

EMPLOYMENT

A jack of all trades or jacking the trades of others: A case of having your fingers burnt in too many pies

6 May 2020 12 min read

National Union of Metal Workers Of South Africa V Lufil Packaging (Isithebe) (A Division Of Bidvest Paperplus (Pty) Limited) (Unreported) Case No. Cct172/19

By Peter Mosebo, Director and Toka Moilola, Senior Associate

1. The phenomenon of dabbling in trades other than one's own niche is not unusual in these adverse economic times. To the contrary, it is becoming commonplace with many acquiring additional skills with a view to navigate the stormy economic and labour market that characterises the current state of affairs. However, the question is whether or not this savvy and progressive outlook could be applied insofar as collective bargaining is concerned.
2. In the instant matter, the Constitutional Court was called upon to make a determination on whether or not a trade union could straddle varying industries outside the scope stipulated in its own constitution. In other words, can a union ignore the defined scope of eligibility of members set out in its own constitution and demand organizational rights from an employer whose industry falls outside the scope of the union's constitution. Many would have thought that the answer to this question is straightforward, but, in this matter, as it will be demonstrated, the issue travelled all the way from the CCMA up to the Constitutional Court to ultimately obtain a definitive answer.
3. Management at Lufil Packaging (Isithebe) ("Lufil") could not have anticipated that their paper and packaging workforce would fancy themselves part and parcel of the rough and rugged metal industry. However, this was the case when 70% of their workforce vouched for National Union of Metal Workers' of South Africa ("NUMSA") to champion their employment rights. With this overwhelming support from the employees at Lufil, NUMSA approached the powers that be at Lufil demanding organisational rights in terms of sections 12 to 16 of the Labour Relations Act as amended ("the LRA"). Lufil refused to grant NUMSA organisational rights at its workplace on the basis that its activities and operations fell outside the registered scope as defined in the union's constitution.
4. Central to this dispute was clause 1(2) of the union's constitution which provides that the registered scope of the union is in the metal industries and refers to Annexure B which in turn lists the industries whose employees are eligible to join NUMSA. NUMSA's constitution does not list the paper and packaging industry within its registered scope of the industries set out in Annexure B to its constitution.
5. Dissatisfied with this response, NUMSA approached the CCMA. The CCMA found that NUMSA could organise Lufil's employees. Bewildered, Lufil approached the Labour Court to review and set aside the CCMA's award.
6. The Labour Court's approach was that in terms of section 12-16 of the LRA, NUMSA's entitlement to organise within Lufil's workplace, hinged on two conditions. First, a union must be registered and, second, a union must be sufficiently representative. The Labour Court found that NUMSA had met both conditions in that it was common cause that it was a duly registered trade union and it was also not in dispute that 70% of Lufil's employees had joined NUMSA.
7. In respect of section 4(1)(b) of the LRA, which provides that '*every employee has the right, to join a trade union subject to its constitution*'. The Labour Court reasoned that if the Legislature had intended that the scope of the industry or a union's constitution to be determinative in obtaining organisational rights, it would have been manifest from the wording of the section. Consequently, the review application failed in the Labour Court.
8. Aggrieved with the outcome and understandably more than bewildered, Lufil took the matter to the Labour Appeal Court ("LAC"). The constitutionality of section 4(1)(b) of the LRA became the crucial issue for determination at the LAC. In this regard, NUMSA's contention was that section 4(1)(b) is unconstitutional as it infringed on fundamental rights to freedom of association and fair labour practices as set out in the Bill of Rights.

