions were now able to negotiate for mini-

87 Report of the Commission of Inquiry into Labour Legislation Part 1 R.P 47/ 1979 par 1.153.1-1.153.2. Manamela *The Social Responsibility of South African Trade Unions* 38 adds that the government accepted the recommendations of the commission which ultimately led to the changing of labour laws, namely, the *Industrial Conciliation Act* and the *Black Labour Regulations Act* which had the effect of prohibiting strike actions by Africans and the establishment of black trade unions were repealed subjected to significant amendments.

88 57 of 1981.

89 48 of 1953.

90 Intelligence Consultancy Namibia 2012 https://intelliconn.wordpress.com/2012/11/02/reform-vs-oppression-the-impact-of-wiehahn-commission-on-labour-relations-in-south-africa/.

91 Intelligence Consultancy Namibia 2012 https://intelliconn.wordpress.com/2012/11/02/reform-vs-oppression-the-impact-of-wiehahn-commission-on-labour-relations-in-south-africa/.

92 Basson *et al* The New Labour Law Handbook 5.

mum terms and conditions of employment throughout an industry collectively as opposed to negotiating at each and every workplace within an industry. This gave rise to a dual system of collective bargaining which is still followed today in some industries.

2.2.1.3 The establishment of the Industrial Court

According to Basson *et al*,[93] the establishment of the Industrial Court pursuant to the recommendations of the Wiehahn Commission also led to the development of both individual and collective labour law in South Africa. The aim of this specialised court was to examine the conduct of the employers, employees and trade unions against the widely defined concept of "unfair labour practice". This resulted in the transition of labour law from the strict application of the common law principle of lawfulness to a body of legal rules governed by principles of fairness, consequently, this meant that the fact that an employer or a trade union's conduct which was said to have been perfectly lawful, could nevertheless be unfair was recognised.[94]

Basson *et al*[95] further state that at collective level, the most important achievement of the Industrial Court was the imposition of the general duty to bargain in good faith on employers. This duty implied two things: first, the Industrial Court recognised that in certain circumstances, the employer had a duty to bargain with a trade union and to grant organisational rights to a trade union and secondly, once the bargaining relationship was established, employers and trade unions were obliged, as far as tactics employed in the bargaining process were concerned, to bargain in good faith.[96]

The main positive impact of this duty at collective level was the recognition of the role of trade unions as representative bodies and that any efforts by employers to undermine this representative role of unions during the bargaining process would be labelled "bad faith" bargaining to be remedied by appropriate court orders.[97]

The Industrial Court also had an impact on the law relating to strikes which was modified. This includes the common law rule which stated that a striking employee breaches a contract of employment and that a dismissal was justified in such a circumstance which was modified on the basis that it could constitute an unfair labour

93 Basson *et al The New Labour Law Handbook* 6.
94 Basson *et al The New Labour Law Handbook* 6.
95 Basson *et al The New Labour Law Handbook* 7.
96 Basson *et al The New Labour Law Handbook* 7.
97 Basson *et al The New Labour Law Handbook* 7.

practice to dismiss such an employee. The Industrial Court accepted that in certain circumstances, employees who embarked on a strike action could be protected against dismissal when the strike complied with the requirements for lawfulness as set out in the then *Labour Relations Act* 28 of 1956 (hereafter the 1956 LRA).[98]

2.2.2 The South African labour law after 1994

It is common cause that a new political dispensation came into power in 1994 which heralded the coming of a new labour dispensation. Labour relations and labour policies changed significantly from those which prevailed under the previous government. Consequently the Interim Constitutition,[99] the final Constitution of 1994 and the LRA were adopted to give effect to a new system of labour relations anchored on the new constitutional values including equality, non-racialism and democratic participation.[100]

2.2.2.1 The Interim Constitution

The Preamble to the Interim Constitution provided that there was a "need to create a new order in which all South Africans will be entitled to a common South African citizenship in democratic constitutional state". It is submitted that this constitutional imperative resulted in a positive impact on labour rights since there was a need for equality in the country, this meant that all legislation which criminalised strike actions by africans and which generally had the effect of racialising labour relations were now abolished.[101]

To ensure that there was a change in labour relations, the Interim Constitution further regulated labour relations in terms of section 27 which provided for the right of both the employers and employees to form and join their respective organisations.[102] The section further stated "that workers and employers had the right to organise and bargain collectively and that workers had the right to strike for the purpose of collective bargaining".[103]

The Preamble to the Interim Constitution and the above mentioned section regulated and ensured equality amongst all employees in the country regardless of their race,

98 Basson *et al The New Labour Law Handbook* 7.
99 The Interim Constitution of the Republic of South Africa, 1993.
100 See also Tshoose and Kruger 2013 PER/ PELJ Journal 285.
101 See the Preamble of the Interim Constitution, 1993.
102 Section 27 (2) of the Interim Constitution, 1993.
103 Section 27 (3) and (4) of the Interim Constitution, 1993.

colour or gender *etc.*, this also resulted in the equal treatment of all unions in the country.[104]

2.2.2.2 The Final Constitution

The Preamble to the Constitution of the Republic of South Africa, 1996 states that we, the people of the Republic of South Africa:

> Adopt the Constitution as the supreme law of the Republic so as to heal the racial divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa, able to take its rightful place as a sovereign state in the family of nations.[105]

It is submitted that by healing racial divisions of the past, this also included the labour relations systems and legal framework which were racially structured in the past. Hence, it is submitted that as in the case of the Interim Constitution, the 1996 Constitution also had a positive impact on the labour relations systems in the country.[106]

Section 23 of the Constitution is the cornerstone of labour rights in the Constitution since it regulates labour relations and provides amongst other things, "that everyone has the right to fair labour practices".[107] The section has provided for "every worker's right to form and join a trade union, to participate in the activities and programmes of a trade union; and to strike." Similarly, the section also provides the same rights to employers regarding their employers' organisation.[108] Furthermore the section also calls for the equal treatment of trade unions as it regulates for the right of every trade union and employers' organisation to engage freely in collective barganing.[109] This was achieved with the enactment of the LRA in 1995.

However apart from section 23, there are other sections in the Constitution which also had a direct impact on labour rights and this includes the equality clause, where it is

104 Own emphasis.
105 The preamble of the Constitution of South Africa, 1996.
106 Own emphasis.
107 Section 23 (1) of the Constitution of the Republic of South Africa, 1996.
108 Section 23 (2) and (3) of the Constitution of the Republic of South Africa, 1996.
109 Section 23 (5) of the Constitution of the Republic of South Africa, 1996.

stated “that everyone is equal before the law and has the right to equal protection and benefit of the law and that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.[110] It is submitted that the equality clause also impacts on labour laws as all employees must be equally treated in all workplaces despite their differences.[111]

The right to human dignity, which states that “everyone has inherent dignity and the right to have their dignity respected and protected”; the right to freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources; the right to freedom of religion, belief and opinion; and the right to freedom of association,[112] all have a direct impact on labour rights and have elevated labour rights to fundamental rights since they must be protected and respected in all workplaces. An example of this is found in the *Hoffman v South African Airways* (hereafter SAA) case,[113] wherein the Constitutional Court was concerned with the “constitutionality of South African Airways’ (SAA) practice of refusing to employ as cabin attendants people who are living with the Human Immunodeficiency Virus (HIV).”[114] The appellant (Mr Hoffman), was living with HIV and was refused employment as a cabin attendant by SAA because of his HIV positive status.[115]

The Constitutional Court referred to section 9 of the Constitution, the right to equality and concluded that there was no doubt that the SAA discriminated against the appellant and there was no justification for such discrimination.[116] The Court further held that the appellant would have indeed been employed but for the unfair discrimination as what stood between him and employment was his HIV status, the Court then ordered for employment as appropriate relief.[117]

2.2.2.3 *The Labour Relations Act, 1995*

110 Section 9(1) and (2) of the Constitution of the Republic of South Africa, 1996.
111 Own emphasis.
112 Sections 18, 15, 12, and 10 of the Constitution of the Republic of South Africa, 1996.
113 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17.
114 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 par 1.
115 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 par 2.
116 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 par 29.
117 *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 par 49 and 54.

