CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 188/22

In the matter between:

AFGRI ANIMAL FEEDS Applicant

and

NATIONAL UNION OF METALWORKERS SOUTH AFRICA First Respondent

MALULEKE AND 13 OTHERS Second and Further Respondents

Neutral citation: *AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Limited) v National Union of Metalworkers South Africa and Others* [2024] ZACC 13

Coram: Maya DCJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J

Judgment: Schippers AJ (unanimous)

Heard on: 21 November 2023

Decided on: 21 June 2024

Summary: Sections 161 and 200 of the Labour Relations Act 66 of 1995 — *locus standi* of trade union — trade union constitution — definitive of powers — admission of members outside registered scope — *ultra vires* and invalid

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Johannesburg Labour Court, Johannesburg):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Labour Appeal Court is set aside and replaced with the following:

   "The appeal is dismissed."
4. The parties shall bear their own costs in the Labour Appeal Court and this Court.

JUDGMENT

SCHIPPERS AJ (Maya DCJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J and Tshiqi J concurring)

Introduction

[1] Can a trade union represent employees in proceedings in the Labour Court, if those employees cannot become members of that union? That is the question raised by this application for leave to appeal.

[2] This question arose when the applicant, AFGRI Animal Feeds, a division of PhilAfrica Foods (Pty) Ltd (AFGRI), which manufactures and distributes animal feeds, raised a preliminary point in proceedings before the Labour Court that the first respondent, the National Union of Metalworkers of South Africa (NUMSA), a

trade union registered under the Labour Relations Act[1] (LRA), was precluded from representing the second to thirteenth respondents (dismissed employees) in that Court. In terms of its constitution, membership of NUMSA is restricted to workers in the metal and related industries. The dismissed employees were formerly employed by AFGRI in the animal feeds industry.

Background

[3] It is common ground that in September 2017 the dismissed employees embarked on an unprotected strike following AFGRI's refusal to grant NUMSA organisational rights. They were dismissed on 1 December 2017. They challenged the fairness of their dismissals. On 19 December 2017, NUMSA, on their behalf, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[4] The dispute was not resolved in the CCMA and, in June 2018, NUMSA and the dismissed employees, represented by the same firm of attorneys, referred an unfair dismissal dispute to the Labour Court. In the statement of case, NUMSA is cited as the first applicant and the dismissed employees as the second and further applicants. They allege that in July 2017 the dismissed employees became members of NUMSA and are in good standing. They seek an order declaring that their dismissal is procedurally and substantively unfair, and directing AFGRI to reinstate them retrospectively; alternatively, to pay them compensation (Labour Court proceedings). Those proceedings are pending in the Labour Court.

[5] In its statement of defence, AFGRI disputes that the dismissed employees are members of NUMSA and asserts that NUMSA and its legal representative lack legal standing and authority to act on their behalf. When the case was heard in the Labour Court, AFGRI objected to NUMSA's standing on the ground that its

[1] 66 of 1995.

constitution prohibits the dismissed employees, who were employed in the animal feeds industry, from becoming members of NUMSA. Its constitution states that persons "working in the metal and related industries are eligible for membership of the Union".[2]

[6] AFGRI's objection was based on section 161(1)(c) of the LRA, which provides that a party to proceedings in the Labour Court may appear in person or be represented only by a member, office-bearer or official of that party's registered trade union. Since the dismissed employees could not become members of NUMSA, it had no legal standing to represent them in an unfair dismissal dispute in the Labour Court under section 161(1)(c) of the LRA.

Litigation history

Labour Court

[7] The Labour Court upheld the preliminary point, with costs. It stated that the enquiry was twofold. The first was whether NUMSA had the right to refer the matter in its own interest and the interests of its members; and the second, whether NUMSA had the right to represent the dismissed employees.[3]

[8] As regards the first enquiry, the Labour Court reasoned as follows. The dispute had been referred to it in terms of section 191(5)(b) of the LRA and rule 6 of the Rules for the Conduct of Proceedings in the Labour Court[4] (Rules). Section 191(5)(b) provides that an employee may refer a dispute about the fairness of a dismissal to the Labour Court for adjudication. Rule 6 of the Rules requires the party initiating the proceedings to refer the matter by way of a statement of claim, signed by that party. Rule 1 defines a party as "any party to court proceedings and includes a person representing a party in terms of section 161 of the Act".

