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TRIBUTE TO AKHO NTANJANA



Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton
and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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AN ATTEMPT BY A TRADE UNION TO
IGNORE ITS OWN CONSTITUTION,
A DISCUSSION OF: *NATIONAL UNION OF
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METALWORKERS SOUTH AFRICA AND
OTHERS* [2024] ZACC 13

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I INTRODUCTION

In a time where trade unions are the primary means of securing and protecting the rights of workers, the novel question then becomes, should trade unions be allowed to act against their own constitutions and represent workers who fall outside the scope of their constitutions? This is a question that the Constitutional Court has set precedent on and confirmed in two of its judgments. The Constitutional Court (CC) in *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* (2020) 41 ILJ 1846 (CC), (hereinafter referred to as *Lufil Packaging CC*) had to decide whether a trade union can ignore its own constitution and demand organisational rights from an employer for employees who are its members, despite the employees not being eligible for membership to the trade union due to the scope of the trade union's constitution not extending to the industry in which the workers were in. If the trade union is allowed to admit these workers as its members, would this not be a trade union ignoring its own constitution? The decision delivered by Victor AJ provides that a trade union cannot claim organisational rights from an employer by ignoring its own constitution and trying to admit workers who do not fall within the scope of its constitution. The Constitutional Court again, in *AFGRI Animal Feeds (A Division of*

PhilAfrica Foods (Pty) Limited v *National Union of Metalworkers South Africa* [2024] ZACC 13 (hereinafter referred to as *AFGRI*) confirmed that a trade union cannot ignore its own constitution and admit workers who are not allowed to be admitted by its own constitution.

The distinguishing facts between *AFGRI* and *Lufil Packaging CC* is that *Lufil Packaging CC* dealt with securing organisational rights for employees who fell outside the scope of the trade unions' constitution whilst *AFGRI* dealt with whether a trade union can be allowed to represent workers in unfair dismissal proceedings, when the workers fell outside the scope of the trade unions constitution. In essence, in both matters, the workers fell outside the trade union's constitution. In *Lufil Packaging CC* it was about securing organisational rights for those workers and in *AFGRI*, it was about the trade union representing those workers in unfair dismissal proceedings.

This case note will discuss both judgments referred to above, without being concerned about the distinguishing facts of organisational rights versus representation in unfair dismissal proceedings. The case note will be addressing the question of whether a trade union can act against its own constitution in admitting members who fall outside the scope of its constitution? The case note will also consider whether this would be allowing the trade union to act *ultra vires* its constitution or simply advancing freedom of association. The case note will also deal with whether it is considered as third-party interference when the employer, as a third party, points out that the trade union is acting contrary to its own constitution.

II FACTS IN *LUFIL PACKAGING CC*

Lufil Packaging (Lufil) manufactured and printed plain paper bags or paper-derivatives based products (*Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd* v *Commission for Conciliation, Mediation and Arbitration* (2019) 40 *ILJ* 2306 (LAC) para 2 to para 3 (hereinafter referred to as *Lufil Packaging LAC*)). On 27 January 2015, the National Union of Metal Workers of South Africa (NUMSA) wrote to Lufil asking it to provide stop orders for the deduction of union fees for its alleged members who were employees of Lufil (*Lufil Packaging LAC* para 4). Lufil responded by saying its core business does not form part of NUMSA's scope and referred NUMSA to its own constitution in Annexure B (*Lufil Packaging LAC* para 4). Clause 1(2) of NUMSA's constitution provides that the scope of the union is the metal industry (*Lufil Packaging CC* para 4). Annexure B details the industries to which NUMSA's membership is open to and it does not include the paper and packing industry in which Lufil operates in (*Lufil Packaging CC* para 4). Lufil alleged that NUMSA, in recruiting members from Lufil's operation, NUMSA acted *ultra vires* to its own constitution in (*Lufil Packaging CC* para 4).

Lufil did not recognise NUMSA and declined to act on implementing union stop order deductions in its work.

The issue in this *Lufil Packaging* matter was ‘Can a union ignore its own constitution and demand organisational rights from an employer for its members, despite them not forming part of the scope of its constitution, which defines eligibility for membership?’ (*Lufil Packaging CC* para 1).