The LRA was enacted in furtherance of section 23 of the Constitution with the important purpose of providing "a framework in which employees and their trade unions, employers and their employers' organisation can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; to promote orderly collective, employee participation in decision making in the workplace and the effective resolution of labour disputes".[118]

To ensure equality in a workplace and the equality of all trade unions in South Africa, the LRA further regulates the employees' and employers' right to freedom of association where both parties are afforded the right to join any trade union and employers' organisation;[119] the rights of trade unions and employers' organisation where both organisations are afforded amongst other rights, the right to determine their own constitution and rules, the right to hold elections for their office bearers, officials and representatives; and the right to plan and organise their administration and lawful activities.[120] Furthermore, the LRA also grants organisational rights to trade unions in terms of sections 12-16 (which will be discussed in detail in chapter 3) to ensure and protect the equal treatment of all trade unions.

Apart from the LRA, there are other pieces of legislation such as the *Basic Conditions of Employment Act*, as amended (hereafter BCEA),[121] which was also promulgated with the purpose of advancing economic development and social justice by regulating and giving effect to the right to fair labour practices conferred by section 23 of the Constitution, by establishing and enforcing basic conditions of employment and by regulating the variation of basic conditions of employment.[122]

The BCEA as the name suggest, regulates conditions of employment such as amongst other things, the working time, where every employer must regulate the working time of each employee with due regard to but not limited to the health and safety of employees and the family responsibilities of employees;[123] overtime, in that an employer may not request or permit an employee to work overtime except in accordance with

118 Section 1 of the LRA. See also long title to the Act.
119 Section 4 and 6 of the LRA.
120 Section 8 of the LRA.
121 75 of 1997.
122 Section 2 of the BCEA.
123 Section 7 of the BCEA.

an agreement;[124] and other basic conditions of employment such as the meal intervals, daily and weekly rest periods, pay for work on Sundays, leave and remuneration *etc.*[125]

The *Occupational Health and Safety Amendment Act*[126](hereafter OHSAA) was enacted to "provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant, machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; and to establish an advisory council for occupational health and safety".[127]

The OHSAA as the name suggest, provides and ensures the protection of the health and safety of all employees in workplaces. It regulates *inter alia*, the health and safety policy, where it is stated "that the Chief Inspector may direct an employer in writing to prepare a written policy concerning the protection of the health and safety of his employees at work";[128] the general duties of employers to their employees which states that "every employer must provide and maintain a working environment that is safe and without risk to the health of employees";[129] the general duties of employers and self-employed persons to persons other than their employees;[130] and general duties of manufacturers and others regarding articles and substances for use at work *etc.*[131]

The *Compensation for Occupational Injuries and Diseases Act*[132](hereafter COIDA), was enacted to "provide for the compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries and diseases".[133] COIDA regulates the compensation of employees for the diseases and injuries incurred in a workplace, thus it provides *inter alia*, for the right of employee to compensation; the application for compensation fund; notice of accidents by the employee to the employer and by the employer to the commissioner etc.[134]

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124 Section 10 of the BCEA.
125 Sections 32, 20, 16, 15, and 14.
126 181 of 1993.
127 See the Preamble to Act.
128 Section 7 of the OHSAA.
129 Section 8 of the OHSAA.
130 Section 9 of the OHSAA.
131 Section 10 of the OHSAA.
132 130 of 1993.
133 Purpose of the Act, COIDA.
134 Sections 22, 16, 38 and 39 of the COIDA.

The *Unemployment Insurance Act*[135] (hereafter UIF), was enacted to "provide for the payment from the fund of unemployment benefits to certain employees and for the payment of illness, maternity, adoption, and dependants benefits related to the unemployment of such employees and to provide for the establishment of the Unemployment Insurance Board *etc".*[136] It regulates amongst other things, the employees' right to benefits, the unemployment benefits, the illness benefits, the maternity benefits, etc.[137]

The *Promotion of Equality and Prevention of Unfair Discrimination Act*[138](hereafter PEPUDA) as amended was enacted to give effect to section 9 of the Constitution so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; and to prevent and prohibit hate speech.[139]

As PEPUDA was enacted in furtherance of section 9 of the Constitution, it regulates amongst other things, the prevention and general prohibition of unfair discrimination on the ground of race, gender, disability, prohibition of hate speech, and the prohibition of harassment *etc.*[140]

The *Employment Equity Act* (hereafter EEA),[141] was enacted to provide for employment equity and to provide for related matters thereof. The enactment of this Act led to employment, occupation and income inequalities within the national labour market and created the need to eliminate unfair discrimination in employment.[142]

It is not in dispute that trade unions were abused by the apartheid government which gave rise to the need for unique entrenchment of labour rights in the Constitution and the pieces of legislation.[143] This was because the drafters thereof were determined to avoid history of this abuse repeating itself after 1994. This is found evident in terms of Section 23 of the Constitution which goes to great lengths to protect, inter alia, the

135 63 of 2001.
136 Section 2 of the UIA.
137 Sections 12-26 of the UIA.
138 4 of 2000.

139 Section 2 of the PEPUDA.
140 Sections 6-11 of PEPUDA.
141 55 of 1998.
142 See the Preamble to the Act.
143 Constitution of the Republic of South Africa, 1994.

right to form and join a trade union, the right of every trade union to organise and the right of every trade union to engage in collective bargaining.[144]

It is thus submitted that as a result of the advent of the new Constitution and the LRA as well as several pieces of legislation discussed above, trade unions were granted constitutional rights as mentioned above which were also protected in the LRA. This included organisational rights in terms of section 12-16 which can be obtained through section 21 procedure and the preconditions for utilising such a procedure.

2.2.3 Summary

This chapter has discussed the evolution of the South African labour law. The chapter has looked at the position of labour both before and after the 1994 dispensation. The chapter has further concluded that due to the Wiehahn Commission and the coming into operation of the Constitution and the LRA, we can now lay claim to organisational rights being granted to all trade unions and consequently the section 21 procedure. The next chapter is proposed to deal with how these organisational rights are acquired.

144 Tshoose and Kruger 2013 PER/ PELJ Journal 286.

CHAPTER 3: ACQUISITION OF ORGANISATIONAL RIGHTS

3.1 Introduction

The main focus of this chapter is on the two key words in the second requirement for the acquisition of organisational rights, namely, "sufficient representation" and "workplace". Thus, this chapter will discuss the preconditions to be met before a trade union can utilise the section 21 procedure. The chapter will further discuss the section 21 procedure itself which a union can utilise provided the preconditions have been met and later discuss the different organisational rights in terms of the LRA.

3.2 The statutory requirements of section 21 procedure

The section provides that "any registered trade union may notify an employer in writing that it seeks to exercise one or more of the organisational rights in a workplace". However, there are certain requirements in terms of section 2 (a) and (b) which must be met before the union in any given case can utilise the procedure.

Basson[145] *et al* adds that where an employer refuses to grant a union certain organisational rights, such a union may be able to utilise the provisions of section 21 of the LRA in order to obtain organisational rights. However, before these provisions can be utilised, there are two requirements to be met by any given trade union. These two requirements will now be discussed.

3.2.1 Registration

Section 21 (2) of the LRA provides that the the union must also attach a certified copy of registration to the notice given to the employer in terms of subsection (1). This makes the registration of a trade union the first requirement under section 21 procedure.[146] However, the Act does not impose a legal duty on trade unions to register but rather encourages them do to so as it grants organisational rights to registered trade unions only.[147]

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145 Basson *et al* "Organisational Rights"48.

146 Sections 12-16 of the LRA, 1995 refers to registered trade unions. Basson *et al* "Organisational Rights" 48 adds that before a trade union can utilise the provisions of section 21 of the LRA, such a trade union must firstly be registered as orgnisational rights provided for in the Act may only be claimed by a registered trade union.

147 The value of registration of trade unions under the LRA has already been discussed in chapter one wherein it is stated that only registered trade unions may exercise organisational rights, conclude collective agreements, apply for the establishment of a bargaining council or statutory a council, apply for the establishment of a workplace forum or authorise a picket by its members, Sections 11, 23, 27, 39, 78, 69 and 115 (3) of the LRA. See also Basson *et al* "Organisational Rights"37.