[2] NUMSA's constitution states that the union is open to all workers employed in any of the industries defined in Annexure B to the constitution. Those industries, in turn, are defined as "THE METAL AND RELATED INDUSTRIES, the scope of the union."

[3] *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.

[4] Rules for the Conduct of Proceedings in the Labour Court, GN 1665 *GG* 17495, 14 October 1996.

[9] The Labour Court then referred to sections 161(1)(c) and 200 of the LRA. Section 161(1)(c) entitles a party in any proceedings before the Labour Court to appear in person or be represented by an office-bearer or official of that party's registered trade union. In terms of section 200(1)(b), a registered trade union may act on behalf of any of its members, or in the interest of any of its members (section 200(1)(c)), in any dispute to which such member is a party. The Labour Court concluded that these provisions, read together with rule 1 of the Rules, show that a trade union may refer a dispute to or represent a dismissed employee in the Labour Court, only if that union is registered and the employee who is a party to the dispute is a member of that union.[5]

[10] As to the second enquiry, the Labour Court cited this Court's decision in *Lufil*[6] for the principle that a voluntary association such as NUMSA is bound by its constitution, and has no power to act beyond it. The court rejected NUMSA's argument that *Lufil* applies only in a case where a trade union seeks to enforce organisational rights. It held that a trade union could act only on behalf of members falling within the scope of its registered constitution, which is "valid for all enquiries".

[11] The Labour Court rejected the argument that the point raised by AFGRI constituted an interference in the internal affairs of NUMSA. Rather, AFGRI sought to hold NUMSA to its constitution in a case where the union purported to exercise rights on the basis that the employees were its members.

[12] The Labour Court concluded that NUMSA's referral of the dispute in terms of section 200 of the LRA, was invalid and void from the outset. NUMSA therefore lacked legal standing to launch the proceedings.[7] NUMSA was ordered to pay costs because

[5] *LC judgment* above n 3 at paras 8-12.

[6] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* [2020] ZACC 7; (2020) 41 (ILJ) 1846 (CC); 2020 (6) BCLR 725 (CC) (*Lufil*) at para 47.

[7] *LC judgment* above n 3 at paras 23-4.

the dismissed employees' employment had "long since ended" and NUMSA was not in a collective bargaining relationship with AFGRI.

Labour Appeal Court

[13] The Labour Appeal Court overturned the Labour Court's decision. It held that NUMSA was a party to the Labour Court proceedings in terms of section 200(1)(b) of the LRA, because it was acting both on behalf of its members, and in their interests, as envisaged in section 200(1)(c). In those proceedings, both NUMSA and the dismissed employees were represented by their attorney as contemplated in section 161(1)(a) of the LRA and not by an office-bearer in terms of section 161(1)(c).[8]

[14] On the question whether NUMSA could represent the dismissed employees when they worked in an industry which fell outside its constitution, the Labour Appeal Court drew a distinction between a trade union's exercise of organisational rights on the one hand, and its representation of employees in an unfair dismissal dispute on the other. For this proposition the Labour Appeal Court relied on its decision in *MacDonald's Transport*.[9] There, it was held in the context of arbitration proceedings, that when exercising organisational rights such as the right to engage in collective bargaining, a trade union must establish that it has a right to act on behalf of workers by proving that they are its members. However, in dismissal proceedings, generally the workers (not the union) are parties to the proceedings. Workers have the right to choose a representative. When they want a particular union to represent them in dismissal proceedings, the only question is the right to choose that union.[10]

[15] The Labour Appeal Court referred to *Lufil* and stated that where a trade union functions within a specified constitutional scope when bargaining collectively on behalf

[8] *National Union of Metalworkers of South Africa (NUMSA) v AFGRI Animal Feeds (Pty) Limited* [2022] ZALAC 99; (2022) 43 ILJ (LAC); [2022] 10 BLLR 902 (LAC) (*LAC judgment*) at paras 22-3.

