IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:

J115/99

In the matter between:

NATIONAL POLICE SERVICES UNION First Applicant

NATIONAL SECURITY AND ESSENTIAL SERVICES UNION Second Applicant

NATIONAL POLICE, PRISONS AND CIVIL RIGHTS UNION Third Applicant

and

THE NATIONAL NEGOTIATING FORUM First Respondent

JUDGMENT

VAN NIEKERK, A:

[1] This is an application for urgent interim relief against the First and Second Respondents. The First Applicant seeks an interim order calling on the Respondents to show cause why an order should not be made :

1.1 As against the First Respondent -

1.1.1 declaring invalid a decision taken at a meeting of the

First Respondent on 11 April 1997 to set a threshold of representativity for qualification as an employee organisation in terms of the South African Police Service Labour Regulations at 10 000 members.

1.2 As against the Second Respondent -

1.2.1 declaring the de-registration of the First Applicant to be null and void;

1.2.2 interdicting and restraining the Second Respondent from withdrawing the registration of the First Applicant as an employee organisation; and

1.2.3 declaring the application on behalf of the First, Second and Third Applicants to be registered as an employee organisation to have complied with the statutory requirements for registration as an employee organisation.

[2] Only the Second Respondent, to whom I will refer as “the National Commissioner” opposes the application. I will refer to the First Respondent as “the NNF”, and to the First Applicant as “the Union”.

BACKGROUND

[3] The Union was a member of the NNF. Its effective expulsion from that body and the consequent loss of certain rights, and in particular, the right to have the dues of its members deducted by way of a stop order against their salaries, gives rise to this application.

[4] These developments are the consequence of a decision taken by the NNF to apply a threshold of 10 000 members for registration as an employee organisation. Although the use of the word "registration" in the Notice of Motion and the affidavits filed by the parties utilises the nomenclature adopted in the South African Police Service Labour Regulations, in this context, registration effectively

means recognition by the SAPS for the purposes of collective bargaining. Registration in terms of the Regulations should not be confused with registration in terms of section 96 of the Labour Relations Act, 66 of 1995 ("the LRA"). As it happens, the union is registered in terms of section 96, but its status in that respect is unaffected by any of the decisions of the National Commissioner or the NNF, or by these proceedings.

[5] To understand the context within which the application is brought, some appreciation of the institutions and practices of collective bargaining in the South African Police Services is necessary.

[6] The South African Police Service Labour Regulations (“the Regulations”) were made by the Minister of Safety and Security on 27 September 1995, and published in Government Notice R1489 on the same date. Despite their imperious form and tone, the Regulations deal with many issues that in other sectors would be governed by an agreement in terms of which a trade union is recognised by an employer as a collective bargaining agent. Employee organisations that are registered in terms of the Regulations are accorded various rights, including the right to have the employer (the SAPS) deduct membership fees from the salaries of employees.

[7] Regulation 6 provides that an employee organisation must apply to the National Commissioner to be registered as such, despite its registration in terms of any other law. Regulation 6(4) sets out the conditions for registration, one of which is that the employee organisation must be sufficiently representative of SAPS employees. The Regulations do not define "sufficiently representative" but "employer" is defined to mean the SAPS. The Regulations also provide for the loss of recognition, *inter alia*, if the employee organisation concerned is no longer sufficiently representative of SAPS employees. (See Regulation 6(6)).

[8] The Regulations also establish the NNF. The employer (the SAPS) and all recognised employee organisations are parties to the NNF, and may participate in the proceedings of the

NNF. The primary function of the NNF is to negotiate matters of mutual concern, which are defined to include terms and conditions of employment. Importantly for the purpose of these proceedings, the NNF is also required to determine from time to time the threshold of representativity for the purposes of registration as an employee organisation. (See Regulation 4(3)). Voting rights in the NNF are equally divided between the SAPS on the one hand and recognised employee organisations jointly on the other hand. The employee organisations enjoy a number of votes in direct proportion to the number of members of each in relation to the overall membership of recognised associations. In matters other than unfair labour practice disputes and other disputes of right, a vote of the employer together with a majority vote of the employee side of a meeting constitutes a binding decision of the NNF. Disputes about the interpretation of agreements concluded by the NNF must be referred to arbitration (see Regulation 13).