As mentioned earlier in chapter one, there are certain requirements which must be met before a union can be registered. Once the union complies with such requirements, the Registrar must register the union or organisation. The four requirements to be met by the trade union are as follows:

- must have its own name and a shortened form, which has not been used by any other union;
- must have its own constitution which must comply with certain requirements set out in section 95 (5) LRA;
- must have an office within the Republic; and that
- the union must be independent, that is free from any interference or influence, direct or indirect control of any employer or an employers' organisation.[148]

In order to register, a trade union or employers' organisation must provide an application form, a copy of its constitution and any other relevant information that may assist the Registrar in determining whether the union or employers' organisation has complied with the requirements for registration.[149] Section 96(2) of the LRA further provides that the Registrar may require further information in support of the application. Once the Registrar is satisfied that all the prescribed preconditions have been met, then Registrar must register the trade union by adding the union's name in the register of trade unions or employers' organisation and thereafter issue a certificate of registration to the union.[150]

3.2.2 *Representation requirement*

After registration, registered trade union must then prove that it have a certain number of employees as its members in the given workplace in order to exercise the organisational rights.[151] What triggered this study is the conceptual challenge in terms of the two key words in this requirement namely "representation" and "workplace" as both these terms are pregnant with terminological ambiguities. It is submitted that for as long as these two keywords are not defined with necessary precision by legislation,

148 Section 95 of the LRA.
149 Section 96 (1) of the LRA.
150 Section 96(3) of the LRA.
151 Section 21(2)(b) of the LRA.

conflicts between trade unions and employers regarding organizational rights will persist, that is why these two concepts lie at the heart of this study.[152]

The question here is what is meant by sufficient representativity in the workplace? In other words what percentage of the employees in a workplace must a union represent before it can obtain organisational rights under the LRA? And given the evolving nature of work itself in the 4th Industrial Revolution as indicated in the introductory chapter, even the definition of "workplace" is now not precise.[153]These two concepts will now be analysed in great detail below.

3.2.2.1 Sufficient representation

The LRA does not provide a detailed explanatory differentiation between majority and sufficient representation, however Manamela opines that there are two forms of representation, namely: majority and sufficiently representative.[154] Majority representation has been described as the full representivity based on a simple majority of members employed in a given workplace, which is 50% + 1 per centrum, while sufficient representation has been described as the partial representivity of employees in a given workplace.[155] Given this background, the question is what percentage will suffice as being sufficiently representative?

Basson[156]*et al* asserts that majority representation is relatively straightforward and does not pose practical difficulties because it simply means that the given union represents most of the employees in a specific workplace, as such, it should not be too difficult for a trade union to prove that. This is why the study is only concerned with the term "sufficient representation" which the LRA does not define.

The study submits that since the LRA lacks or does not define what sufficient representation of a registered trade unions means, this has led to practical difficulties and inconsistent decisions as to whether a registered trade union with a given percentage

152 Own emphasis.
153 Basson *et al* "Organisational Rights"49.
154 Manamela *The Social Responsibility of South African Trade Unions* 106.
155 Israelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand-recognition- at- your-workplace-2012-01-05.
156 Basson *et al* "Organisational Rights"49.

of all the employees in the workplace is sufficiently representative, what is the sufficient threshold for representivity?[157] This problem also relates to the principle of majoritarianism as can be illustrated by the following cases:

In the case of *United Associations of South Africa (UASA) and Another v BHP Billiton Energy Coal South Africa (BECSA) Ltd and Another,*[158] the minority unions (UASA and AMCU) appealed to interdict the employer (BECSA) and the majority union (the National Union of Mineworkers, NUM) from changing thresholds for organisational rights in a collective agreement.

(a) Facts of the case

The majority union and the employer had concluded a new threshold agreement in which they raised the threshold for organisational rights, which resulted in the coalition (UASA and AMCU) not being able to obtain such rights and the coalition then made an urgent application, asking the Court to have that agreement declared null and void.[159]

The earlier settlement indicated that the coalition needed at least 15% membership of the employees in order to be recognised and exercise organisational rights in terms of the LRA for a specific operation. However in 2013, BECSA entered into another agreement with NUM which raised the threshold for the organisational rights enjoyed by the coalition to 30% representation.[160]

The respondents (BECSA and NUM) argued that they were entitled, in their capacity as the employer and the majority union, to conclude such contracts as regulated by section 18 of the LRA.[161]

157 Basson*et al* "Organisational Rights"49.

158 United Associations of South Africa(UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another J 354/13 par 1,2,3,7,11,12 and 57.

159 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 1.

160 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 2.

161 Section 18 (1) of the LRA provides that "an employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15".

(b) The legal question before the court was whether the termination of the organisational rights granted to the minority unions by the employer in terms of the settlement agreement was unlawful?

(c) Order of the Court

Given the binding agreement that existed between BECSA and the minority unions (UASA AND AMCU), the employer could not apply the 30% representation threshold to the minority unions as long as that agreement existed. Therefore, the respondents were prohibited from enforcing the threshold agreement until a decision has been made regarding its application and validity at arbitration.[162]

(d) *Ratio decidendi/* Legal principle

In arriving at its decision, the Court held that, it lacked the capacity to decide on the application and enforcement of collective agreement matters.[163] However, the Court ordered for the granting of the interim relief after having considered the requirements for an interim relief.[164]

In granting an interim relief, the Court looked at the nature of section 18 of the LRA and stated there was nothing prohibiting the parties to a threshold agreement to conclude a new one, with the effect of increasing the threshold required for granting organisational rights. Thus, section 18 of the LRA afforded NUM and BECSA the right to conclude and amend agreements.[165]

This case clearly depicts the principle of majoritarianism as the Court held that it was permissible for majority unions and employers to conclude new agreements or amend existing agreements.[166]

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162 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 54.

163 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 24.

164 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 46.

165 *United Associations of South Africa (UASA) and Another v BHP Billiton energy coal South Africa (BECSA) ltd and another* par 53.
See also the case of *AMCU and others v Bafokeng Rasimone* LAC 32578/15, where the court dealt with the question whether the interpretation and application of section 189 and 23 of the LRA infringed organisational rights. The Applicants in this case indicated that sections 189(a)-(c) be excised from the LRA, alternatively be reinterpreted in a manner that is consisted with sections 9,10,18,23,32 and 34 of the Constitution and that it be declared that where an employer consults with a trade union that employer is required to consult with in terms of a

Similarly in the case of *South African Postal Office v Commissiner Sowosenetz and others,*[167] the employer applied to set aside an arbitration award which allowed the minority union, the South African Postal Workers Union (hereafter SAPWU), to be recognised as "sufficiently representative" in the workplace. The facts of the case were as follows:

a. Facts of the case

On the 31st of January 2008, the applicant (employer) concluded an agreement (The 2008 agreement) with the fourth respondent, the Communication Workers Union (hereafter CWU), the majority union which provided that the union should be recognised if it satisfied the 30% + 1 representativeness of the employees employed by the employer.[168]

SAPWU then requested certain organisational rights from the applicant in mid-2009. The applicant declined and consequently SAPWU referred an organisational rights dispute to the CCMA in late 2009. A settlement agreement was concluded to settle this dispute on the basis that SAPWU exceeded the 30% + 1 threshold for recognition by the employer.[169] However, SAPWU was still denied such rights as per the settlement agreement. Consequently, the union referred a further dispute to the CCMA regarding the "interpretation/application" of the settlement agreement.[170]

On 19 January 2011, the applicant and CWU then concluded the 2011 agreement (the 2011 agreement), which stated that the threshold for the exercise of the organisational rights was 40%+1. The 2011 agreement also indicated that the agreement amended and superseded any other threshold agreements.[171]

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collective agreement, that employer must also consult with any other trade union whose members are likely to be affected by the proposed dismissals. Furthermore, In respect of section 23(1)(d) the Applicants seeked an order declaring the said section unconstitutional insofar as it permits a collective agreement regulating the dismissal of employees based on operational requirements, concluded with a majority trade union, to bind employees who are not members of the registered trade union. The Court held that insofar as any of the employees' constitutional rights were indeed infringed or violated, it is justified and not unduly excessive. The limitation is part and parcel of the overall legislative policy choice in favour of majoritarianism and therefore there is a compelling good reason for the limitation and it serves an important policy purpose. Consequently, the application was dimissed.

167 *South African Post services v Commissiner Sowosenetz and others* (2013) 2 BLLR 216 (LC).

168 *South African Post services v Commissiner Sowosenetz and others* par 4.

169 *South African Post services v Commissiner Sowosenetz and others* par 7.

170 *South African Post services v Commissiner Sowosenetz and others par 10.*

171 South African Post services v Commissiner Sowosenetz and others par 13 and 15.

"The Commissioner then held that the threshold in the 2011 agreement between the employer and CWU superseded all other previous threshold agreements but it did not operate retrospectively nor did it affect the attainment by the Applicant (SAPWU) of the threshold that was valid as at November 2009, which was 30 + 1. Consequently, SAPWU was ordered to retrospectively enjoy organisational rights from the date that it attained a 30% + 1 threshold being 9 November 2010 or earlier if it was able to verify that with the First Respondent (South African Post Office Ltd)".[172]

"In the Labour Court, the applicant contended that the Commissioner's finding was unreasonable and unjustifiable as he only focused upon irrelevant considerations, and thus committed errors of law. The applicant relied on the submission that at the time of the arbitration, the 2011 agreement had superseded all previous agreements by novation, and thus SAPWU's claim was academic, or alternatively, was novated".[173]

(b) The question before the court was whether the 2011 agreement had superseded all the previous agreements by novation?