[9] *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union* [2016] ZALAC 32; (2016) 37 (ILJ) 2593 (LAC); [2017] 2 BLLR 105 (LAC).

[10] *LAC judgment* above n 8 at paras 26 and 34.

of its members, that union relies on its particular knowledge of the industry it serves, and employees may seek membership of the union for this reason. However, according to the Labour Appeal Court, different considerations apply when deciding whether employees are entitled to representation by a trade union under section 200 or 161(1)(c) of the LRA. Fairness and the employees' right to representation in individual disputes are then relevant considerations.[11]

[16] The Labour Appeal Court stated that where a trade union "has accepted the employee as a member outside its constitutionally-prescribed scope of operation" – in other words, allowing employees to become members beyond the powers conferred on the union by its constitution – it does so on the basis that its representation of the employee "is limited". Where this happens, and following *Lufil*, the Labour Appeal Court said, the trade union "will not be entitled to bargain collectively with the employer".[12]

[17] The Labour Appeal Court found that where a trade union represents employees in individual disputes with their employer, that representation is aimed at providing effective access to justice and redress to the employees, "in accordance with sections 23 and 38 of the Constitution and prevailing labour legislation". In such a case, the employer has no interest in holding the union to the terms of its constitution in order to limit the employee's right to representation.[13]

[18] The Labour Appeal Court held that it is not the business of an employer to concern itself with the relationship between individual employees and their union; that an employer should not be able, at its election, to invoke the provisions of a trade union's constitution; and that the approach in interpreting the constitution of a voluntary

[11] Id at paras 34-5.

[12] Id at para 36.

[13] Id at para 37.

organisation is "one of benevolence, rather than of nit-picking, which ought to be aimed at the promotion of convenience and the preservation of rights".[14]

[19] The Labour Appeal Court then "contrasted" the latter approach with the one followed in *Lufil*, namely that a voluntary association is bound by the categories of membership contained in its constitution, and has no powers beyond those set out in that document.[15] It found that *Lufil* was not concerned with a trade union's suitability to represent employees in unfair dismissal or unfair labour practice disputes, but with the role of a union's constitution in giving effect to a government policy of collective bargaining at a sectoral level.[16]

[20] The Labour Appeal Court concluded that the Labour Court erred in finding that the dismissed employees' membership of NUMSA was invalid and void from the outset. It also erred in holding that NUMSA lacked legal standing, and that its referral of the matter was invalid. The Labour Appeal Court held that there was no reason for the costs award. Consequently, the Labour Appeal Court upheld the appeal, set aside the Labour Court's order and substituted it with an order dismissing the preliminary point.[17]

Submissions before this Court

The applicant's submissions

[21] AFGRI submits that on a proper construction of section 161(1) of the LRA, it confers legal standing on a registered trade union only where it is a party to the proceedings, in which case it may be represented by a director or equivalent (section 161(1)(b)); or where its members are parties, in which event those members may be represented by any office-bearer or official of the union (section 161(1)(c)).

[14] *General Industries Workers Union of SA v Maseko* (2015) 36 ILJ 2874 (LC).

[15] *Lufil* above n 6 at para 47.

[16] Id at paras 27 and 32-3.

[17] Id at paras 38-40.

NUMSA is not a party to the Labour Court proceedings, because the unfair dismissal dispute is between AFGRI and the dismissed employees; not between AFGRI and NUMSA.

[22] AFGRI contends that section 161(1)(c) of the LRA contemplates representation only by a trade union whose constitution permits workers in the animal feeds industry to become members of that union. NUMSA's constitution precludes the dismissed employees from membership of the union – they are not employed in the metal and related industries. Therefore, NUMSA (or a member, office-bearer or official of NUMSA) does not have standing in the Labour Court proceedings.