[9] The enactment of the LRA affected the nature and status of the Regulations. Item 18 of Schedule 7 of the LRA provides that the NNF will continue to exist, subject to item 20(2)(d). That paragraph deems the NNF to be bargaining council established in terms of Section 37(3)(b) of the LRA, for the SAPS.

[10] Item 19 of Schedule 7 provides that the Regulations have the effect and status of a collective agreement binding on the State, the parties to the NNF and all employees within its registered scope. In other words, the enactment of the LRA had the effect of a metamorphosis- the NNF became a bargaining council, and the Regulations assumed the character of a collective agreement concluded by a bargaining council.

[11] It is obvious from the provisions of Regulation 6 that membership of the NNF is not open to all comers. Employee organisations are required to establish and maintain their credentials in the form of a sufficient degree of representativity. The

sufficiency of representativity, as I have noted, is a matter, which the NNF is required to determine. On 18 and 19 March 1997, the NNF had a meeting at which the question of a threshold was discussed. The Union was not represented at the meeting. The reason for its non-attendance is not entirely clear; the minutes record its absence and the fact that no apologies were received. The minutes also record agreement amongst those parties present on a threshold of 10 000 paid up members. The SAPS undertook to draw up an agreement to this effect.

[12] On 22 and 23 April 1997, the NNF met again. The Union was represented at the meeting. The minutes of the meeting confirm that agreement was reached on the threshold, and record that a written agreement was signed by two unions (neither of whom are party to these proceedings) and who from the membership figures stated in the minutes, clearly represent the vast majority of SAPS employees. The Union made something of the fact that the agreement as drafted made no provision for signature by its representative. Although this may amount to a breach of industrial relations etiquette, it takes matters no further. It is clear that the Union and at least one other minority union for reasons that remain undisclosed refused or failed to sign the agreement. It was not contested though that in terms of the Regulations, the agreement had the support of the employer party and the majority union parties to the NNF and that it was in this sense at least a valid collective agreement, binding on all parties to the NNF.

[13] The Union does not have 10 000 members. At the time that agreement was reached in the NNF on the threshold, it appears to have had less than 2000 members. Its inability to meet the threshold posed an immediate and serious problem. The effect of the implementation of the threshold is not only the derecognition of the Union for collective bargaining purposes, but also the forfeiture of organisational rights enjoyed by recognised unions. In particular, de-recognition means the loss of status as a party to the NNF, and forfeiture of the right to have membership fees deducted by the South African Police Services from the salaries of members, the right of access during working hours, and the right to information.

[14] For reasons never satisfactorily explained, the decision taken on 11 April 1997 was not immediately implemented.

[15] A little less than a year later, on 24 and 25 March 1998, the matter of the threshold was once again placed on the NNF's agenda. The Union was represented at this meeting. The minute of the meeting reads as follows -

> "***THRESHOLD FOR REPRESENTIVITY : [EMPLOYER]***
>
> *Management stated that an agreement in this regard*

has been reached in April 1997 and that discussions have taken place in the Constitutional Committee. A threshold of 10 000 members was agreed upon.

PSA stated that if management was prepared to revisit the agreement that it should be re-negotiated.
SAPU stated that they were not ready to revisit the agreement and that they wanted it implemented.
Management undertook to give employee organisations notice of the process to de-register.
The item remains on the agenda."

[16] On 27 March 1998, an attorney acting on behalf of the union wrote to the National Commissioner. She advised him that neither the LRA nor the regulations stipulated a requirement of 10 000 members as a condition for recognition. The National Commissioner was requested that Regulation 6(b) be referred to the President of the Labour Court for interpretation. The question that it was proposed to put to the Court was whether "sufficiently representative" in Regulation 6 meant 10 000 members. This request was obviously based on a misreading of Regulation 13, which provides for disputes about the terms of reference of an arbitration to be referred to the president of the industrial court, or another agreed person.

[17] The National Commissioner was invited to submit the letter to the NNF for consideration. The letter stated further that should the matter not be referred to the Labour Court within 60 days, the union would adopt the attitude that the decision to de-register the union had been withdrawn. The National Commissioner did not respond to the letter.

[18] On 28 and 29 April 1998, a further meeting of the NNF was held. Again, the matter of the threshold for recognition was raised. The Union was represented at this meeting. Again, the issue of the

threshold for representativity was discussed. The SAPS representative at the meeting noted the agreement reached in April 1997 on a threshold of 10 000 members, and stated that the National Commissioner would give notice of withdrawal of registration where necessary. Certain of the unions present at the meeting made comments, the majority of which were to the effect that the agreement should be enforced. The representatives of the Union stated that they were “still consulting with their Legal offices”.