The Labour Appeal Court found that NUMSA was not entitled to organisational rights in Lufil’s workplace as the employees, who it alleges were its members, fell outside NUMSA’s scope based on NUMSA’s own constitution and therefore, NUMSA was not sufficiently representative in Lufil’s workplace (*Lufil Packaging CC* para 10). The reasoning of the Labour Appeal Court was that under section 4(1)(b) of the LRA, the employee has a right to join a union, subject to the union’s constitution (*Lufil Packaging CC* para 11). The constitution of NUMSA in this instance did not allow for Lufil’s employees to join NUMSA, as Lufil’s industry fell outside the scope of NUMSA’s constitution.

III NUMSA AND LUFIL’S CONTENTIONS AT THE CONSTITUTIONAL COURT

When the matter went to the Constitutional Court, NUMSA argued that the matter concerned a key constitutional issue (*Lufil Packaging CC* para 11). It was of the view that the right to join a trade union is a constitutional right which is available to all workers and the same can be said about freedom of association (*Lufil Packaging CC* para 12). It utilised section 39(2) of the Constitution to argue that section 4(1)(b) of the LRA be interpreted so as not to limit the right to join a trade union and freedom of association (*Lufil Packaging CC* para 12). NUMSA made a submission that the LRA and its own constitution should be interpreted in a less restrictive manner as this would give effect to the fundamental rights in sections 18 and 23 of the Constitution (*Lufil Packaging CC* para 13, also see *POPCRU v SACOSWU* (2018) 39 *ILJ* 2646 (CC), *SATAWU v Moloto* (2012) 33 *ILJ* 2549 (CC). Section 18 of the Constitution deals with freedom of association while section 23 deals with fair labour practices.

NUMSA’s interpretation is that the phrase ‘subject to its constitution’ in section 4(1)(b) of the LRA meant that if the union and its members were in an agreement concerning their relationship, then it would not be for the employer or any other third party to challenge the relationship between the member/employee and the trade union by looking at the trade union’s constitution (*Lufil Packaging CC* para 14). In essence, section 4(1)(b) of the LRA must be interpreted in a manner that would still promote freedom of association (*Lufil Packaging CC* para 14). NUMSA was of the view that it had

an agreement with its members and while Lufil's industry was not included within the scope of NUMSA's constitution, it was not prohibited or excluded (*Lufil Packaging CC* para 15). As a result of this agreement between it and the employees/its members, Lufil cannot then interfere as a third party as it lacks *locus standi* to challenge the employee's membership to NUMSA (*Lufil Packaging CC* para 15). NUMSA argued that no employer should intervene in the internal operation of a trade union (*Lufil Packaging CC* para 16, also see *National Union of Mineworkers obo Mabote v Commission for Conciliation, Mediation and Arbitration* (2013) 34 ILJ 3296 (LC); *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA* (2015) 36 ILJ 1292 (LC); *Nestoil Plc v National Union of Petroleum and Natural Gas Workers Suit No: NIC/LA/08/2010*).

Lufil on the other hand, argued that NUMSA's constitution stated that only the employees in certain industries could be its members and the LRA provided that the trade union must give effect to its own constitution (*Lufil Packaging CC* para 18). Lufil argued that NUMSA must be bound by its own constitution as the lawmakers could not have intended that a trade union qualify for organisational rights in the LRA by acting contrary to its own constitution (*Lufil Packaging CC* para 19). Lufil was of the view that trade unions can only rely on lawfully admitted members when they claim organisational rights (*Lufil Packaging CC* para 21, in para 20, NUMSA limits the case to an argument that the trade union has an obligation to prove that the members it claims in order to obtain organisational rights joined the trade union lawfully).

IV DECISION OF THE CONSTITUTIONAL COURT IN *LUFIL PACKAGING CC*

The Constitutional Court used the same logic as the Labour Appeal Court that in common law, trade unions only have the powers and capacities that are given to them by their own constitutions and as a result, they cannot admit members that fall outside the scope of their constitution (*Lufil Packaging CC* para 8). If the trade union admits workers who fall outside the scope of its constitution, it is *ultra vires*, and the employer has the standing to challenge this (*Lufil Packaging CC* para 8). The Constitutional Court accordingly cited *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC) 910, in that a trade union acts *ultra vires* its own constitution when it allows membership of individuals who are not allowed to be members of that trade union in terms of the union's own constitution. A trade union cannot create a class of membership which falls outside its own constitution, if they do so, they exceed their powers and the act in question has no validity.