[23] Legal standing consists of procedural and substantive requirements. AFGRI contends that procedurally, NUMSA has a true onus to prove that it has standing to represent the dismissed employees and it must prove compliance with section 161(1)(c) of the LRA. Substantively, it also bears a true onus of proving that it has a direct and sufficient interest in the unfair dismissal dispute between AFGRI and the dismissed employees. NUMSA failed to meet these requirements.

[24] AFGRI submits that the Labour Appeal Court was wrong to hold that section 200(1)(b) and (c) and 200(2) of the LRA confers standing on NUMSA. Section 200(2) provides that a registered trade union is entitled to be a party to any proceedings under the LRA, if one or more of its members is a party to those proceedings. These provisions, AFGRI contends, do not grant a trade union standing to represent non-members in disputes before the Labour Court. The wording of sections 161(1)(c) and 200 makes it clear that legal standing in an unfair dismissal dispute is regulated by section 161(1)(c). But even if section 200 applies, it does not authorise NUMSA to act on behalf of the dismissed employees – they are prohibited by its constitution from becoming members of the union.

[25] AFGRI contends that the Labour Appeal Court's reliance on *MacDonald's Transport* is misplaced, and a misdirection. The facts in that case are distinguishable.

There, the employees were not precluded by the relevant trade union's constitution from becoming members. Instead, it was alleged that they had not paid subscriptions to the union as a result of which their membership had lapsed, which the Labour Appeal Court found had not been proved. Further, so AFGRI contends, the case was not concerned with standing under section 161(1)(c) of the LRA, but with arbitrations in the CCMA.

The respondents' submissions

[26] The respondents submit that the right of the dismissed employees to be represented in the Labour Court by a party of their choosing lies at the heart of this case. This right is inextricably linked to the fundamental right of access to courts,[18] because employees usually come up against well-resourced employers with strong legal teams, and the right of access "without comparable representation is meaningless". Moreover, preventing the dismissed employees from being represented by NUMSA, which they have chosen as their trade union, unduly limits their right to freedom of association.[19] Therefore, so it is submitted, membership of a trade union can include persons employed in sectors falling outside its registered scope, as defined in its constitution.

[27] The respondents contend that AFGRI conflates the "right to appear" on behalf of employees under section 161, with the "right to represent" them under section 200 of the LRA. NUMSA's involvement in the Labour Court proceedings is based on section 200 and not section 161 of the LRA. The dismissed employees were represented by a legal practitioner, as the Labour Appeal Court found. The Labour Appeal Court rightly held that NUMSA represented the dismissed employees in terms of section 200(1)(b) and (c) and section 200(2) of the LRA; and that the relationship between a trade union and its members is a private matter, save in the case of collective bargaining, where the union may not act outside the scope of its constitution.

[18] Section 34 of the Constitution provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[19] Section 18 of the Constitution provides: "Everyone has the right to freedom of association."

[28] The rule laid down in *Lufil* that a trade union is bound by the categories of membership set out in its constitution – which the respondents say is confined to collective bargaining as found by the Labour Appeal Court – does not, the respondents argue, apply to legal standing. This is because organisational rights have an impact on the rights of an employer. However, the representation of vulnerable employees in proceedings in the Labour Court does not affect any of the employer's rights. The only right affected is that of the dismissed employees to be represented by NUMSA, a union of their choice. Recognition of this right "can amount to benevolence, but such benevolence is necessary and justified in light of the broader mandate imposed by the LRA and international law".

[29] In short, the respondents submit that a distinction can be made between membership of a trade union for the purpose of exercising organisational rights, and membership for the purpose of representation before a forum, including the Labour Court. This distinction, the respondents say, "is possible and necessary", as contemplated in *Lufil* and *MacDonald's Transport*.

Issues

[30] The issues in this case are these:

(a) Does the application engage this Court's jurisdiction?

(b) Should leave to appeal be granted?

(c) If leave is granted, does NUMSA have the authority to represent the second to fourteenth respondents, and thus establish legal standing in the Labour Court proceedings?