[19] At the conclusion of the discussion on this issue, it was recorded that the relevant employee organisations would be notified within 90 days of the withdrawal of their registration if they did not meet the required level of 10 000 members.

[20] After the April meeting of the NNF, there could have been no doubt in anybody’s mind that the threshold had been fixed at 10 000 members and that it was about to be enforced.

[21] The National Commissioner alleges that on 3 June 1998, a letter was addressed to the union in which it was advised that if it did not meet the required threshold within 90 days, its registration would be withdrawn. The Union alleges that it did not receive the letter, and counsel for the National Commissioner conceded that he could not establish that it had in fact been sent. The parties are agreed however that by 21 September 1998, the Union had received written notice of the National Commissioner’s intention to implement the threshold.

[22] In the latter half of 1998, the Union adopted a different tactic in order to meet the new threshold. It sought to invoke the assistance of other unions in a similar predicament. In September 1998, it entered into an agreement with the Second and Third Applicants. In terms of that agreement, the parties agreed to co-operate extensively for the purpose of acting jointly in terms of section 11 of the LRA for the purpose of meeting the threshold established by the NNF. On 9 September 1998, the Union submitted an application for registration, requesting the National Commissioner to take into account the membership of the Second and Third Applicants in determining whether the Union met the requirement posed by the Threshold of 10 000 members.

[23] The united front presented by the agreement between the three unions concerned did not persuade the National Commissioner to change his mind. The National Commissioner adopted the view that regulation 6 referred to a single employee organisation, and did not permit, as Chapter III of the LRA does, two or more unions acting jointly to meet a threshold for sufficient representativity. He noted too that the Unions constitution did not provide for membership other than members of the Union itself, and that the registration of the Union “working together” with the Second and Third Applicants would lead to a proliferation of union representation within the SAPS. On 23 September 1998, a letter to this effect was addressed to the Union.

[24] On 26 October 1998 the head of the South African Police Services Labour and Industrial Relations addressed a letter to the

Union's attorneys in which the refusal of the application based on the co-operation agreement was confirmed. The same latter advised the union that its organisational rights had been withdrawn with effect from 8 October 1998.

[25] The Unions attorneys responded to this letter on 2 November 1998. The terms of that letter reflect the Union's primary complaint as one relating to the period of notice within which it was to be granted an opportunity to rectify the shortfall in its membership. The letter records that the Union was notified on 21 September 1998 of the implementation of the threshold, and that the 90-day notice period would therefore terminate only on 20 December 1998. The attorney then demanded an undertaking that the National Commissioner accepted that the union had until 20 December to meet the threshold, and that no action would be taken that would prejudice the rights of the Union both generally and in relation to check-off.

[26] On 5 November 1998 the National Commissioner replied, and confirmed that he would extend the union's registration until 20 December 1998. The Union's attorney responded on 21 December 1998, this time challenging the de- recognition of the Union on the basis that it had not been notified of the threshold agreement and that it had not been afforded the opportunity to participate in the meeting of the NNF that concluded the agreement. The response relies too on a draft agreement for the restructuring of the NNF which contemplated the admission to a proposed bargaining council of two or more unions acting jointly. For these reasons, it was alleged that the National Commissioner's actions were unlawful and premature. The National Commissioner replied the next day, reiterating its position that the Union was deregistered with effect from 20 December 1998.

POINTS IN LIMINE

[27] At the commencement of the proceedings, Mr Ram, representing the National Commissioner, raised three points in limine.

[28] First, it was argued that in so far as the Union relied on certain provisions of both the LRA and the Constitution, this Court did not have jurisdiction to grant the relief sought. In support of this contention, it was argued that while the LRA protects and gives effect to fundamental labour rights, the Act prescribes the procedure for the resolution of disputes concerning those rights. In particular, the LRA requires that disputes in respect of organisational rights be referred to the CCMA for conciliation, and if unresolved, to arbitration in terms of Section 21(7). Similarly, those disputes that concern the interpretation and application for collective agreements are required to be resolved either in terms of

the agreement itself through conciliation and arbitration, or in the absence of such a provision in the collective agreement, by the CCMA. It was submitted that the dispute between the parties was required to be determined in accordance with one or the other of these provisions, and that this precluded the Court from hearing this application.