(c) Decision of the Court

The Court decided that the arbitration award hailed down by the Commissioner, was reviewed and replaced with the following terms:

> The provisions of the 2011 agreement novated the representivity threshold contained in any collective agreements concluded between the South African Post Office Limited and the Communication Workers Union prior to the conclusion of the 2011 agreement; and the 40% + 1 representivity threshold contained in the 2011 agreement, applied to SAPWU's request for the organisational rights referred to in sections 12, 13 and 15 of the Labour Relations Act 1995.

(d) *Ratio decidendi/* Legal principle

In deciding whether the said agreement (2011 agreement) superseded other threshold agreements, the Court looked at the principles of novation and referred to the case of *Swadif (Pty) Ltd v Dyke N.O*,[174] wherein it was held that "when parties novate they intend to replace a valid contract by another valid contract. The court further indicated

172 *South African Post services v Commissiner Sowosenetz and others par 16.*
173 *South African Post services v Commissiner Sowosenetz and others par 17.*
174 1978 (1) SA 928 (AD) at 94OG-H.

that it was settled law that the parties to an agreement could, through a novation, vary one obligation in an "old contract" and replace it with another obligation, leaving the other terms intact".[175] The court then considered the 2011 agreement in order to apply the principles of novation as indicated above and held that:

> the provisions of the 2011 agreement clearly showed an intention to replace any existed representivity threshold with a new one. Accordingly, any representivity threshold which existed at the time the 2011 agreement was concluded was novated by the provisions of the 2011 agreement. The representivity threshold at the date that the Commissioner made his award was 40% + 1. In failing to find that the novation had the effect of replacing the representivity threshold that was applicable immediately prior to the conclusion of the 2011 agreement with the threshold contained in the 2011 agreement and then applying the threshold in the 2008 agreement, the Commissioner committed a material error of law.[176]

Just like the above BECSA case, this case also illustrates the negative impact of the principle of majoritarianism on minority trade unions, as such unions are left unable to meet the threshold standards set by majority unions and employers entitled by section 18 of the LRA.

Moreover, Tshoose and Kruger[177] conducted interviews with Solidarity Trade Union regarding the union's experience in the mining industry,[178] particularly at the Anglo Platinum where there was a recognition agreement which required 30% representation of the employees. Solidarity had obtained the required threshold and was thus recognised as "sufficiently representative" in the workplace. In January 2009, the majority unions (NUMSA and NUM) and Anglo Platinum entered into a new contract which increased the recognition threshold to 40%, this was after the 30% recognition threshold agreement had lapsed.[179]

Solidarity launched a major recruitment drive in an attempt to recruit at least 30 new members in order to reach the 40% recognition requirement as per the agreement.

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175 *South African Post services v Commissiner Sowosenetz and others par 24 and 25.*

176 *South African Post services v Commissiner Sowosenetz and others par 32.*

177 Tshoose and Kruger 2013 PER/ PELJ Journal 290.

178 Tshoose and Kruger 2013 PER/ PELJ Journal 290.
Interview 1: Gideon du Plessis: Deputy-General Secretary (Solidarity Trade Union) 2012;
Interview 2: Andre van der Merwe: Head Mining Industry (Solidarity Trade Union) 2012;
Interview 3: Louis Pretorious; Senior National Organiser: (Solidarity Trade Union) 2012.

179 Tshoose and Kruger 2013 PER/PELJ Journal 291.

However the attempt to recruit new members failed and the union lacked the 40% representation.[180] Consequently, Solidarity was then given 90 days' notice of the withdrawal of its recognition status and was thereafter not able to meet the required threshold after three verification exercises.[181]

The above case studies indicates just how majority unions and employers' decisions to establish or amend a threshold in terms of section 18 always result in a situation where minority unions cannot or are unable to obtain organisational rights.

It must be noted here that the LRA provides the CCMA arbitrators with some broad guidelines[182] in terms of section 21(8) of the LRA which provides that arbitrators deciding on the "sufficient representativity" of a union must consider the following:

- "the need to avoid excessive numbers of trade unions in a workplace;
- the need to minimise the financial and administrative burden on the employer;
- the nature of the workplace;
- the nature of the rights sought;
- the nature of the sector (industry) into which the workplace falls;
- the organisational history of the workplace or any other workplace of the employer; and
- consider the composition of the workforce in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on a fixed term contracts, part-time employees or employees in other categories of non-standard employment".[183]

The study submits that the above guidelines lead to strict adherence to the principle of majoritarianism and the unequal treatment of trade unions regarding organisational rights. Israelstam agrees and asserts that these guidelines in terms of the LRA are not really helpful and creates confusion.[184] Hence, that there is a need for law reform and a fixed percentage regarding the meaning of the term sufficient representation.

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180 Tshoose and Kruger 2013 PER/PELJ Journal 292.

181 Tshoose and Kruger 2013 PER/PELJ Journal 292.

182 Israelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand-recognition- at- your-workplace-2012-01-05.

183 Labour Relations Act 66 of 1995.See alsoIsraelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand- recognition- at- your-workplace-2012-01-05.

184 Israelstam 2012 http://www.polity.org.za/article/when-can-a-trade-union-demand-recognition-at-your-workplace-2012-01-05.

It is further submitted that the cases discusses in 3.2.2.1 above and the solidarity trade unions' experience in the mining industry indicate that legislative reform on the meaning of sufficient representation will minimise the impact of the principle of majoritarianism indicated thereof.

3.2.2.2 Workplace

The second keyword which poses theoretical and practical difficulities in the second requirement is the word "workplace" in which the definition thereof of has already been provided in chapter one.[185] It is submitted that this study recognises three theoretical and practical challenges that arise as a result of this definition.These includes the following questions:

First, given the definition "workplace" in the private sector and the fact that we are at threshold of the Fourth Industrial Revolution with its digitalization and transformation of society as discussed in the introductory chapter, what then constitutes a workplace for an employee who works from home or any other place? Is the home considered a workplace in this regard?

The joint International Labour Organisation (ILO)-Eurofound Report referred to in chapter one, points out that currently technology has made it possible for employees to work from home or anywhere at any time and this has transformed the traditional mode of work. This is made possible by the use of technology such as laptops, tablets and smartphones which increase flexibility in the workplace and mode of work and in the process increasing productivity, innovation and performance. This means that recently employees need not be in a fixed workplace to perform their duties.[186] The intersection of technological changes and societal transformation call for new, flexible, and innovative ways of doing things, including, re-imagining what is meant by "work" and "workplace".

Hence, this study submits that there is a need for the definition of a "workplace" in terms of section 213 of the LRA to include employees who works from places other than the conventional or traditional workplaces as the nature of work itself is undergoing fundamental changes due to the imminence of the Fourth Industrial Revolution.

185 Section 213 of the LRA 66 of 1995. See chapter one 1.1.2 for the definition in detail.
186 ILO 15 02 2017 http://www.annuallabourlawconference.co.za/news/24-02-2017/working- anywhere-anytime-effects-technology-world-work.

Moreover, many economies are fast “in-formalizing” with what was previously known as the “informal sector” now being regarded as the “new norm” as a result of the emergence of new business models such as the gig economy, which in turn call for the re-imagining of new types of labour laws and employment relations.

Secondly, with the definition still in mind, the question is what constitutes a workplace for employees employed under TES and earning below the prescribed threshold, as they are working at the workplace of the client and not that of the TES, if a period of three months has not passed. This scenario was discussed in *Assign Services v CCMA, 2015*[187] wherein the Court held in favour of a sole relationship as discussed in the introductory chapter.

Section 198 of the LRA provides that a temporary employment services means:

> any person who, for reward, procures for or provides to a client other persons, who render services to, or perform work for, the client; and who are remunerated by the temporary employment service.

The section further provides in terms of section 198A (3) (b) that in the cases of employees of TES performing temporary services and earning below the prescribed threshold, the deeming provision mean that after three months, they are employed by the client.