9. The LAC rejected this contention on the basis that section 23(5) of the Constitution empowers the legislature to enact legislation regulating collective bargaining and that legislation is the LRA. To the extent that the LRA, limits a right in the Bill of Rights, including the right to freedom of association and fair labour practices, such limitation is reasonable and justifiable if it complies with section 36(1) of the Constitution. The LAC found the limitation in section 4(1)(b) of the LRA to be reasonable and justified and therefore consistent with the Constitution. It held that the eligibility to join a trade union is determined by the provisions of the union's constitution as adopted by the union's own decision making body and duly registered.
10. The LAC further held that the LRA requires unions to determine in their constitutions which members are eligible to join and, by necessary implication, precludes them from admitting as members, employees who are not eligible to be admitted in terms of the union's registered constitution and that any purported admission of such employees as members is *ultra vires* the union's constitution and invalid.
11. Therefore, it was concluded that the employees on whom NUMSA relied in alleging that it was sufficiently representative were, in law, not members of NUMSA because they did not fall within the scope of eligibility as set out in its constitution, as such, NUMSA was insufficiently representative of the employees at Lufil and therefore it was not entitled to any organisational rights.
12. Aggrieved, NUMSA launched an application for leave to appeal to the Constitutional Court ("the Concourt"). In the leave to appeal, NUMSA, slightly changed the tact. It no longer attacked the constitutionality of section 4(1)(b) but instead, argued that the right to join a union is a constitutional right afforded to all workers and that it is an unfettered right; so is the right to freedom of association.
13. It submitted therefore that the LRA and union's own constitution should be interpreted less restrictively in the light of section 39(2) of the Constitution and in so doing would give effect to the fundamental rights guaranteed in sections 18 and 23 of the Constitution and that if the Legislature intended the scope of the union's constitution to be determinative, it would have said so.
14. NUMSA's core argument on the wording of section 4(1)(b) of the LRA was that an interpretation of this section must recognise that the phrase "subject to its constitution" is one that must be applied in such a way so as to ensure that unions and their members can exercise their right to freedom of association. This would mean that provided the union and its members are satisfied that its constitution governs their relationship, the employee has a right to join that union, which in turn, entitles it to claim organisational rights from the employer.
15. In other words, if the union and its members are in agreement as to the relationship between themselves, then it is not for a third party (including employer) to challenge that relationship by looking at its constitution. Therefore, the words, 'subject to its constitution' in section 4(1)(b) of the LRA, should be restricted to mean between a union and its members *inter se* and should not be subject to outside interference by an employer.
16. On this basis, NUMSA contended that it and the majority of Lufil's employees entered into a contractual relationship and that nowhere in its Constitution is there any express reference to any obligation regarding eligibility being limited to the scope of the union. It argued that whilst Lufil's industry is not listed in NUMSA's scope of industries, it is also not precluded, therefore, as a registered union with sufficient representation at 70%, Lufil employees applied for and were accepted as members of NUMSA. Therefore, it has complied with the representivity provisions of the LRA and ought to be granted organisational rights within Lufil.
17. In opposition, Lufil's argued that at common law, a union has no powers outside of those given to it in its constitution. If a union admits a member contrary to its constitution, it acts *ultra vires* and unlawfully. It submitted that this position is reinforced by the LRA in that it requires unions who seek organisational rights to register a constitution that prescribes the criteria for membership. It makes the granting of organisational rights dependent on membership. Therefore, the only plausible reading of section 4(1)(b) of the LRA is that unions can only rely on lawfully admitted members when they claim organisational rights. The Legislature could never have intended that a union could qualify for organisational rights under the LRA in breach of its own constitution. It submitted that in this case, Lufil's employees cannot be members because they fall outside the scope of NUMSA's constitution.
18. In determining this dispute, the Concourt asked the question whether it was in the interests of justice for it to grant leave to appeal in this matter. The Court stated that it had to consider whether there were reasonable prospects that it would materially reverse or alter the decision of the Labour Appeal Court.
19. It then stated that the central issue in dispute is whether NUMSA can obtain organisational rights in terms of the LRA from Lufil, whose employees fall outside of NUMSA's scope as defined in its constitution. In determining this issue, the Court considered two relevant provisions of the LRA, the first being the requirements for the registration of unions in terms of section 95(5) of the LRA and second, an employee's right to freedom of association with the right to join a union subject to its constitution as stipulated in section 4(1)(b) of the LRA.
20. The Court observed that NUMSA relies extensively on the right to freedom of association, but what it fails to take into consideration is that as a voluntary association, it may be vulnerable to capture by external actors and that its identity and character and function is

worthy of protection not only from the state but also from external actors who may not share its goals. The Court observed that NUMSA's blatant disregard for the provisions in its own constitution may violate the existing members' right to associate and disassociate.

21. The Court found that LRA makes it peremptory for a union to have a constitution in order to qualify for registration. It concluded that the constitution, together with any rules and regulations, "collectively constitute the agreement which is entered into by its members" and that when members have formally adopted a constitution, it becomes legally binding on them. It governs the relationship between the members and on registration it becomes public and is available for inspection by outsiders.
22. It held that Section 95(5)(b) of the LRA defines clearly the qualification for and admission to membership and of course many other aspect. This section provides that: *'the constitution of any trade union or employers' organization that intends to register must prescribe qualifications for, and admission to, membership.'*
23. It then concluded that NUMSA has chosen to define the scope of its membership as those being in Annexure B. The relevant clause, setting out its scope, also serves the purpose of prescribing eligibility. Therefore, NUMSA had exercised its right to formulate its own constitution, consistent with the provisions of section 95 of the LRA. Having chosen to limit the scope of eligibility for membership it is fatal to its argument that its right to freedom of association is impacted.
24. The Court further held that the contractual purpose of a union's constitution and its impact on the right to freedom of association of its current members is founded in its constitution. A voluntary association, such as NUMSA, is bound by its own constitution. It has no powers beyond the four corners of that document. Having elected to define the eligibility for membership in its scope, it manifestly limited its eligibility for membership. When it comes to organisational rights, NUMSA is bound to the categories of membership set out in its scope. NUMSA's definition of its scope is binding upon it.
25. Therefore, as a matter of common law and based on the LRA, NUMSA's constitution precludes membership outside of those industries listed in Annexure B and any admission of members outside the terms of the constitution is *ultra vires* and invalid. Accordingly, the leave to appeal was dismissed.
26. However, the Court also observed that section 95(5)(v) of the LRA read with section 14(1) of NUMSA's constitution stipulate the procedure for the amendment of NUMSA's constitution by the National Conference. The Court noted that NUMSA can amend its scope of membership, without limitation, provided it follows its prescribed amendment procedures.
27. The lesson we learn from this case is that the union's constitution is binding on the union and when it comes to organizational rights, the employers have a right to challenge the union if in demanding such rights it acts outside the scope as defined in its constitution. It also confirms that the employees cannot lawfully join a union operating outside their employer's industry for that would defeat the purpose of effective and orderly collective bargaining. These rules serve to protect all stakeholders from the chaos of ambiguity which would result if certain Jacks were allowed to dabble in one too many trades.
28. However, this case also exposes another weakness and this is that the door is not completely closed for the Jacks who want to dabble in one too many trades in that they can simply and procedurally amend the union's constitution to include as many trades as they can afford to dabble in. The consequences are that, through amending its constitution and expanding its scope, one union can potentially dominate all the main industries in the country.



Peter Mosebo