[29] All of the submissions made by counsel overlook the nature of these proceedings. The Union seeks an interim order. The Court is not precluded from granting such an order only because the Court may not in the final instance have jurisdiction in respect of the dispute between the parties. Section 158(1)(a) empowers the Court to grant urgent interim relief and interdicts, and there is nothing in that section or in section 157, which regulates the jurisdiction of this Court, that expressly or impliedly places a limitation on the Courts powers to the extent that Mr Ram suggested. The authority on which he relied, *NEWU* v *LMK Manufacturing (Pty) Ltd & others (1)* [1997] 7 BLLR 896 (LC) does not support his submission. Despite the broad wording of the head note to the report, the *LMK Manufacturing* judgment is concerned with the existence or otherwise of a clear right in circumstances where a union claims a right to deduction of subscriptions or levies from an employee's wages. The Court did not hold that it was deprived of jurisdiction because the right to deduction of subscriptions was a matter ultimately to be determined by arbitration. Indeed, there is authority to the contrary. In *National Union of Metalworkers of South Africa v Nissan South Africa Manufacturing (Pty) Limited* (unreported) J3659/98, Basson J held that -

" *It is an accepted principle that, even though the Labour Court itself does not have the jurisdiction to deal with disputes in regard to the application and interpretation of such collective agreements, (this being the jurisdictional domain of the CCMA in terms of the Act) the Labour Court may in appropriate circumstances, grant interim relief pending the arbitration of such disputes in terms of the Act*." (at p8 of the unreported judgment).

[30] I agree. There is no merit in the objection to the Court's jurisdiction. I would note however that many of the submissions made by both counsel in this regard have a bearing on the respective rights of the parties, and in particular, whether the Union has established a prima facie right to the relief it seeks. I deal with this matter later in this judgment.

[31] The second point *in limine* raised by the National Commissioner relates to the lack of authority on behalf of the deponent to the Union's affidavit. The deponent, who describes himself as the duly appointed President of the Union, states that he is duly authorised to make the affidavit and bring the application on behalf of the Union. In the answering affidavit filed on behalf of the National Commissioner, the deponent to that affidavit states - "*I have no knowledge of the allegations as set out herein and cannot*

admit or deny same".

[32] Mr Ram relied on *NUM v Freegold Consolidated Mines* (1998) BLLR 712 (LC) to submit that the failure by the Union, in its replying affidavit, to respond to the National Commissioner's challenge in respect of his authority, was fatal to the application. Mr Dorfling contended that the terms of the answering affidavit did not amount to a challenge of the deponent's authority, and that no response was required in this regard from the Union in its replying affidavit.
[33] The terms of the National Commissioner's challenge are not sufficiently bold for me to entertain a point *in limine* on the basis suggested by Mr Ram. The answering affidavit filed on the National Commissioner's behalf simply denies any knowledge of authority. The consequences of a challenge to authority, as the *Freegold* judgment demonstrates, can be both inconvenient and costly. If a challenge is made, it should be made on terms that are sufficiently unequivocal to alert the party to whom the challenge is directed that a response is necessary. In this instance, the answering affidavit does not specifically deny the authority of the deponent to the replying affidavit, nor does it put the Union to proof of authority. That being so, there was no obligation on the Union to prove authority, and the point *in limine* based on a lack of authority cannot be sustained.
[34] Finally, it was argued that the application is not urgent. In its founding affidavit, the Union noted the following factors in support of its contention that the matter was one of urgency. First, it is submitted that although the NNF decided to set the threshold at 10 000 members on 11 April 1997, this decision only came to the knowledge of the Union by way of written notification on 21 September 1998. Secondly, it is submitted that between 12 October 1998 and 22 December 1998, there "*was constant negotiations and correspondence between the attorney of record for the First Applicant and the First Respondent's representatives pertaining to a possible settlement in this matter which failed to materialise on 22 December 1998 when the Minister's representative refused any further postponement of the deductions from the NAPOSU members' salaries*". Thirdly, it is submitted that there were very few working days between 22 December 1998 and the time that papers were finally settled, making it impractical to bring the application on an urgent basis in that period of time. Finally, it is submitted that the First Applicant had been involved in other extensive litigation, which precluded it from urgently pursuing its rights after receipt of the letter dated 22 December 1998. The National Commissioner has denied that the matter is urgent, and submitted that the application should be dismissed on that basis.
[35] None of the submissions made by the Union are particularly compelling. The Union knew in April 1997 that a threshold was to be established, and it was aware of the consequences of a threshold