Harvey[188] states that the definition of a workplace in terms of the LRA has a negative impact on employees under the TES since such employees are often not members of any union, consequently, they do not enjoy any organisational rights afforded to registered and sufficiently representative trade unions.[189]

It is against this background that this study asks the question what constitutes a “workplace” for employees under TES, performing a temporary service, earning below the prescribed threshold and wherein a period of three months has not passed since such employees are working at the workplace of the employer and not that of the TES even

187 Assign Services (pty) Ltd v CCMA 1230/15 of 8 September 2015.
188 Harvey The Constitutionality of section 198 11.
189 Harvey The Constitutionality of section 198 11.

though a period of three months has not passed. Hence the study supports the minority judgment by Cachalia AJ in favour of the dual employment relationship as discussed in chapter one.

Thirdly, this study also submits that there is a need to clarify what constitutes a workplace where operations are conducted by an employer in more than one operation to eliminate conflicts between employers and trade unions regarding this matter. This is graphically illustrated by the case of *Association of Mineworkers Construction Union (AMCU) v Chamber of Mines*[190] as discussed in chapter one above, where the Constitutional Court had to decide whether individual mines constituted separate workplaces to establish the constitutionality of section 23 (1) (d) of the LRA. The Constitutional Court held that the individual mines did not constitute separate workplaces, consequently, the collective agreement was validly extended to AMCU members

This case illustrates that conflicts can arise between employers and trade unions where the employers where more operations by the same employer are concerned. Hence, the study submits that there is a need for awareness and clarity on what determines a workplace where the employer conducts two or more operations.

3.2 Section 21 procedure

This section provides that any registered trade union must, as soon as it wants to exercise organisational rights in terms of the LRA, inform the employer in a written format that it wants to exercise the organisational right depending on its representativity. The section further provides that the trade union must also attach to the notice, "a certified copy of the trade union's certificate of registration and must specify, *inter alia,* the workplace in which the union wants to exercise the rights; the representativeness of the union in that workplace; the rights which the union wants to exercise; and the manner in which the union wants to exercise these rights".[191]

Within 30 days after having received the notice, the employer must arrange a meeting with the former, with the purpose of concluding a collective agreement regulating the manner in which the organisational rights will be exercised.[192] An employer may refuse

190 *Association of Mineworkers Construction Union v Chamber of mines* [2017] ZACC 3 (CCT 87/16) para 27.
191 Section 21 (2) of the LRA.
192 Section 21(3) of the LRA.

to grant the union organisational rights because there is a dispute as to what constitute a workplace or because the employer argues that the union does not enjoy the required degree of representativeness.

If no agreement is reached between the parties, the matter is referred to the CCMA for conciliation and if that also fails, the trade union could either request that the dispute be arbitrated or embark on strike action.[193] This means that the CCMA Commissioner can decide whether the requirements for the granting of organisational rights have been met and how these rights should be exercised.[194]

From the cases, it is clear that these requirements are only directory in nature. In the Case of *SACWU v Technical Systems*,[195] the CCMA had to decide whether the trade union had complied with these requirements where the only notice the employer received was a fax from a union requesting a meeting to discuss, amongst other things, basic trade union rights and a statement that the union had organised the company's employees. The Court held that the union's notice to the employer was substantial compliance with the requirements of section 21 as the requirements are peremptory in nature. Similarly in the case of *SACTWU v Sheraton Textiles*,[196]the Commissioner accepted a notice that substantially complied with these requirements as the union did not specify the manner in which it wanted to exercise the rights.

3.2.1 Withdrawal of organisational rights

Section 21(11) provides that if the employer is of the opinion that the trade union is no longer sufficiently representative, the matter may be referred to the CCMA for the withdrawal of the organisational rights, in which case the provisions of subsections 5-10 which regulates the referral of the dispute regarding organisational rights to the Commission will apply.[197]

193 Sections 21(7) and 65(2) of the LRA.
194 Section 21(6) of the LRA.
195 [1997] 7 BLLR 948 (CCMA).
196 [1997] 5 BBLR 662 (CCMA). See also *SACWU v Technical Systems* [1997] 7 BBLR 948 (CCMA), where the only notice the employer received was a fax from the union requesting a meeting to discuss basic trade union rights and a statement that the union has organized the companies' employees and this was held to be substantial compliance with the requirements of section of 21.
197 Section 21 (5)-(11) od the LRA.

3.4 Organisational rights in terms of the LRA

Once the section 21 requirements have been met and it is clear that the trade union is sufficiently representative in a workplace, the LRA makes provision for the granting of five types of organisational rights which will be discussed separately below. The organisationa rights include: trade union access to the workplace, the deduction of trade union subscriptions from the salaries of the employees, the granting of leave to these trade union's representatives for certain purposes and a procedure for gaining access to certain information held by the employer.[198]

3.4.1 Trade union access to the workplace

In terms of section 12 of the LRA, a registered trade, sufficiently representative union qualifies to get access to the workplace. This is because the said union needs to be able to recruit and communicate with its members.[199] Such a union that is also entitled to hold meetings with employees at the workplace, but outside working hours.[200] The members of a representative trade union are also entitled to vote in a ballot at the workplace.[201]

Section 12(4) of the LRA provide that the union's right to exercise the right in terms of this section access may be subject to any condition as regards the time and the place of the access as is reasonable and necessary to protect life and property or to prevent the undue disruption of work. Examples of such limitations are to be found in the award of the CCMA Commissioner in *SACTWU v Sheraton Textiles*,[202] where the employer shared a building with another employer. It was held that the fact that there were two employers in the same premises could in itself also justify a limitation on access as there was a possibility of the disruption of another employer's operation. The Commissioner then imposed the following limitations:

> before entering the premises, the trade union had to give the employer 48 hours' notice in writing; any meetings had to take place over lunch time or after working hours for not longer than two hours in the canteen or such other place as agreed upon; and the trade union was only entitled to two

198 Sections 12-16 of the LRA.
199 Basson*et al* The New Labour Law Handbook 285.
200 Section 12 (2) of the LRA.
201 Section 12(3) of the LRA.
202 [1997] 5 BLLR 662 (CCMA).

meetings per month for purposes of recruitment or communicating with its members".[203]

3.4.2 Deduction of trade union's subscriptions or levies

In terms of section 13 of the LRA, an employee belonging to a registered and sufficiently representative trade union may provide the employer with written authorisation to deduct union's subscriptions from his or her wages. As soon as possible after receiving the authorisation, the employer must start making the deduction and must pay the subscription to the trade union on or before the 15th day of the following month.[204] The employee may revoke the authorisation by giving one month's written notice to the union and the employer, a three months written notice must be given to an employer in the public service.[205]

Section 13(5) further provides that when paying the deductions to the trade union, the employer must also furnish the union with the following:

- a list of union members from whose wages deductions were made;
- details as to the amounts deducted and paid to the union and the period to which the deductions relate; and
- copies of all written notices of revocation of authorisation by union members.[206]

3.4.3 Trade union representatives

Section 14 of the LRA provides that the employees belonging to a registered trade union having a majority of employees as its members in a workplace have a right to elect trade union representatives provided the union has at least 10 members in the workplace. The number of union members will determine the number of representatives to be elected in a given workplace.[207] For example, if there are between 10 and 50 union members in a workplace, the union may elect two representatives, if there are more than 1 000 union members in the workplace, 12 representatives may be elected for the first 1 000 members and one additional representative for every 500

203 SACTWU v Sheraton Textiles [1997] 5 BLLR 662 (CCMA).
204 Section 13(2) of the LRA.
205 Section 13(3) of the LRA.
206 Section 13 of the LRA.
207 Section 14 of the LRA.

additional union members but the maximum number of trade union representatives that may be elected is up to 20.[208]

Section 14(5) of the LRA entitles a trade union's representative to time off during working hours without loss of pay to perform his or functions as a trade union's representative[209] and to be trained in any subject of relevance to the performance of the representative's functions.[210]

3.4.4 Leave for office-bearers for union activities

Sometimes an employee is also an office-bearer of a trade union and the performance of his or her duties as an office bearer, such as attendance at union conferences and meetings may require him or her to be absent from work.[211]

Section 15 of the LRA provides that "an office-bearer of a registered, sufficiently representative trade union is entitled to take reasonable leave during working hours for the purpose of performing the functions of his or her office". Section 15 (2) further provides that the "union and the employer may agree to the number of leave days, the number of days paid leave and the conditions attached to any leave". Should the union and the employer be unable to reach an agreement on these matters, the dispute may be determined by an award made in terms of section 21 of the LRA.[212]

3.4.5 Disclosure of information

A trade union's representative, when asked to represent a member at a disciplinary hearing may, for an example, request the employer for copies of the documents on the member's personal file. Apart from the trade union representatives, trade unions themselves typically have the need for information whenever they engage in consultation or collective bargaining with the employer and this often relates to the financial position of the employer.[213]