Jurisdiction and leave to appeal

[31] The LRA is legislation designed to give effect to the rights enshrined in section 23 of the Constitution. The central issue in this case concerns the meaning and effect of sections 161 and 200 of the LRA, which is a constitutional matter.[20]

[32] The matter also raises an arguable point of law of general public importance.[21] It concerns the legal standing of a trade union to represent employees, precluded from membership under its constitution, in the Labour Court and other fora. The issue is not confined to the interests of the parties, but is important to all trade unions, employers and employees.[22] This Court's jurisdiction is thus engaged.

[33] It is in the interests of justice that leave to appeal be granted. In this regard, prospects of success are an important consideration. In light of this Court's decision in *Lufil*, there are reasonable prospects that this Court will reverse the decision of the Labour Appeal Court. Further, legal standing is a threshold issue and the Labour Court proceedings have not reached the trial stage. On this issue, clarity and certainty are required for, as we were informed by NUMSA's counsel, numerous trade unions and employees are similarly situated, and they regard the Labour Appeal Court's judgment as authoritative.

Does NUMSA have legal standing?

The relevant provisions of the LRA

[34] Section 161 of the LRA which is headed "Representation before Labour Court", provides:

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[20] *National Union of Metalworkers of South Africa v Trenstar (Pty) Limited* [2023] ZACC 11; 2023 (4) SA 449 (CC); [2023] 7 BLLR 609 (CC) at para 21; *Lufil* above n 6 at paras 26-7; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14.

[21] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 20.

[22] *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (10) BCLR 1261 (CC) at para 17.

> "(1) In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by—
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> (a) a legal practitioner;
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> (b) a director or employee of the party;
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> (c) any office-bearer or official of that party's registered trade union or registered employers' organisation;
>
> (d) a designated agent or official of a council; or
>
> (e) an official of the Department of Labour.
>
> (2) No person representing a party in proceedings before the Labour Court in a capacity contemplated in paragraphs (b) to (e) of subsection (1) may charge a fee or receive a financial benefit in consideration for agreeing to represent that party unless permitted to do so by order of the Labour Court."

[35] Section 200 of the LRA is headed "Representation of employees or employers" and reads:

> "(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party—
>
> in its own interest;
>
> on behalf of any of its members;
>
> in the interest of any of its members.
>
> (2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."

[36] AFGRI's main complaint is that the Labour Appeal Court erred in holding that NUMSA was authorised, in terms of section 200 of the LRA, to represent the dismissed employees in the Labour Court proceedings. AFGRI contends that NUMSA had to demonstrate legal standing under section 161(1)(c) of the LRA.

[37] AFGRI is however mistaken in relation to section 161(1). Section 161(1)(a) makes it clear that a party to any proceedings before the Labour Court may be

represented by a legal practitioner. As appears from the pleadings, NUMSA and the dismissed employees were represented by a firm of attorneys in the Labour Court proceedings, as envisaged in section 161(1)(a). So, the question of representation under section 161(1)(c) does not arise. That provision empowers a member, office-bearer or official of the trade union, of which the litigant is a member, to represent the litigant in proceedings before the Labour Court. Section 161(1)(c) authorises the union official to sign pleadings and appear in court, thereby overcoming the normal bar against non- lawyers representing others in superior courts.

[38] The Labour Appeal Court was thus correct to hold that NUMSA and the dismissed employees were represented by their attorney in the referral of the matter to, and in the proceedings before, the Labour Court, in terms of section 161(1). And nothing turns on the fact that the dispute is about an unfair dismissal. Section 161(1), on its plain wording, empowers the persons referred to therein to represent a party in "any proceedings" before the Labour Court.

