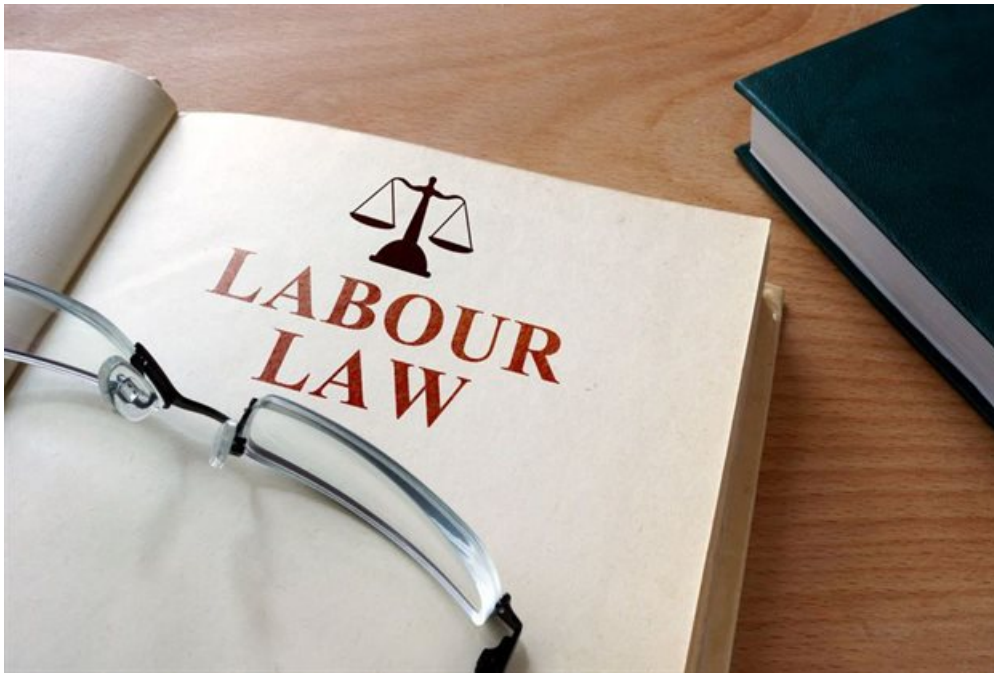


Can unions claim organisational rights after recruiting ineligible members?

 By Jacques van Wyk

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For the purposes of being awarded organisational rights, is a trade union allowed to include employees who are not eligible to be members in terms of its constitution?



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This issue was dealt with by the Labour Appeal Court in *Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration and Others (DA8/2018) [2019]* (13 June 2019).

Lufil Packaging (the Appellant) manufactures printed and plain paper bags and associated paper-derivative based packaging.

The National Union of Metalworkers of South Africa (Numsa) approached Lufil, asking it to provide stop orders for the deduction of union fees from its members, who were employees of Lufil. Lufil refused to do so on the basis that Numsa was recruiting members outside the scope of its constitution. Numsa's constitution covered 21 industries, none of which included the "packaging industry". In fact, Lufil fell under the scope of the Statutory Council for the Printing Newspaper and Packaging Industries (PNPI).

Numsa is not a member of PNPI. In addition, Numsa's constitution provided that "all workers who are or were working in the metal and related industries are eligible for membership of the Union." In other words, if the employees are not working for an employer working in one of the 21 recognised industries, they cannot become Numsa members.

CCMA and Labour Court

Numsa approached the Commission for Conciliation, Mediation and Arbitration (CCMA) seeking organisational rights in terms of section 21 of the Labour Relations Act 66 of 1995 (LRA), which rights included, among others, the right to stop order deductions. Section 21 of the LRA allows a trade union to approach the CCMA and demand organisational rights if they have met the thresholds required for the rights sought.

Lufil argued that the CCMA did not have jurisdiction to hear the matter due to the fact that Numsa was barred from recruiting Lufil's employees as members as per its constitution. The CCMA held that Numsa had standing to seek organisational rights in a workplace falling outside the scope of its constitution. Lufil launched an application to the Labour Court to review this decision (first review). In the interim, the CCMA dispute proceeded to arbitration. Lufil agreed to certain organisational rights being granted subject to the outcome of the review application. The commissioner in the arbitration awarded organisational rights to Numsa finding that its members represented approximately 70% of the workforce. This award was also reviewed by Lufil (second review).

The first and second review were consolidated (Consolidated Review Application) and formed the basis of the Labour Court dispute. The Labour Court agreed with the CCMA that Numsa's members represented approximately 70% of Lufil's workforce and dismissed the Consolidated Review.

Lufil appealed to the Labour Appeal Court.

Court's evaluation

Lufil submitted before the LAC that a trade union cannot rely on employees who purport to be its members, if those employees are not eligible to be members of the trade union in terms of its constitution. They submitted further that Numsa is bound by its constitution and as such, cannot have as members, employees who fall outside of Numsa's own membership requirements. Lufil argued that it did, in fact, operate outside the scope of Numsa's constitution; therefore Numsa could not recruit its employees as members. If these members were discounted, then Numsa's membership would decrease to a level too low to qualify Numsa for organisational rights.

Numsa, in relying on the Constitution of the Republic of South Africa, 1996 ("Constitution"), the LRA and provisions of Constitution, argued that it did, in fact, have standing to claim organisational rights on behalf of its members. Numsa argued that Constitutional rights must be interpreted generously to afford the widest ambit of protection. Restrictions on membership allows the trade union the right to limit who may join it, it is not an issue in terms of which an employer can raise an objection.

The LAC agreed with Lufil. While Numsa had the right to approach the CCMA, it had to meet the prescribed conditions required to obtain organisational rights.

The LRA regulates the registration of trade unions. It provides, among others, that the constitution of any trade union must prescribe qualifications for and admission to membership (section 95(5)(b) of the LRA). Only a registered trade union may apply for the exercise of organisational rights and for the relief to obtain and enforce them. Section 4(1)(4)(b) of the LRA also provides that "every employee has the right to join a trade union, subject to its constitution." The LAC went on to hold that

“ the obvious implication of this provision is that the right to join a trade union will be circumscribed by the membership eligibility criteria in the trade union's constitution as adopted by the trade union's relevant decision making body and

By necessary implication, employees who do not meet the criteria for membership cannot be members. Should they nonetheless be admitted as members, this act will be invalid.

When a registered union seeks organisational rights it must show that it is representative in order to obtain such rights. Where employees have been made members of a trade union in breach of the trade union's constitution, they cannot constitute members of that trade union. This, in turn, impacts upon whether or not a trade union has met the required level of representation within the workplace. The LAC found that, taking this into account, Numsa did not meet the required representation threshold and was not, therefore, entitled to organisational rights. The appeal was upheld.

Importance of the case

Where a trade union admits employees as members contrary to its constitution it acts outside the scope of its powers (*ultra vires*). The trade union will not be entitled to rely on those members when a determination is made whether it has the necessary representation to claim organisational rights in a workplace.

A trade union which admits employees as members in breach of its constitution cannot rely on such 'members' when seeking organisational rights by way of arbitration proceedings in terms of section 21 of the LRA.

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Jacques van Wyk is a director in Labour and Employment Law at Werksmans Attorneys. He was named as a recommended lawyer in Labour & Employment by the Legal500 (2010-2012), and co-authored 'Labour Law in Action - A Handbook on the new Labour Relations Act - 1997' with Frances Anderson. Jacques specialises in commercial employment transactions arising during mergers and acquisitions, corporate restructures, executive employee terminations of employment, drafting employment contracts and letters of appointment; disciplinary codes and procedures; and grievance procedures.

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