of 10 000 members for its status as a collective bargaining agent. It was aware too during March that pressure was mounting to implement the threshold. Its concerns were such that an attorney was instructed to put the National Commissioner on terms. At the April meeting of the NNF, it was clear to all present that the axe was about to fall on those unions that had insufficient members to meet the threshold. Even though the correspondence misconceived the exact nature of the Union's remedy, the letter demonstrates an awareness of a right of recourse in response to the NNF's proposed course of action. Even assuming that the Union did not receive the notification of 3 June 1998, it was aware, on its own version, by 26 September 1998, of the attitude adopted by the National Commissioner.

[36] I am unable to find any evidence on the papers of "constant negotiations" that may have justified delaying the application. There is no record of any meetings in which possible compromises were explored. The correspondence referred to takes the matter no further- on both sides, it amounts to a restatement of previously held positions.

[37] On its own version, and irrespective of receipt or otherwise of the letter of 3 June 1998 and the delays in implementing the threshold, the Union was aware on 21 September 1998 of moves to implement the threshold and what the consequences of implementation would be. By 23 September 1998 the Union was aware that its strategy of seeking strength in numbers by forming alliances with other minority unions had not found favour. When the notice period relating to its derecognition expired, the threat to the Union’s pocket became a reality, and it was only then, the day after its derecognition became effective, that the Union was galvanised into action.

[38] Having been so galvanised, the Union did not pursue its interests with the degree of expeditiousness that might have been expected. Although I am mindful of what Judge Sutherland termed the "collective slumber" that pervades the land from mid-December to early January (see *Transport & General Workers Union & others v Hiemstra NO & another* (1998) 19 1598 (LC), that does not excuse more than three weeks of inactivity on the part of the Union between 22 December 1998 and 13 January 1999, when the application was launched. The Labour Courts remain open to the public during the holiday season. A duty Judge is available at all times. This is one of those instances where whatever urgency there may have been was permitted to take a break, only to resume once the holiday season came to an end. (See *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (WLD)).

[39] The latitude extended to parties to dispense with the Rules of this Court in circumstances of urgency is an integral part of a balance that the Rules attempt to strike between time limits that afford parties a considered opportunity to place their respective cases before the Court and a recognition that in some instances, the application of the prescribed time limits, or any time limits at all, might occasion injustice. For that reason, Rule 8 permits a departure from the provisions of Rule 7, which would otherwise govern an application such as this.

But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this Court. For these reasons, I find that the Union has failed to satisfy the requirements relating to urgency.

[40] I was inclined to dispose of this application solely on the grounds of urgency. However, in terms of the order made on 14 January 1999, the parties had filed answering and replying affidavits, and when the application was called, extensive heads of argument were submitted by both counsel. Since the events surrounding the derecognition of the Union were as integral a part of the merits as they were to any consideration of urgency, I have considered and will deal with the application beyond the points in limine raised by the National Commissioner.

[41] To succeed in this application, the Union must establish a prima facie right, a well-grounded apprehension of irreparable harm if the relief is not granted a balance of convenience in favour of granting the relief, and the absence of any other satisfactory remedy.

A *PRIMA FACIE* RIGHT

[42] Mr Dorfling relied on Section 157(2) of the LRA in response to the objection taken by the Second Respondent in regard to jurisdiction. It was submitted that Section 157(2), which confers on this Court concurrent jurisdiction with the High Court -

> "(a) *in respect of any alleged violation or threatened violation, by the State in its capacity as employer of any fundamental right entrenched in chapter 3 of the Constitution; and*
>
> *(b) in respect of any dispute over the Constitution finality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct by the State in its capacity as employer.*"

[43] It was submitted on the Union's behalf that the NNF and/or the

National Commissioner had infringed the following constitutional rights -the right to equality in terms of Section 9; the right to freedom of association in terms of Section 18; the right to fair labour practice in terms of Section 23; and the right to just administrative action in terms of Section 33.