[39] Section 200(1) of the LRA empowers a registered trade union to act in one or more of the three capacities listed in that provision, in any dispute to which any of its members is a party. In such a dispute a trade union may act in its own interests or solely for its own advantage; or on behalf or in the interests of any of its members; or a combination of these. The purpose of section 200(2) is to confer on the trade union itself a legal right to be a party to any dispute to which its members are parties.[23]

[40] Section 200 thus determines a trade union's legal standing: it may act in its own right or interest (section 200(1)(a)); it is entitled to act on behalf of any of its members (section 200(1)(b)); and it may act in the interests of any of its members (section 200(1)(c)). That a trade union should act on behalf or in the interests of its

[23] *Manyele v Maizecor (Pty) Limited* (2002) 23 ILJ 1578 (LC) at para 12.

members is not new. Some 75 years ago, Centlivres JA in *Amalgamated Engineering Union*[24] described the role of a trade union as follows:

> "The whole idea underlying the trade union system . . . is that the trade union concerned should act as the spokesman of its members . . . To insist that whenever a dispute arises between employers and employees, an individual employer or employee should set the statutory machinery in motion for the purpose of settling the dispute, would tend to defeat the object which the legislature had in mind . . . for it is obvious that what the legislature had in mind was that employees should use the services of the trade union of which they are members and that employers should use the services of employers' organisations to which they belong."[25]

[41] In the present case, NUMSA does not act in its own interests: there is no such allegation in the statement of case. Rather, NUMSA is litigating on behalf of or in the interests of the dismissed employees, whom it claims are its members in good standing, and the relief sought is an order declaring their dismissal procedurally and substantively unfair. The Labour Appeal Court therefore rightly concluded that the issue of NUMSA's legal standing is governed by section 200(1)(b) and (c), and not section 161(1) of the LRA.

NUMSA's registration and its consequences

[42] The requirements for registration of a trade union are set out in section 95 of the LRA. A trade union may apply to the registrar for registration if it assumes a name and adopts a constitution in accordance with the prescribed requirements;[26] has an address in the Republic;[27] and is independent.[28]

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[24] *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A).

[25] Id at 912. This dictum was cited in *NUMSA v CCMA* [2000] 11 BLLR 1330 (LC) at para 31 and approved in *Blyvooruitzicht Gold Mining Co Limited v Pretorius* [2000] 7 BLLR 751 (LAC) at para 12.

[26] Section 95(1)(a) and (b) of the LRA.

[27] Section 95(1)(c) of the LRA.

[28] Section 95(1)(d) of the LRA.

[43] The prescribed requirements for the constitution of a trade union are contained in section 95(5) of the LRA. These include the requirement that the constitution must "prescribe qualifications for, and admission to, membership".[29] NUMSA's constitution provides that all workers who are working in the metal and related industries are eligible for membership of the union.[30] NUMSA's scope is defined in Annexure B to its constitution. It states that "[t]he Union shall be open to all workers employed in any of the following industries". The annexure then lists and describes the various industries in considerable detail, which is referred to as "the metal and related industries, [t]he scope of the union".[31]

[44] The most important consequence of registration of a trade union is that it acquires legal personality: it is a body corporate distinct from its members and officials, and acquires its own reputation separate from its members, which is protectable.[32] This, however, does not permit a trade union to operate outside its registered scope.[33] Generally, the scope of registration of a trade union is determined by the nature of the entity.[34]

[45] One of the effects of legal personality is that a trade union, as a body corporate, may perform any act in law which its constitution requires or permits it to do. The constitution sets out the union's powers – a prescribed requirement for registration under section 95(5) of the LRA. The constitution corresponds with the articles of association of a company and may be enforced in like manner. Where a trade union performs any act that deviates from or is contrary to its constitution, that act is

[29] Section 95(5)(b) of the LRA.

[30] Constitution of the National Union of Metalworkers of South Africa (NUMSA) as amended at National Congress of NUMSA in 2012 and at its Special National Congress in December 2013 at 8, Chapter 2(2).

[31] Id.

[32] Van Jaarsveld et al "Trade Unions" in *LAWSA* 3 ed (2017) vol 24(1) at para 480 citing *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); *Mbobo v Randfontein Estate Gold Mining Co* 1992 ILJ 1485 (IC).

[33] Id; *Lufil* above n 6 at para 56.