However, financial information may be highly sensitive and the employer may be compromised if this information is disclosed to third parties. Section 16 of the LRA provides

208 Section 14(2) of the LRA.
209 The functions of trade unions representative are set out in section 14 (4) of the LRA.
210 Section 14(5) of the LRA.
211 Basson*et al* The New Labour Law Handbook 287.
212 Section 15(3) of the LRA.
213 Basson*et al* The New Labour Law Handbook 289.

for the disclosure of information to both trade union representatives and trade unions but tries to do so in a way which also takes the potentially sensitive position of the employer into account.[214] Thus, the section provides as follows:

With regards to the disclosure of information to the trade union's representatives, section 16 (2) of the LRA provides that "an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively, the functions referred to in section 14(4)".[215] Furthermore, as far as trade unions themselves are concerned, section 16(3) of the LRA provides that "whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining".[216]

Both these sections make it clear that the trade union representatives and trade unions are only entitled to relevant information. In the case of trade union representatives, the information must be relevant to the functions they are performing in terms of section 14(4). There must therefore be a link between the information required and the function of representation and consultation between the employer and the trade union.[217]

3.5. Summary

This chapter has anaysed the legislation governing the acquisition of organistional rights by trade unions. The two keywords namely, "workplace" and "sufficient representation" in the second requirement for utilisation of organisational rights have been analysed and clarified as this was the purpose of the chapter. Furthermore the chapter has also discussed other relevant issues such as the section 21 procedure and the acquisition of organisational rights with particular references to terminological ambiguities inherent in these terms. The changing nature of the world of work requires a rethinking or re-imagining what "workplace" now means and in the future. In the next chapter, we discuss developments in comparable jurisdictions.

214 Basson*et al* The New Labour Law Handbook 289.
215 Section 16(2) of the LRA.
216 Section 16(3) of the LRA.
217 Basson*et al* The New Labour Law Handbook 289.

CHAPTER 4: COMPARATIVE PERSPECTIVES

4.1. Introduction

Section 39(1) of the Constitution deals with interpretation of the Bill of Rights and provides that:

> The courts are required, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Similarly, the courts are also required to consider international law, and may consider foreign law.[218]

Section 233 of the Constitution also makes it an obligation for the Court to reasonably interpret legislation in such way that is consistent with international law. The section provides that:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

In the case of the *South African National Defence Union v Minister of the Defence and Another*(hereafter SANDU*)*,[219] the Court relied amongst others, on international instruments for determining the meaning of the term “worker” and held that taking into account the provisions of ILO conventions and recommendations[220] as to the meaning and scope of the word 'worker', when s 23(2) of the Constitution spoke of 'worker' it had to be interpreted in such a way as to include members of the armed forces, even though the relationship they had with the defence force was unusual and not identical to an ordinary employment relationship.[221]

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218 Section 39 (2).

219 1999 20 ILJ 2265 (CC) par 30.

220 Seated in Geneva and is an important source of labour standards across countries, it has built up a set of principles which regulate a number of labour matters. South Africa has incorporated the provisions of its recommendations and conventions with the adoption of both the LRA and the EEA which seeks to give effect to ILO instruments dealing with freedom of association, unfair dismissal and discrimination, Basson *et al* Labour Law Handbook 17.

221 See also the *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) case where the Court held that International agreements and customary international law provide a framework within which…(the Bill of Rights) can be evaluated and understood and for that

Furthermore, the LRA also makes provision for one to comply with the international obligations of the country when applying and interpreting its provisions in terms of section 3 of the LRA.

It is against these constitutional imperatives that this chapter aims to analyse the legislation governing the acquisition of organisational rights (the representivity and workplace aspects respectively) with reference to international law standards (ILO) due to South Africa's membership thereof and compare it to four other national jurisdictions in order to borrow from them as the South African law is still in infancy. This is because these jurisdictions, namely, Malawi, Bahamas, Dominican Republic and Belize are member states to the ILO and their domestic laws are more to the point, especially as regards the notion of "sufficient representation".

4.2. A brief overview of the ILO

The ILO was founded in 1919 as part of the Treaty of Versailles at the end of World War 1. Its main objective is to achieve social justice and peace among nations though the universal, humane conditions of labour.[222]

The most important task of the ILO has been the development, promotion, and monitoring of international labour standards. To date, the organisation has adopted 189 globally applicable, legally binding Conventions and 202 legally non-binding recommendations for the regulation of labour conditions. Due to the constraints of time and the scope of the study, only the following conventions will be discussed in this study.[223]

The ILO's Governing Body has identified eight Conventions as fundamental, covering subjects that are considered as fundamental principles and rights at work. This includes the following:

- Freedom of Association and Protection of the Right to Organise Convention;[224]

purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Interim American Commission on Human Rights and the European Court of Human Rights, had inappropriate cases, report of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.

222 ILO http://www.ilo.org/global/about-the-ilo/lang--en/index.htm accessed 15 May 2018.

223 ILO http://www.ilo.org/global/about-the-ilo/lang--en/index.htm accessed 15 May 2018.

224 1948 (No. 87).

- Right to Organise and Collective Bargaining Convention;[225]
- Forced Labour Convention;[226]
- Worst Forms of Child Labour Convention[227]
- Equal Remuneration Convention;[228] and
- Discrimination (Employment and Occupation) Convention.[229]

These Conventions are viewed as enabling standards and respecting them is viewed as a precondition for the application of all remaining ILO norms.[230]The eight fundamental Conventions have meanwhile been ratified by between 150 and 175 countries whereas 48 member states have not yet ratified them. However, the member states that have not ratified the Conventions on the fundamental rights of labour are obliged solely on the basis of their membership of the ILO to observe, to promote, and to implement the core labour standards set by the ILO Declaration on Fundamental Principles and Rights at work and its follow up, adopted in 1998.This means that the national labour and social laws of the member states must be brought into line with the ILO standards.[231]

For the sake of brevity, this study will only discuss the Convention on the Right to Organise and Collective Bargaining Convention which relates to the acquisition of organisational rights and thereafter discuss the definitions of the terms sufficient representation and workplace in the ILO's Conventions.[232]

4.2.1 Right to Organise and Collective Bargaining Convention (hereafter ROCBC)

The Preamble to the Convention[233] declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace". This chapter will briefly discuss relevant articles of the Convention.

225 1949 (No. 98).
226 1930 (No. 29).
227 1999 (No. 182).
228 1951 (No. 100).
229 1958 (No. 111).
230 ILO http://www.ilo.org/global/about-the-ilo/lang--en/index.htm accessed 15 May 2018.
231 The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, makes it clear that these rights are universal, and that they apply to all people in all States regardless of the level of economic development.
232 ILO http://www.ilo.org/global/about-the-ilo/lang--en/index.htm accessed 15 May 2018.
233 Right to Organise and Collective Bargaining Convention1949 (No. 98).

Article 2 (part I)[234] of the ROCBC provides "that workers and employers, without distinction whatsoever, have the right to establish and to join organisations of their own choosing without previous authorisation". The Convention has been domesticated in the country in that the freedom of association of both employers and employees is protected in both the Constitution and the LRA. Section 23(2) and (3) of the South African Constitution protects the right of all employees or employers has to form and join their respecitive organisations and to participate in the activities and programmes thereof. Furthermore, section 4 and 6 of the LRA, also provides for the protection of the employees and employers' right of freedom of association and states that "every employee has the right to participate in forming a trade union or a federations of trade union and to join a trade union subject to its constitution".[235]

Article 3(1) (part I) of the ROCBC protects the right of workers' and employers' organisations to exercise their rights freely. This includes *inter alia*, the right to establish their own constitution and rules, to vote for representatives without fear and to organise their administration and activities. One can also draw an inference that the South African labour law has also been brought to line with this article as section 23 (4) of the Constitution grants such rights to trade unions and employers' organisations. Furthermore the LRA also grants trade unions and employers' organisations organisational rights in terms of sections 12.13,14,15 and 16.

However Article 8 (part I) of the ROCBC provides that:

> In exercising the rights provided for in the Convention, workers and employers and their respective organisations, should respect the law of the land and that the law of the land should not be such as to impair, nor should it be so applied as to impair, the guarantees provided for in the Convention.

It is submitted that the silence of the LRA and the practical challenges brought about by the definition of the term workplace, impairs on trade unions right to organise as protected in the Convention, the South African Constitution and the LRA. Consequently, trade unions cannot exercise all the organisational rights afforded in the LRA.