Section 4(1)(b) of the LRA provides that every employee has the right to join a trade union subject to the trade union's constitution. NUMSA argued that this phrase was an internal mechanism that can be ignored at will (*Lufil Packaging CC* para 38). The LRA requires a union to determine, in its constitution, the employees that are eligible to join it. The Constitutional Court noted that section 3 of the LRA required that the interpretation of the LRA be in compliance with the Constitution and South Africa's international obligations (*Lufil Packaging CC* para 43). Articles 2, 3 and 10 of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 (the Convention) provided that trade unions have the right to draft their own constitutions and rules and public authorities must refrain from any interference which could restrict this right (*Lufil Packaging CC* para 44). The Convention further holds that workers shall have the right to establish and, subject only to the rules of the trade union concerned, to join trade unions of their own choosing without previous authorisation. The Constitutional Court was of the view that the wording of section 4(1)(b) of the LRA mirrors that of the Convention (*Lufil Packaging* para 45). The Constitutional Court through these analyses proved that the union was bound by its constitution and cannot ignore it at will.

NUMSA relied on *Num obo Mabote v Commission for Conciliation, Mediation and Arbitration* (2013) 34 ILJ 3296 (LC) (hereinafter referred to as *NUM*) to make its argument about the employer not being allowed to interfere with the internal mechanisms of a trade union. In that case, Mabote was a member of the National Union of Mineworkers (NUM). NUM's constitution opened membership to all workers in the mining, energy, construction and allied industries. Mabote was employed in the hospitality industry by Kalahari Country Club (M Meyerwitz 'Which trade unions are allowed to represent employees at the CCMA?' *South African Labour Guide*, <https://www.labourguide.co.za/most-recent/1815-which-trade-unions-are-allowed-to-represent-employees-at-the-ccma> (accessed 15 January 2022)). Using section 4(1)(b) of the LRA, it appeared that since Mabote did not work in the mining sector, he was not a valid member of NUM. However, the Judge was of the view that this provision should not be interpreted so restrictively. The court in this *NUM* case found that it could not have been the intention of the lawmakers to restrict the right of representation, by a trade union, to the extent that it is up to interference by the employer to deny workers the right through the union's constitution. The court in *NUM* found that it was not for the employer to interfere with the internal decisions of a trade union as to who could be a member of the union.

Victor AJ in the Constitutional Court successfully rebutted NUMSA's above argument by citing Woolman et al 'Freedom of Association' *Constitutional Law of South Africa* Service 6 (ed) (2014) at 44-2-3, who explained that it was

extremely important for a trade union to have control over its membership policies and internal affairs (*Lufil Packaging CC* footnote 46). Instances where the trade union admitted individuals who did not fall within its purpose had the effect of altering the identity of the trade union. The Constitutional Court noted that Woolman continued arguing that without capacity to police their membership and regulate their internal affairs, trade unions risked having their aims substantially changed (*Lufil Packaging CC* para 33). The trade union must have the power to control the entrance of members because, without built-in limitations, members and outside parties could easily change and ruin the functioning and character of the trade union (*Lufil Packaging CC* para 33).

In *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) paras 644 G–645 C, the court held that the constitution of a trade union together with other rules and regulations are essentially an agreement created by the trade union's members. That constitution not only regulates the trade unions' scope of existence but also its powers and that of its office bearers.

With regards to freedom of association and the right to join a union, Victor AJ stated that workers joined NUMSA for its knowledge of the metal industry, in choosing to join NUMSA, they elected, by choice, not to join unions in other industries (*Lufil Packaging CC* para 35). NUMSA's disregard of its constitution violated the existing member's right to associate with it and disassociate from it. Further, in line with the Convention and the LRA, NUMSA formulated its constitution, and it made the decision to limit the scope of eligibility of its members. Thus, it could not be said that the right to freedom of association was impacted (*Lufil Packaging CC* para 46).

The Constitutional Court decided that Lufil was in the paper and packaging industry which was not included in Annexure B of NUMSA's constitution. Therefore, NUMSA was not eligible to demand organisational rights from Lufil. Lufil could not be said to interfere with NUMSA's internal workings by holding it accountable to a constitution that NUMSA drafted voluntarily and to which the existing members have agreed (*Lufil Packaging CC* para 68). NUMSA argued that the word 'only' did not appear in clause 2(b) of its constitution (workers who are or were working in the metal industry or other related industries are eligible for the membership of NUMSA) and this should have been interpreted to mean that any industry can be admitted (*Lufil Packaging CC* para 49). This argument, in the Constitutional Court's view, lacked logic and legal persuasion (*Lufil Packaging CC* para 50). Through its own self-imposed limitation, NUMSA was prevented from making contractual agreements with workers who fell outside its scope and object (*Lufil Packaging CC* paras 62 and 64). To allow unions to operate outside of their constitutions at their discretion would violate core constitutional values such as accountability, transparency, and openness.