[34] *Food & Allied Workers Union* 1992 ILJ 1271 (IC).

ultra vires (beyond its powers) and null and void.[35] In such a case, an individual may approach a court to interdict the *ultra vires* act.[36]

NUMSA is bound by its registered scope of operation

[46] The centrality of a trade union's constitution is underscored by section 4(1)(b) of the LRA. It provides that every employee has the right to join a trade union "subject to its constitution". The constitution, together with any rules and regulations, establishes a contract between the individual members of the union who are bound in a voluntary association.[37] Registration of the union allows the public access to the constitution: it becomes a public document.[38]

[47] The constitution of a trade union also promotes transparency, as is demonstrated by this very case. In *Lufil* this Court said:

> "The constitution of the union . . . serves an important purpose for employers, as they are informed of the different industries within which unions operate. To allow unions to operate outside their constitutions, at their discretion, would go against core constitutional values such as accountability, transparency and openness."[39]

[48] NUMSA's constitution restricts its registered scope to workers in the metal and related industries. The dismissed employees were working in the animal feeds industry when they applied for membership of the union. They were not eligible for membership for the simple reason that they were employed outside NUMSA's registered scope. Their admission was, and remains, an act that is beyond NUMSA's powers as defined in its constitution. In *Lufil* this Court rejected an argument by NUMSA that it could

[35] Van Jaarsveld above n 32 at para 481; *Gründling v Beyers* 1967 (2) SA 131 (W) (*Gründling*) at 139H-140B, approved by this Court in *Lufil* above n 6 at para 53.

[36] *Gründling* above n 35; *Garment Workers' Union v Smith* 1936 CPD 249.

[37] *Lufil* above n 6 at para 37.

[38] Van Jaarsveld above n 32 at para 484.

[39] *Lufil* above n 6 at para 64.

admit to membership workers in any industry, holding that such an argument was inconsistent with the text of its constitution.[40]

[49] Thus, in *Lufil*, this Court stated the position as follows:

> "A voluntary association, such as NUMSA, is bound by its 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." [41]

[50] The Court went on to say:

> "As a matter of common law and based on the LRA, NUMSA's constitution precludes membership outside of those industries listed in Annexure B. Any admission of members outside the terms of the constitution is *ultra vires* and invalid."[42]

[51] Nothing could be clearer. There is no ground for drawing a distinction between a trade union's representation of employees when enforcing organisational rights and representation in an unfair dismissal dispute, as submitted by NUMSA. That distinction is both illogical and at odds with the principle that a trade union has no powers beyond those conferred by its constitution. It would mean that NUMSA is entitled to represent the employees in an unfair dismissal dispute because they are members of the union; but it cannot exercise organisational rights on their behalf, because they are not members.

[52] It is untenable to say that a person is a member of a trade union for one purpose, but not for another, as counsel for NUMSA fairly conceded. The union either has the

[40] Id at para 22.

[41] Id at para 47.

[42] Id at para 56.

power under its constitution to admit the dismissed employees as members, or it does not. There can only be one answer to the question: Can the dismissed employees become members of NUMSA? The answer is no. As this Court held in *Lufil*:[43] "NUMSA is precluded from concluding membership agreements with workers who fall outside its scope".

[53] Consequently, NUMSA has no authority to represent the dismissed employees and therefore has no legal standing in the Labour Court proceedings. The question of standing is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a litigant's interest in proceedings which warrants its title to prosecute the claim asserted.[44] Generally, a party claiming relief from a court must establish that it has a direct and substantial interest in the subject matter of the suit.[45] Procedurally, the onus of establishing an interest rests upon the applicant; it is an onus in the true sense.[46] NUMSA has met neither requirement: it cannot prove that it has an interest in the Labour Court proceedings, because its registered scope precludes the dismissed employees from becoming members of NUMSA.

[54] It follows that *Lufil* is directly in point: the issue here is the construction and meaning of NUMSA's registered scope as defined in its constitution, which does not extend to the animal feeds industry.[47] It is not about the right of the dismissed employees to be represented by a union of their choice, nor their right of access to court. These rights are not implicated at all. The dismissed employees have the right to join and be represented by any trade union whose registered scope permits them to be members. And the issue has nothing to do with interference in the internal affairs of

[43] *Lufil* above n 6 at para 62.