[44] Mr Ram argued that the qualification "by the State in its capacity as employer" precluded the Union from relying on section 157, and that I need not consider the infringement or otherwise of any of the fundamental rights alluded to by Mr Dorfling. He urged me to adopt a narrow view, limiting the application of this section and therefore the Labour Court's jurisdiction to instances where the State acts as an employer in the context of an individual employment relationship. When the National Commissioner notified the Union of the intention to implement the threshold, and when it refused to recognise the three unions acting jointly, it was accordingly acting not in its capacity as an employer, but as a party to a collective agreement that it intended to enforce.

[45] In my view, the wording of section 157 does not support this limitation. There is no express exclusion of acts by the State in the context of collective as opposed to individual labour matters, nor can I find any implication in that section to that effect. When the SAPS elects to become a party to collective agreements concluded in the NNF does not do so in some capacity unrelated to employment. Entering into collective agreements with trade unions is something The SAPS is the sole employer party to the NNF. When it concludes agreements in the NNF it does so in its capacity as an employer. In its correspondence with the Union concerning the enforcement of the threshold and its interpretation of Regulation 6, it was acting in the same capacity. Its actions are therefore subject to scrutiny in terms of section 157(2) of the LRA.

[46] The question that then arises is whether the conduct of the NNF or the National Commissioner amounts to a violation or threatened violation of any fundamental right protected by the Constitution.

[47] Mr Dorfling submitted that both the setting of the threshold of 10 000 members in order to retain membership of the NNF, and the refusal by the National Commissioner to recognise the Union acting jointly with the Second and Third Applicants were actions that amounted to an administrative act or conduct. In particular, it was argued that the failure by the NNF and the National Commissioner to afford the Union the opportunity to be heard before the decisions were taken was in conflict with Section 33(1) of the Constitution, read together with the principles of the common law pertaining to fair administrative action.

[48] I do not agree. The decision to determine a threshold was not

an administrative act, nor did the decision to interpret regulation 6 to exclude one or more unions acting jointly amount to one. Although it is true that the Regulations require the National Commissioner to give notice of any intention to withdraw recognition, the threshold and the decision to implement it were the product of a process of collective bargaining, not the unilateral exercise of an administrative function or power on the part of the National Commissioner. The Union participated, albeit in muted fashion, in the bargaining process. The fact that it was dissatisfied with both the outcome and the notice by the National Commissioner that he intended to implement that outcome, is not a reflection on the process by which that outcome was achieved. The decision by the National Commissioner not to register the Union acting jointly with the Second and Third Applicants was based on his interpretation of the collective agreement in the form of the Regulations. The refusal to register the Union in these circumstances was not the outcome of the exercise of an administrative discretion or function so much as an application of the National Commissioner's understanding of the terms of the collective agreement. This understanding is of course open to challenge ultimately by way of arbitration either in terms of the agreement itself or in terms of the LRA. The values of accountability, responsiveness and openness in regard to administrative justice referred to in *Carephone (Pty) Ltd v*

Marcus NO &others [1998] 11 BLLR 1093 (LAC) at 1099 are satisfied by the processes established in the LRA.

[49] Mr Dorfling submitted that another minority union had not suffered the same fate as the applicant union, and that this unequal treatment amounted to an infringement of the right to equality. The letter addressed to the Union on 3 June 1998 was also addressed to the other minority union. There is nothing in the papers which satisfactorily establishes that notwithstanding that notice, the National Commissioner had treated that union any differently. In any event, the right to equality in this context finds expression in section 18(2) of the LRA. That subsection requires a bargaining council, when it fixes a threshold of representativity for the purposes of acquiring the organisational rights contained in sections 12, 13 and 15, to apply the threshold equally to any registered union seeking those rights. This provision can be enforced in terms of section 22 of the LRA.

[50] In so far as the application of the rights to engage in collective bargaining, to freedom of association, and to form and join a federation are concerned, I am acutely aware of the complex and controversial issues raised by this argument. Regrettably, the submissions in the respective heads of argument and those made during the proceedings did not adequately address these issues, and the constraints under which this judgment was prepared preclude me from doing so in any meaningful way. Suffice it to say, however, that for the purposes of this application I am satisfied that the LRA gives effect to the fundamental rights concerned in Chapters II and III of the statute. The actions by the National Commissioner were effected within the parameters of those provisions. On this admittedly limited basis, and only for the purpose of establishing the existence or otherwise of a prima facie right, I find that the National Commissioner's conduct did not

amount to an infringement of any of the fundamental rights as alleged by the Union.