V FACTS OF THE AFGRI CASE

In *AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Limited) v National Union of Metalworkers South Africa* [2024] ZACC 13, the issue before the Constitutional Court was: ‘Can a trade union represent employees in proceedings in the Labour Court, if those employees cannot become members of that union?’ (para 1). In this case, the applicant was AFGRI, a company which manufactures and distributes animal feeds, and the respondent was, again, NUMSA (para 2). In this matter, AFGRI’s employees went on an unprotected strike to fight for organisational rights for NUMSA, in September 2017 and they were subsequently dismissed on 1 December 2017 (para 3). NUMSA then referred the matter to the CCMA and the Labour Court to challenge the alleged unfairness of the dismissal. AFGRI on the other hand argued that NUMSA had no *locus standi* in the matter as the dismissed employees were not NUMSA’s members and NUMSA could not act on their behalf (para 4). At the Labour Court, AFGRI argued that the dismissed employees could not be members of NUMSA because NUMSA’s constitution prohibited them, it only allowed people in the metal and related industries (para 5). AFGRI based its argument on section 161(1)(c) of the LRA, which states that a party in a dispute in the Labour Court can appear for themselves or be represented by an official of their chosen trade union and since the dismissed employees were prohibited by NUMSA’s own constitution to be members of NUMSA, then, NUMSA had no legal standing to represent those workers in the Labour Court due to section 161(1)(c) of the LRA (para 6).

The Labour Court was of the view that the issue was twofold. First, whether NUMSA could refer the matter to it and second, if NUMSA could represent the dismissed workers (para 7, *National Union of Mineworkers of South Africa v AFGRI Animal Feeds (Pty) Limited*, unreported judgment of the Labour Court, Johannesburg, Case No JR 387/18 (LC judgment) at para 7). The Labour Court on the first part concluded that a union can, indeed, refer a dispute to, or represent a dismissed worker in, the Labour Court. However, that can happen only if that trade union is not only registered but the worker who is a party to the dispute must also be a member of that trade union (para 9). On the second part, the Labour Court cited *Lufil Packaging CC* discussed above that organisations that are joined voluntarily are bound by their constitutions and should not be allowed to act beyond them (para 10). NUMSA attempted to distinguish this matter from the *Lufil Packaging CC* matter on the basis that on that matter, it was seeking to enforce organisational rights, but the Labour Court did not accept this as it was of the view that a trade union can act ‘only on behalf of members falling within the scope of its registered constitution’. The Labour Court also found that AFGRI’s objection was to hold NUMSA accountable to its own constitution and it was not an interference with

NUMSA's internal affairs (para 11). The Labour Court found that NUMSA lacked *locus standi* to refer the matter to it (para 12).

The Labour Appeal Court overturned the Labour Court's decision as it differentiated between a union's exercise of organisational rights and the trade union's representation of workers in unfair dismissal proceedings (paras 12 and 13). Using *McDonald's Transportation Upington (Pty) Limited v Association of Mineworkers and Construction Union* (2016) 37 ILJ 2593 (LAC) (*McDonald's*), the Labour Appeal Court noted that in collective bargaining, which involves organisational rights, one must prove that the trade union can act for workers through proving that the workers are its members which is different to unfair dismissal proceedings where workers are entitled to choose a representative and they (employees) are the party to the dispute and not the trade union (para 14). According to this court, the only relevant question is the worker's right to choose such a representative (para 14).

The Labour Appeal Court, however, was of the view that when a trade union represents a worker who is in an industry outside the union's constitution, such representation would have limits and such limits do not extend to collective bargaining (para 16). The Labour Appeal Court also indicated that the purpose of the trade union representing its member, would be to secure justice, thus, the employer has no interest in trying to make the trade union abide by its constitution just to limit the worker's representation (para 17). It saw no need for the employer, as a third party, to concern itself with the relationship between a trade union and its members and it set aside the Labour Court's decision.