[44] *Gross v Pentz* [1996] ZASCA 78; 1996 (4) SA 617 (SCA); [1996] 4 All SA 63 (A) at 632B-C; *Sandton Civic Precinct (Pty) Limited v City of JHB* [2008] ZASCA 104; 2009 (1) SA 317 (SCA); [2009] 1 All SA 291 (SCA) at para 19.

[45] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* [1998] 2 All SA 379 (A); 1988 (3) SA 369 (A) at 388B-E.

[46] *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I.

[47] *Lufil* above n 6 at para 52.

the union. As it was put in *Lufil*, "[t]he essential approach in this case is not to police compliance with [NUMSA's] internal provisions, but once it interfaces with third parties, NUMSA's conduct is circumscribed by its constitution and has wide ranging public consequences".[48]

[55] The issue in this application is also not about "holding the union to the terms of its constitution in order to limit the employee's right to representation"; nor fairness and the dismissed employees' right to representation in individual dispute proceedings, as the Labour Appeal Court opined. Rather, the issue is whether NUMSA may act beyond the bounds of its constitution. Yet again, *Lufil* provides a complete answer:[49]

> "NUMSA has adopted a constitution which is clear in its terms. It is a voluntary association with rules and annexures that collectively form the agreement entered into with its members. The constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts in general. The classic interpretative principle is that effect must be given to the ordinary language of the document, objectively ascertained within its context."

[56] The Labour Appeal Court however held that the approach to interpreting the constitution of a voluntary association is one of benevolence, aimed at the promotion of convenience and the preservation of rights. That is not so. The plain language and structure of NUMSA's constitution in relation to its registered scope make it clear there is no room for the Labour Appeal Court's approach. As was said in *Capitec*:[50]

> "Interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."[51]

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[48] *Lufil* above n 6 at para 62.

[49] Id at para 53, footnotes omitted.

[50] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Limited* [2021] ZASCA 99; 2022 (1) SA 100 (SCA).

[51] Id at para 15.

[57] Finally, NUMSA's submission that preventing it from representing the dismissed employees in the Labour Court proceedings limits their right to freedom of association, lacks merit. As this Court held in *Lufil*,[52] there can be no suggestion of an infringement of the rights contained in section 18 and 23 of the Constitution where the union itself has chosen to circumscribe its scope of operation in its constitution.[53]

Conclusion

[58] NUMSA has no authority to represent the dismissed employees in the Labour Court, because they are precluded from becoming members of the union. It therefore has no legal standing in the Labour Court proceedings. Its constitution confines membership to workers in the metal and related industries. The dismissed employees, who formerly worked in the animal feeds industry, fall outside of those industries. NUMSA's act in admitting them as members of the trade union contrary to its constitution, is *ultra vires* and invalid.

[59] We were informed that there are trade unions operating in the animal feeds industry which admit employees in that industry to membership. Moreover, the dismissed employees themselves are entitled to continue with the Labour Court proceedings in their own names. A firm of attorneys acted for them when the dispute was referred to the Labour Court, and is still on record for them.

Costs

[60] Although AFGRI was awarded costs in the Labour Court, it did not ask for such an order in this application. In the circumstances, an order that the parties should bear their own costs in the Labour Appeal Court and in this Court is appropriate.

[52] *Lufil* above n 6 at paras 54 and 61.

[53] Section 18 of the Constitution states that everyone has a right to freedom of association. In terms of section 23(2), every worker has a right to form and join a trade union.

Order

[61] The following order is made:

Leave to appeal is granted.

2. The appeal succeeds.
3. The order of the Labour Appeal Court is set aside and replaced with the following:

"The appeal is dismissed."

4. The parties shall bear their own costs in the Labour Appeal Court and this Court.

For the Applicant:	TJ Bruinders SC and C Prinsloo instructed by Annelie Grundlingh Attorneys
For the Respondent:	FA Boda SC and S Bismilla instructed by Serena Chetty Incorporated Attorneys