Rights of minority trade unions in the workplace

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Polity

On 23 August 2018 the Constitutional Court (ConCourt) delivered another seminal judgment regarding rights of minority trade unions in the workplace. This was after an application instituted by POPCRU, a majority trade union of employees in the Department of Correctional Services (DCS), wherein it sought leave to appeal against the whole of a judgment of the Labour Appeal Court.

POCRU's appeal to the ConCourt follows a judgment by the Labour Appeal Court wherein it found that the DCS was entitled to enter into an agreement granting organisational rights in terms of sections 12 (Trade union access to workplace), 13 (Deduction of trade union subscriptions or levies) and 15 (Leave for trade union activities) of the LRA to South African Correctional Services Workers' Union (SACOSWU), a minority trade union.

These rights were the subject of a section 18(1) collective bargaining agreement that set a membership threshold for the acquisition of these rights. It was not in dispute that SACOSWU's membership fell short of this threshold.

The background

On 8 November 2001, POPCRU concluded a collective bargaining agreement with DCS in terms of which the threshold for admission to the DCS's Bargaining Council for a single registered union, or for two or more registered unions acting jointly, was agreed to be *9000 members*, which amounted to approximately 22,5% of employees (threshold agreement).

The threshold agreement also regulated the representation of employees at disciplinary and grievance proceedings. A second collective bargaining agreement regulated relations between all employees and DCS, and provided that only unions admitted to the Bargaining Council or any sector of the Bargaining Council would have the following rights:

- union access to the workplace;

- access to stop-order facilities for union subscriptions;
- leave for union activities;
- use of facilities; and
- the right to elect shop stewards.

During early November 2010 SACOSWU, having about *1500 members at DCS*, also concluded a collective bargaining agreement with DCS in terms of section 20 of the LRA. This collective agreement gave SACOSWU rights to organise union activities outside working hours, represent its members at disciplinary hearings and to assist members in grievance procedures, and to have subscriptions deducted from its members in its favour.

Section 20 of the LRA dealing with organisational rights in collective agreements states that "Nothing in this Part (Part A of Chapter 3) precludes the conclusion of a collective agreement that regulates organisational rights".

The dispute

POPCRU took issue with the collective bargaining agreement concluded between DCS and SACOSWU, basically arguing that it was unlawful as DCS was bound by the threshold agreement not to grant organisational rights to minority trade unions.

On this basis, POPCRU referred the matter to the General Public Service Sector Bargaining Council (GPSSBC) for conciliation, but the dispute was not resolved. The dispute was then referred for arbitration. The arbitrator found that the collective bargaining agreement concluded by SACOSWU and DCS was valid.

POPCRU appealed to the Labour Court which made a finding in its favour to the effect that a collective bargaining agreement regulating the issue of organisational rights would have preference over any other provision in statute relating to organisational rights. SACOSWU thereafter appealed to and was successful at the Labour Appeal Court (LAC).

The LAC held that a section 18 threshold agreement sets a minimum threshold for automatic acquisition of rights and is not a barrier to minority trade unions obtaining the same through their own collective bargaining.

Interpretation of the dispute

The essential dispute between the parties in the ConCourt concerned the proper interpretation of sections 18 and 20 of the LRA.

POPCRU, on one hand, argued that a section 18 collective bargaining agreement is effectively binding on all parties and other employees and trade unions not party to the threshold

agreement in terms of section 23 of the LRA. Consequently, an employer cannot therefore enter into another collective bargaining agreement with a minority trade union granting that trade union rights regulated in a section 18 collective bargaining agreement.

Section 18(1), dealing with right to establish thresholds of representativeness, states 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 a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15".

SACOSWU, on the other hand, contended that a section 20 collective bargaining agreement trumps a section 18 collective bargaining agreement as section 20 states that “nothing” in that part of the LRA prevents a minority trade union from entering into a collective bargaining agreement with the employer.

Section 23, which POPCRU argues gives the threshold agreement its binding effect, falls into a different part of the LRA. SACOSWU further argued that POPCRU's matter was moot, because the threshold agreement on which POPCRU’s case rested was superseded by a subsequent agreement.

The majority judgment

In a majority judgment pertaining to the essential dispute (away from the moot point), it was decided that it would be in the interest of justice to interpret the meaning of sections 18 and 20 since such interpretation may still have effect on disputes arising on the same legal question but between other different parties in due course.

Ultimately, the ConCourt found that POPCRU’s interpretation of section 18 was incorrect as it would effectively deny minority unions the right to engage in collective bargaining. The ConCourt reasoned that this right is conferred on every trade union by the Constitution, regardless of whether the union is a minority or majority union.

It is not surprising, the ConCourt stated, that section 18 does not prohibit collective bargaining between an employer and a minority union where there is a collective agreement between that employer and the majority trade union. It held that such a prohibition would be inconsistent with the Constitution and international law.

Effectively, the ConCourt held that an agreement that seeks to limit the right to collective bargaining would be inconsistent with the Constitution and invalid where it was not a limitation that meets the requirements of section 36 of our Constitution.

A separate judgment

In a separate judgment, through Deputy Chief Justice Zondo and on a different reasoning, it was pointed out that to acquire statutory organisational rights, a trade union does not need the consent of the employer. It simply needs to meet the requirements of the LRA that it must be sufficiently representative of the employees of the employer in a particular workplace. Whereas, to acquire contractual organisational rights, a trade union does not need to meet the levels of representativeness prescribed by the LRA but needs to reach an agreement with the employer in terms of which the employer confers those organisational rights on the union.

The Deputy Chief Justice pointed out that an important distinction between statutory organisational rights and contractual organisational rights is that in the case of statutory organisational rights, an employer has no right in law to terminate them as long as the union concerned continues to meet the statutory requirement that it must be sufficiently representative of the employer's employees in the relevant workplace. Whereas, in the case of contractual organisational rights, an employer does have a right to terminate contractual rights by simply giving a lawful notice of termination of the collective agreement.

The Deputy Chief Justice held that the organisational rights that the DCS granted SACOSWU were contractual organisational rights whereas the threshold fixed in the collective agreement between the DCS and POPCRU related to statutory organisational rights.

The Deputy Chief Justice concluded that the DCS was not precluded by the LRA from concluding a collective agreement conferring contractual organisational rights on SACOSWU while its collective agreement with POPCRU was still operational, even though SACOSWU did not meet the threshold fixed in that collective agreement between the Department and POPCRU.

From the above, it is clear that employers will have to rethink their approach and strategy when dealing with minority trade unions in their respective workplaces. In particular, employers should endeavour to obtain legal advice before considering concluding an agreement with a minority trade union - especially where another agreement, on the same or similar rights, is in place with a majority trade union in that workplace. Minority trade unions may view this judgment as opening doors to them in respect of further rights pertaining to grievance and disciplinary inquiry representation as well as representing their members during restructuring exercises.

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