VI SUBMISSIONS AT THE CONSTITUTIONAL COURT IN *AFGRI*

AFGRI, at the Constitutional Court, argued that section 161(1)(c) of the LRA only permits worker representation by unions whose constitutions allows the workers membership and since the dismissed employees were in the animal feed industry while NUMSA's constitution permitted membership to workers in the metal industry, then NUMSA could not be allowed to represent the workers (para 22). It also argued that the Labour Appeal Court erred in relying on the *McDonald's* case due to the facts in *McDonald's* being different from its case (para 25). In *McDonald's*, the workers were not prohibited by the union's constitution to be the union's members (para 25).

According to NUMSA, the real issue was the right of workers to choose their representation and it linked this right to the right of access to courts (section 34 of the Constitution) and the issue of 'David versus Goliath' in litigation (para 26). It argued that limiting the right of the employees to be represented by a trade union of their own choosing, limited their freedom

of association as well (para 26). NUMSA distinguished this matter from *Lufil Packaging CC* by arguing that their organisational rights would affect the employer, but in its matter, the employer would not be affected as it is simply representing vulnerable workers (para 28). It sought to distinguish between representing workers for organisational rights and representing workers in unfair dismissal proceedings (para 28).

VII DECISION OF THE CONSTITUTIONAL COURT IN *AFGRI*

The Constitutional Court first considered the issue of the legal interest of NUMSA in these proceedings. According to it, AFGRI misunderstood section 161(1) of the LRA as it required a party to have legal representation – NUMSA and the workers were represented by a firm of attorneys, thus, section 161(1)(a) was met without the need to go to section 161(1)(c) representation (para 36). The Constitutional Court stated that section 161(1)(c) was about trade union representatives signing court documents and making appearances in court, advancing the rights of non-lawyers in superior courts (para 37). Section 200(1) of the LRA on the other hand, is about the trade union acting (a) in its own interest, (b) the interest of its members or (c) both; and section 200(2) is about the trade union being part of a dispute in which its members are involved in (para 39). The Constitutional Court concluded that NUMSA in this case, was acting for its members as governed by section 200(1)(b) and (c) and not section 161(1) of the LRA.

The Constitutional Court moved on to the issue of NUMSA's constitution. The Constitutional Court was of the view that as a result of its registration, a union obtains legal persona, it becomes a separate entity to its members (para 44; *South African National Defence Union v Minister of Defence* 2012 ILJ 1061 (GNP); *Mokoena v Mittal Steel South Africa* 2007 ILJ 1391 (BCA); *SAMWU v Jada* 2003 ILJ 1344 (W); *Food and Allied Workers Union v Wilmark* 1998 ILJ 928 (CCMA); *Mbobu v Randfontein Estate Gold Mining Co* 1992 ILJ 1485 (IC)). The trade union, as a distinct legal entity, may perform acts within its constitution as that is where it draws its powers and any act that is outside its constitution is beyond its powers and becomes null and void (para 45; *Gründling v Beyers* 1967 (2) SA 131 (W) (Gründling) at 139H–140B).

This court noted that the workers, in this case, could not be members of NUMSA as they were in a different industry to the one provided for by NUMSA's own constitution and NUMSA admitting these workers, acted *ultra vires*. The Constitutional Court argued that it was illogical to distinguish the issue of representation for organisational rights and unfair dismissal proceedings as this is against the idea that a union must act within its powers (para 51). The court decided that the dismissed workers could not be members of NUMSA; NUMSA could not represent the workers as it lacked

legal standing to do so (paras 52 and 53). Its reasoning was that the workers had a right to join trade unions whose constitution allowed them to be members (para 54). This was not about interfering with the union's internal affairs or holding it accountable to its constitution just to limit worker representation, this was about whether the trade union could act outside its constitution (para 55).

VIII COMMENTS ON *LUFIL PACKAGING CC* AND *AFGRI*

To fully comprehend the precedent set by the Constitutional Court in the above cases of *Lufil Packaging CC* and confirmed in *AFGRI*, the case note has to briefly outline the position of the judiciary prior to these judgments. One of the earliest of these cases is the *NUM* case where the presiding officer was of the view that it could not have been the intention of the lawmakers to restrict the right of representation by a trade union to the extent that it is up to interference by the employer to deny workers the right through the union's constitution. As indicated above, the court in *NUM* found that it was not for the employer to interfere with the internal decisions of a trade union as to who can be a member of the trade union.