234 Part I of the convention deals with freedom of association.

235 Section 6 of the LRA also provides that "every employer has the right to participate in forming an employers' organisation or a federations of employers' organisation and to join an employers' organisations subject to its constitution".

It must be noted here that South Africa has signed and ratified 27 Conventions of the ILO, which includes the ROCBC. The ROCBC was signed and ratified on the 19th February 1996 and it is still in force. Of the 27 Conventions ratified by South Africa, only 24 are in force, which includes the ROCBC.[236] The three Conventions not in force are: the Night Work (Women) Convention;[237] the Marking of Weight (Packages Transported by Vessels) Convention[238] and the Night Work (Women) Convention (Revised).[239]

4.3. The definition of the terms "sufficient representation and workplace" in the ILO's conventions

4.3.1 Workplace

Article 3 of the Occupational Safety and Health Convention (hereafter OSHC)[240] defines the term "workplace" "as all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer". This definition seems to be very similar with the South African definition in the LRA which defines the term workplace for a private sector as the place or places where employees of the employer work.[241]

It is thus submitted that although definition of workplace in the LRA is similar to that of the ILO's Convention, conflicts and confusions regarding what constitutes a workplace where two or more operations are concerned, where the employee works from home or where the employee has been placed through the TES still exist.

4.3.2 Comparative perspectives on sufficiency of representation

Until parties to a Collective bargaining have recognised one another, no collective bargaining can occur and ultimately no organisational rights can be exercised. Parties may either recognise each other voluntarily through agreements or they may recognise each other through an obligatory legislation. This is to protect trade unions from

236 ILO https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11200:0::NO::P11200_COUNTRY_I D:102888 accessed 17 September 2018.
237 1919 (No. 4).
238 1929 (No. 27).
239 1934 (No. 41). ILO https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11200:0::NO::P11200_COUNTRY_I D:102888 accessed 17 September 2018.
240 A 3 (c) of the Occupational Safety and Health Convention (1981).
241 Section 213 of the LRA.

employers who unreasonably refuse to negotiate with trade unions for the exercise of organisational rights.[242] In such cases, the question of whether or not an employer is obliged to recognise a trade union for such purposes normally depends on the definition established on the representativeness of trade unions.[243] Hence this chapter will now look at how the term "sufficient representation" is defined in other countries which are parties to the ILO Conventions or member states to the ILO.

4.3.2.1 Malawi

Section 25 of the Malawian *Labour Relations Act,* 1996 (hereafter MLRA)[244] protects the right of trade unions to be recognised by the employer for purpose of collective bargaining where such a union has at least twenty percent of the employees employed by the employer as its members.[245]

It is submitted that this means that in Malawi, when a registered trade union represents at least 20% of the employees in a workplace, the said union will be sufficiently representative and the employer is obliged to recognise such a union for the purposes such as collective bargaining and the exercise of organisational rights.[246]

4.3.2.2 Bahamas

Section 41(1) of the Bahamas *Industrial Relations Act,* 1970 *(*hereafter BIRA*)*[247] regulates for 50% as it provides that:

> every employer shall recognise a trade union which more than 50% of the employees in his employment, or in a bargaining unit of such employees, are members in good standing of such trade union.

242 ILO Date unknown http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch3.htm#top.
243 ILO Date unknown http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch3.htm#top.
244 Labour Relations Act 16 of 1996.
245 Section 25 of the MLRA.
246 Section 25 of the MLRA.
247 14 of 1970.

The section continues to state that for the purposes of the settlement of any limited disputes, an employer shall, when called upon by the trade union which is the bargaining agent for employees in a bargaining unit, treat and enter into negotiations with that union.[248]

Furthermore section 41(3) of the BIRA provides that "an employer who, after a claim for recognition as bargaining agent has been established in accordance with section 42,[249] fails or refuses to treat or enter into negotiations within a reasonable time with such bargaining agent, shall be guilty of an offence". Such an employer will be liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.[250]

It is submitted that in terms of Bahamian law, a registered trade union is sufficiently representative if it represents 50% of the employees in the workplace and the employer is obliged to recognise such trade union as the bargaining agent for employees employed by him.[251]

4.3.2.3 Dominican Republic

The Dominican Republic's *Industrial Relations Act,* 1986 (hereafter DIRA)[252] only refers to majority representation and provides that a trade union representing majority of the employees and seeking recognition as the bargaining agent may make a claim to the employer thereof in order to be accordingly recognised.

Section 22 of the DIRA provides that a claim made in terms of section 20 for recognition, must be in writing and must describe the bargaining unit that the trade union

248 Section 41 (2) of the Industrial Relations Act.

249 Section 42 provides that a trade union which seeks recognition by an employer as bargaining agent for employees employed by him, shall make its claim for such recognition in writing to the employer specifying the bargaining unit, if any, in respect of which recognition is sought, and shall serve a copy of such claim on the Minister Within fourteen days (or such longer period as the trade union and the employer may agree, a copy of which agreement shall be forwarded to the Minister) of the date of the receipt of such a claim, the employer shall give notice in writing to the union stating whether he accepts or rejects the claim and, where he rejects the claim, he shall state the reason for such rejection, and shall forward to the Minister a copy of the notice of acceptance or rejection at the time when the notice is given to the union.

250 Section 41(3) of BIRA.

251 Section 41 of the BIRA.

252 Section 20 of the Industrial Relations Act 18 of 1986.

considers appropriate. Within fourteen days from the date of receiving such a claim for recognition by the union, the employer must do the following:

- recognise the trade union as the bargaining agent for that bargaining unit; or
- give notice to the trade union and the Minister that he doubts that the trade union is entitled to be recognised as the bargaining agent for that bargaining unit.[253]

It is submitted that the DIRA does not define what majority representation is or to what percentage of employees should a trade union represents in order to qualify as a majority trade union in a workplace.[254]

4.3.2.4 Belize

Section 23 of the Belizean *Trade Unions and Employers Organisations Act,* 2000 *(BTUEOA)*[255] provides that any trade union claiming to have a majority of the employees of an employer in a bargaining unit as its members may, make a written application to the Tripartite Body constituted under section 22, to be certified as the sole and exclusive bargaining agent for the bargaining unit.

Section 26(1) of the BTUEOA provides that:

> upon receiving a copy of an application for the certification of a trade union as a bargaining agent, an employer must within fourteen days indicate by written notice to the tripartite body: his agreement to recognise the trade union as the bargaining agent of his employees comprised in the bargaining unit; his refusal to recognise the trade union as the bargaining agent of his employees comprised in the bargaining unit; and state therein the reasons, if any, on which his decision is based. [256]

Moreover section 27(1) of the BTUEOA provides that where only one trade union has applied to the tripartite Body for certification, and the employer has agreed in writing under section 26 (1)of the BTUEOA, to recognise the trade union as the bargaining agent of his employees comprised in the bargaining unit, and if the Tripartite Body is satisfied that the other provisions of the Act have been complied with, the Tripartite Body may, after consultation with the trade union and the employer's organisation as

253 Section 22 of the DIRA.
254 Section 20 of the DIRA.
255 24 of 2000.
256 Section 26 of the BTUEOA.

soon as may be, carry out a survey among the employees comprising the bargaining unit to determine the extent of support enjoyed by the trade union among such employees. The Tripartite Body shall certify a trade union if the results of the survey carried out under subsection (1) shows that the trade union is supported by at least fifty-one per centum of the employees comprising the bargaining unit.[257]

It is thus submitted that the BTUEOA does not define the term sufficient representation as well but rather provides that a trade union needs to be 51% representative of the employees in a bargaining unit in order to be a majority trade union and to be offered a certificate as a bargaining agent by the tripartite Body.

4.4. Summary

This chapter has analysed the South African legislation governing the acquisition of organizational rights, more specifically on the terms “workplace” and “sufficient representation”. The chapter has also referred to the internal standards of ILO’s Conventions such as the right to organise and the effective recognition of the right to collective bargaining and the Occupational Safety and Health Convention. The chapter has further compared the South African legislation to other member states of the ILO such as Malawi, Belize and the Bahamas.

257 Section 27(1) of the BTUEOA.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter will provide a conclusion or the major findings of the study as well as recommendations for law reform to address the practical problems raised in the study.