[51] Finally, I was urged to have regard to the spirit of the LRA. In spite of the broad terms in which the Notice of Motion is phrased, both in its papers and during the course of argument, the Union's primary concern appeared to be the imminent withdrawal of the check-off facility that it enjoyed as a recognised union. But the terms of the relief sought by the Union effectively require the Court to overturn a decision taken by a bargaining council, in accordance with a binding collective agreement, which has had the effect of derecognising the Union as a collective bargaining agent. I was urged to find that both the implementation of the threshold and the refusal to register the unions acting jointly were in conflict with the spirit of the LRA. I was referred particularly to section 1 of the LRA which provides for a framework within which unions, employees and employer organisations can collectively bargain, the injunction in section 1(d) to promote orderly collective bargaining and regulation of organisational rights in terms of section 18 of the Act.

[52] All of these submissions overlook an important policy consideration that underlies the LRA. The LRA adopts an unashamedly voluntarist approach- it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the Courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process. That power is underpinned by the organisational rights conferred by Part A of Chapter III of the Act, and the right to collective action conferred by Chapter V. To set aside the derecognition of the Union and to grant an order, even on an interim basis, that the Union remains recognised in terms of the collective agreement constituted by the Regulations, would be an unwarranted interference in a collective bargaining relationship.

[53] The NNF was entitled to take the decision it did. The Union had the opportunity to influence that outcome. The National Commissioner was entitled to give notice of the implementation of the agreement. In so far as the Union's real complaint is the loss of the right to check off rather than its loss of recognition for collective bargaining purposes, there appear to be a number of remedies available to the Union. The rights conferred by sections 12 to 15 of the LRA are unique in the sense that a union seeking to enforce them may do so, at its election, either by strike action (see section 65(2)(a)) or by arbitration. In so far as the Union has a more broadly based complaint about the refusal by the National Commissioner to recognise or bargain with it, the Union has a number of options at its disposal. But it has no enforceable right to recognition, or, as matters presently stand, to check-off. This is not an instance in which this Court is entitled to intervene, either in terms of the letter or the spirit of the LRA.

[54] It follows that the Union has failed to establish a prima facie right to the relief it seeks and that the application should be dismissed on this basis.

[55] Finally, as I have noted, the Union is not without alternative remedies. The determination of what constitutes “sufficiently representative” for the purposes of the Regulations may be challenged, ultimately in an arbitration. The protection against unequal treatment is contained in section 18(2) and can be enforced in terms of Chapter II of the Act. The decision to interpret the Regulations so as to exclude one or more unions acting jointly is a matter of the interpretation of a collective agreement. That interpretation is subject to a process of conciliation and if necessary, to arbitration. Despite the limitations inherent is the inclusion of the SAPS in the definition of “essential services” in section 213 of the LRA, there is nothing to preclude the Union from demanding recognition on terms more amenable to its own interests and pursuing those demands.

[56] For all of the above reasons, the Union has failed to satisfy the requirements relevant to urgent interim relief.

[57] On the question of costs, the Court has a discretion that it must exercise in terms of section 162. In the normal course, the Union’s failure to establish urgency and the requirements for interim relief would have the consequence of costs following the result. However, I am mindful that this is a dispute that concerns a collective bargaining relationship and that despite my finding, the parties will undoubtedly pursue the remedies available to them elsewhere, and that conciliation is an integral stage of all of the available options. There appears in any event from a draft agreement annexed to the papers to be some prospect of a renegotiation of the Regulations to provide for the establishment of a Safety and Security Sectoral Bargaining Council, perhaps on terms that would accommodate the Union either in its own right, or acting jointly with other minority unions. A cost order against the Union in these circumstances may have the effect of prejudicing existing relationships, and inhibiting the prospects of an ultimate resolution of the differences between the parties. For that reason, I intend to make no award as to costs.

[58] I make the following order:

The application is dismissed.

There is no order as to costs.

ANDRE VAN NIEKERK

ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 3 February 1999
Date of judgment: 10 February 1999
On behalf of the First Applicant:

Adv D Dorfling

Instructed by Nompumulelo Rabebe & Co
On behalf of the Second Respondent:

Adv RG Ram

Instructed by the State Attorney