The next of these cases is *McDonald's*. In this case, employees were dismissed for a violent strike. The employer raised an objection at the dismissal hearing, based on the Association of Mineworkers and Construction Union's (AMCU) constitution that AMCU could not represent the employees in question as they were no longer AMCU's members due to the lapse of their subscription of membership (*McDonald's* para 3).

The Labour Appeal Court in *McDonald's* reasoned that when a trade union demands organisational rights from the employer, it must prove that the employees in question are its members (*McDonald's* para 35). However, in dismissal proceedings, the employee and not the trade union is the party. As such and in accordance with Rule 25(1)(c) of the Commission for Conciliation, Mediation and Arbitration (CCMA), an employee has a right to choose their own representative. The only relevant question being the employee's right to choose that specific trade union (*McDonald's* para 35). Simply put, the Labour Appeal Court was of the view that the employer should not concern itself with whether the trade unions' membership information is up to date or any other aspect of the relationship between individual employees and their chosen trade union (*McDonald's* para 40, also see *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC)).

After *McDonald's* there was *Multiquip (Pty) Ltd and Another v National Union of Metalworkers of South Africa* (D 477-20) [2021] ZALC 7 (17 August 2021), where the court confirmed the position of *McDonald's* that the contents of

the trade union's constitution is irrelevant when the trade union is providing representation in the protection of the worker's right to be represented.

What is clear from *NUM, McDonald's* and *Multiquip* is that the third party (employer) could not interfere in the relationship between the trade union and its members/employees and raise the union's constitution as a way of interfering with the trade union's internal affairs. The case note is of the view that prior to *Lufil Packaging CC* and *AFGRI*, the courts seemed to favour freedom of association and the right of an employee to choose their representative over ensuring that a trade union does not act against its own constitution.

'Freedom of association is the single essential right for workers from which all other rights flow and without this right, all the other rights are an illusion' (M Budeli 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective' (2009) *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 15(2) at 57–74). Section 23 of the Constitution provides for the right to fair labour practice, as noted by the court in *Mabote*, this right includes the right of a worker to join a trade union and, as such, a trade union has the right to determine its own internal workings. The Supreme Court of Appeal in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Other* 2002 (5) SA 449 (SCA) further provides workers with the right to legal representation (also see *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2005) 2 All SA 479 (SCA)). The case note is of the view that allowing employers to interfere with the internal workings of a trade union, if not controlled, could have the drastic effect of employers dictating to their workers which trade unions they can and cannot join and which ones can and cannot represent them. This is, in fact, the practical effect of the *Lufil Packaging CC* and the *AFGRI* case. It can be said that these cases allow third-party interference between the relationship of a trade union and its members. The case note is of the view that this can be seen to be going against the rights of workers to associate with a trade union of their own choosing as well as interfering with the internal workings of the trade unions as the courts had previously held in *NUM, McDonald's* and *Multiquip* discussed above.

As indicated above, 'the right to freedom of association is a cornerstone of our democracy, it stems from a basic human need for a society with a shared purpose in a freely chosen enterprise' (M Budeli 'Understanding the right to freedom of association at the workplace: Components and scope' (2010) *Obiter* 31 at 1). This right is an important part of any labour market as it protects individual workers from the vulnerability of isolation and it ensures the worker's effective involvement in the workplace and labour market. This right is particularly significant as a basis for securing trade union freedom from interference by an employer (M Budeli 'The protection of workers'

right to freedom of association in international and regional human rights systems' (2009) 42(1) *De Jure* at 136–138; for a wholistic understanding of this right and trade unions from the historic perspective, also see Finnemore & Van der Merwe *Introduction to Labour Relations in South Africa* (1996) at 22; Ringrose *The Law and Practice of Employment* (1983) at 5). It ensures effective and equal engagement power between the employer and the workers (M Budeli cites Von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (1987) at 225). As such, no employer can effectively attack the freedom of association without impairing the very foundations of society (Woolman (eds) *Constitutional Law of South Africa* (1996) at 22-1, as cited by M Budeli). This means that a violation of this right is a violation of the social norms and rights of the working class.

Allowing third-party interference would be an unwanted limitation of the representation of the working class where the workers are denied access to justice simply because they do not fall within the scope of a trade union, thus, limiting their right to associate with that trade union. This is not the intention of the LRA. Section 1 of the LRA provides that the LRA has the intention of providing social justice where the employers and employees can engage in dispute resolution. Thus, limiting the association of workers with trade unions would violate the principle of social justice and as highlighted above, make the right access to justice for the workers an illusion.