The main problem under the investigation was on the legislation governing the acquisition of organisational rights, with specific reference to the challenges and the opportunities associated with the terms “sufficiently representative” and “workplace” as currently employed in the LRA. Thus, the study aimed to analyse the meaning of the terms “representativeness” and “workplace” in terms of the LRA; to compare the South African position to foreign laws in order to borrow from such countries and to consider international laws such as international conventions, standards and recommendations of the ILO. It is submitted that all these aims and objectives have been dully achieved as they have been dealt with precisely in the preceding chapters. The major findings, conclusions and recommendations are as follows:

5.2 Major findings and conclusions

This study has analysed the legislation governing the acquisition of organisational rights, specifically, the second requirement for the acquisition of such rights. The study has submitted that two keywords in this second requirement, namely “workplace” and “sufficient representation” have some practical challenges due to the silence of the LRA as to their precise meaning. The problem is compounded further by the rapidly evolving nature of work and associated workplaces. The central question is how is labour law, whose principal objective is to protect workers, going to evolve fast enough so as to cater for the “workers” in the “new norm” where “casualization” and “in-formalization” of the workplace is rapidly becoming the norm rather than the exception?

The study has provided the historical background of the legislation governing the acquisition of organisational rights which came into being with the evolution of labour law in South Africa and further compared the South African position regarding these two keywords in the ILO’s Convention and other foreign countries which are also states parties to the ILO.

The comparative aspect of the study has shown that although the definition of the term "workplace" in terms of the LRA is similar to the OSHC[258] of the ILO which defines the term "workplace" as all workplaces where workers need to be or to go by reason of the their work and which are under the direct or indirect control of the employer, there is still a need for legislative reform reading this term in order to be in line with the emerging Fourth Industrial Revolution which with its digitalization and transformation of society.

The comparative study further showed that two comparative jurisdictions have a fixed percentage regarding what is meant by "sufficient representation". The MLRA[259] requires 20% representation of the employees in a workplace in order to be sufficiently representative and the BIR[260] requires 50% representation of the employees in a workplace. The study submits that South Africa can borrow this lesson and have a fixed percentage regarding what is meant by the term.

The study has found that the definition of the "workplace" in terms of section 213 of the LRA creates terminological confusion or practical problems in three instances, namely, where more than one operation by an employer is concerned; where the employee works from any place other than the employer's premises; and where the employee has been placed through the TES. The study has further found that the LRA's silence on the meaning of "sufficient representation" has resulted in the unequal treatment of trade unions when organisational rights are considered.

The study submits that as long as these two keywords are not dealt with sufficiently, conflicts between employers and trade unions will continue to exist regarding what constitute a workplace and whether a certain union is sufficiently representative in any given workplace.

It is against this background that the study provides the following recommendations in order to miminise these conflicts between the said parties and ensure a peaceful, harmonised relationship between such parties.

258 Occupational Safety and Health Convention 155 of 1981.
259 Malawian Labour Relations Act, 16 of 1966.
260 Bahamas Industrial Relations Act14 of 1970.

5.3 Recommendations

5.3.1 The term workplace

The study raised three practical problems as underscored above and as such, the study will provide recommendations for each practical problem separately which are as follows:

5.3.1.1 Technology and the changing scope of work

The joint International Labour Organisation Eurofound report discussed in chapter one illustrates that rapid changing technology has made it possible for employees to work anywhere at any time. This study submits that this makes it difficult to define what constitutes a workplace for an employee who works anywhere other than the employer's premises as the definition in section 213 of the LRA refers to "the place or places where employees of the employer work". The study even asked a hypothetical question which asks whether the restaurant, the home of the employee or any other place the employee might be working from does become the workplace. Hence the following recommendations are provided:

It is submitted that section 213 of the LRA should be amended to include employees who work from any place other than the premises of the employer. It is suggested that section 213 should then read as follows:

the place or places where the employees of an employer work, *where employees work at any other place other than the premises of the employer, the place or places where the employee works will be deemed as the workplace*. "If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".

This definition will be in line with concept of flexibility and innovation at the heart of the Fourth Industrial Revolution which will cater for new business models such as gig/platform economies, including tele-work, mobile work etc.

5.3.1.2 Employees employed under the TES

Section 198A (3) (b) of the LRA discussed above, deems the client as the employer of the employee employed under such circumstances and earning below the threshold only if a period of three months has elapsed. This study discussed the submissions by Harvey[261] who asserts that the definition of the term 'workplace" under the LRA has a negative impact on employees under the TES since such employees cannot organise and they cannot exercise the organisational rights accorded to trade unions that are sufficiently representative of the employees employed by an employer in the workplace. Thus, this study submits that this problem is caused by section 198A (3) (b) of the LRA which deems the client as the employer of the employee earning below the threshold and not the client. Thus, this study provides the following recommendations:

Firstly, that section 198A (3) (b) of the LRA be amended and provide that for the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment services and who earns below the threshold *shall be deemed to be employee of both the client and the TES regardless of the three months period.* This will be in accordance with the definition of the term workplace in section 213 as employees under such circumstances will be working at the place or places of the employer (in this case, the client) and this will result in a positive impact on such employees as they will be able to organise and exercise organisational rights accorded to trade unions;

Secondly, that the definition of workplace itself be amended to include employees under the TES, earning below the threshold, in terms of section 198A (3) (b) since such employees are working at the premises of the client and not that of the TES. Therefore, it is recommended that instead of just "the place or places or places where employees of the employer work", section 213 should include and read as *the place or places where employees of the employer work and the place or places where the employees of the client work where section 198A (3) (b) is applicable.* This will be in accordance with section 213 of the LRA and minimise the confusion as to what constitutes a workplace in such a circumstance and such employees will be able to organise effectively.

5.3.1.3 What constitutes a workplace where more than one operation is concerned?

261 Harvey *The constitutionality of section 198* 11.

The discussion of the *AMCU v Chamber of Mines*[262] case in Chapter One above indicates that conflicts can arise between employers and trade unions regarding what constitutes a workplace where two or more operations are involved. In this case the Court had to determine whether individual mines constituted separate workplaces to establish the constitutionality of section 23 (1) (d) of the LRA and the Constitutional Court held that….different operations may be different places only if they are independent of one another by reason of their size, function or organisation and concluded that in this case, individual mines did not constitute separate workplaces. The Constitutional Court was in favour of the principle of majoritarianism instead of protecting minority unions such as AMCU. However the evolving nature of work requires flexibility in protecting minority unions.

The study indicated in Chapter One that this case illustrates that conflicts can arise between employers and trade unions in this circumstance, hence the following recommendation is provided:

More awareness should be raised regarding this matter as this will minimise existing conflicts between employers and trade unions by hosting campaigns, educational events or conferences involving the said parties, or by distributing brochures on this practical confusion to different trade unions and employers.

5.3.2The concept of sufficient representation

This study has submitted in Chapter One that the silence of the LRA on the meaning of sufficient representation also raises some practical challenges which lead to inequality of treatment of trade unions by CCMA Commissioners who follow the guidelines provided by the LRA. Consequently, by using these guidelines, arbitrators have refused to grant organisational rights to certain trade unions with 30% representativeness or more and granted these rights to other unions with less than 30% representativeness. Therefore this study recommends the following:

The LRA should be amended in such a way as to provide for a fixed percentage regarding what it means to be sufficiently representative in the workplace as in the case of Malawi which refers to 20% representativeness as sufficiently representative.

262 [2017] ZACC 3 (CCT 87/16) par 27.

It is thus recommended that the LRA should define the term sufficient representation to mean 30 % or more but less than 50%, which will be majority representation.

All in all, it is hoped that this mini-dissertation has made a modest contribution to the on-going search for solutions in our Labour Relations system. The Assign case, 2018 amply testifies to the need for continued engagement as even the highest Court in the land remains divided as to import of the 2015 amendments to the LRA. Digitilization of the world of work has huge implications for the workforce, in particular whether traditional patterns of labour law are still the adequate instruments to cope with the coming avalanche associated with the Fourth Industrial Revolution.

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Annexure

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TO WHOM IT MAY CONCERN

CERTIFICATE OF EDITING

I, **Muchativugwa Liberty Hove**, confirm and certify that I have read and edited the mini-dissertation, **A critical analysis of legislation governing the acquisition of organisational rights** by **Kelebogile Patience Madibo, student number 24323748,** submitted in *partial* fulfilment of the requirements for the degree ***Master of Laws*** **in Labour Law at the North-West University.**

Kelebogile Patience was supervised by **Professor Melvin LM Mbao and Ramokgadi WM Nkhumise** of the North-West University.

I hold a PhD in English Language and Literature in English and am qualified to edit such a thesis for cohesion and coherence. The views expressed herein, however, remain those of the researcher/s.

Yours sincerely

Dr M.L.Hove (PhD, MA, PGDE, PGCE, BA Honours – English)

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