However, the above arguments are just one side of the coin. The other side of the argument can be seen in the Constitutional Court's rebuttal of the *NUM* case in *Lufil Packaging CC*. *Lufil Packaging CC* uses the Woolman argument that such interpretation (allowing trade unions to act outside the scope of their own constitutions) if allowed, would change the core character of the union, thereby prejudicing other members who joined it for its special focus on a certain sector (*Lufil Packaging CC* para 33). It is very logical to argue that trade unions are created to cater for that specific sector, not to be broad and allowing the *NUM* interpretation would cast the net too wide. For example, it would lead to a situation whereby a trade union for teachers admits miners or a trade union for farm workers admits medical doctors etc. The case note is of the view that the problem with such 'a broad church' is that it not only violates the rights of those who joined a trade union specifically because it was an industry-specific trade union, but it also has the potential of loosening the expertise a trade union would have or has had in an industry, to the prejudice of its members. Furthermore, considering that trade unions draft their own constitutions according to how they see fit, it would be illogical for it to then try to admit employees it voluntarily left out under its scope.

The case note also concurs with the alternate method provided by the Constitutional Court in *Lufil Packaging CC* that NUMSA could have used

to admit the workers of Lufil as their members thus getting organisational rights. The alternative was if NUMSA wished to admit Lufil employees as its members, then it should have simply amended its constitution (*Lufil Packaging CC* para 69), clause 14(1) of NUMSA's constitution provides for the amendment of its constitution. NUMSA could have simply passed a resolution of its central committee to amend its scope if it really sought to admit Lufil's employees to its membership (*Lufil Packaging CC* para 57). NUMSA has previously amended its constitution to include industries outside its metal industries. The same argument could be raised for the *AFGRI* case. However, in both cases NUMSA chose not to make the amendment, thus, making it difficult to conceive how a provision of a trade union's constitution about its own scope can limit the right of freedom of association (*Lufil Packaging CC* para 61). The case note is of the view that the question is, considering that the trade union has previously amended its constitution to cater for other industries in the past, why did it not simply do that again?

The case note submits that on paper, the Constitutional Court reached correct decisions in both *Lufil Packaging CC* and *AFGRI* when refusing to let NUMSA break its own constitution. This can even be supported by *Food and Allied Workers Union v Ferucci t/a Rosendal Poultry Farm* (1992) 13 ILJ 1271 (LC), which provides that in order for a trade union to exercise organisational rights in a workplace, the scope of the trade union's constitution must provide for the particular business of the employer. This is based on the reasoning that allowing trade unions to admit employees as its members without regard for their own constitutions subverts these purposes to the potential detriment of their existing members and the public at large (Fergus & Godfrey 'Organising and bargaining across sectors in South Africa: Recent developments and potential problems' (2016) 37 ILJ 2211 at 2230–1). In the current context, because NUMSA's constitution only deals with the metal industry then it should only admit members from that industry, not other industries. In essence, the case note concedes that the Constitutional Court's decisions in both *Lufil Packaging CC* and *AFGRI* were correct, on paper.

The judgments, as indicated above, have wider social and legal implications because employers may now interfere with the internal workings of a trade union if the trade union's constitution does not cover the sector in which the particular employer operates (*AFGRI Operations Limited v MacGregor* (2013) 34 ILJ 2847 (LC)). This can be seen to help prevent a situation where unions try to get more members in an industry that they are not knowledgeable in, which will have a negative consequence should the worker need representation only to find that the union lacks basic information about that industry and its procedures, policies and protocols.

IX CONCLUSION

The case note concludes that the CC's judgments are well written and reasoned judgments. The Justices, for every conclusion, drew from a previously made analyses and applications of such a conclusion. The court left no stone unturned as it dealt with all the contentions of NUMSA, ranging from freedom of association, the right to ignore its constitution at its own will and internal interference by the employer. The court also successfully interpreted the LRA and common law. The Justices also went further by providing an alternative method which can be used by other unions in the future such as simply amending their constitutions to gain new members. Through its reasoning, one can see that the court understood the social impact of its decision and what it would mean to allow NUMSA to breach its own constitution. The decisions of the Constitutional Court are clear, a trade union cannot act beyond the powers given to it by a constitution that it voluntarily drafted as allowing such would have the possibility to change the character of the union.