



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 172/19

In the matter between:

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

Applicant

and

**LUFIL PACKAGING (ISITHEBE)
(A DIVISION OF BIDVEST PAPERPLUS (PTY) LIMITED)** First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION** Second Respondent

LEON PILLAY N.O. Third Respondent

Neutral citation: *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* [2020] ZACC 7

Coram: Khampepe ADCJ, Froneman J, Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ.

Judgment: Victor AJ (unanimous)

Heard on: 21 November 2019

Decided on: 26 March 2020

Summary: Section 4(1)(b) of the Labour Relations Act 66 of 1995 — trade union constitutions — scope of industry — eligibility of trade

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court)
the following order is made:

1. The application for leave to appeal is dismissed.
 2. Each party is ordered to pay its own costs.
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JUDGMENT

VICTOR AJ (Froneman J, Jafta J, Khampepe ADCJ, Madlanga J, Majiedt J,
Mathopo AJ, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] The issue in this case is a novel one. 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?

[2] The applicant, the National Union of Metal Workers South Africa (NUMSA), appeals the decision of the Labour Appeal Court, which found in favour of Lufil Packaging (Isithebe) (a division of Bidvest Paperplus (Pty) Limited) (Lufil) in a dispute for organisational rights within Lufil.

[3] The Labour Appeal Court held that NUMSA was not entitled to organisational rights within Lufil's workplace. This is because its employees fell outside of NUMSA's

registered scope according to its constitution and it was, therefore, not sufficiently representative.¹

[4] Clause 1(2) of NUMSA’s constitution provides that “[t]he scope of the union is the metal industry” and refers the reader to Annexure B for details. Annexure B sets out the industries to which NUMSA membership is open. Annexure B makes no reference to the paper and packaging industry. Clause 2(2) of NUMSA’s constitution defines the ambit of eligibility for membership as follows—

“[a]ll workers who are or were working in the metal and related industries are eligible for membership of [NUMSA]”.

NUMSA went outside of its registered scope being the metal and related industries, as set out in clause 1(2), read with Annexure B of its constitution by admitting employees in the paper and packaging industry as members.² Lufil refused to grant NUMSA organisational rights on the basis that the industry in which it is engaged does not fall within NUMSA’s scope as defined in its constitution and therefore its employees are not eligible to be members of NUMSA.

Background and litigation history

CCMA and Labour Court

[5] The CCMA and the Labour Court had to determine two issues: first whether Lufil could refuse to accord NUMSA organisational rights in terms of sections 12 to 16 of the Labour Relations Act³ (LRA) in the face of NUMSA enjoying a 70% membership of Lufil’s employees. Second, Lufil raised a jurisdictional point alleging that NUMSA

¹ In *AMCU v Chamber of Mines of South Africa* [2017] ZACC 3; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC) at para 53 Cameron J stated that “the LRA does not define when a trade union is ‘sufficiently representative’ to enjoy organisational rights under Chapter III.” He further stated at para 57 that “[t]his Court has recognised the constitutional warrant for majoritarianism in the service of collective bargaining.”

² Although the scope of industries which NUMSA represents is wide, the paper and packaging industry is not included in its scope of membership as defined in its constitution.

³ 66 of 1995.

did not have the required *locus standi* (the right or capacity to institute legal proceedings) to bring the dispute to the CCMA. The application was decided on the papers. The CCMA found that NUMSA was entitled to organisational rights from Lufil. On the issue of *locus standi*, the CCMA held that the point raised by Lufil did not engage its jurisdiction. It also ruled in favour of NUMSA on the preliminary issue that it could organise the employees of Lufil irrespective of whether its activities and operations did not fall within NUMSA's registered scope, as stipulated in its constitution. Lufil accordingly failed on both issues and launched two applications to the Labour Court to review and set aside the arbitration awards.⁴

[6] The two review applications were consolidated and heard by the Labour Court. The Labour Court upheld the CCMA's rulings in relation to *locus standi* and reasoned that a union wishing to exercise organisational rights, in accordance with the LRA, need only satisfy two conditions. First, the union must be registered. It was common cause that NUMSA is a registered union. Secondly, the union must be sufficiently representative.⁵ The Court found that NUMSA also met this condition.⁶ It reasoned that, had the Legislature intended the scope of the industry or the union's constitution to be determinative of the right to organisational rights, it would have said so.⁷ The Labour Court also reasoned that the essence of the organisational rights contained in Part A of Chapter III entails rights that are enjoyed essentially at the instance of the employees as members of the union.⁸ The Court held further that the LRA sets out specifically what is required of a union seeking organisational rights and found that NUMSA satisfied those requirements.⁹ Both review applications accordingly failed.¹⁰ Aggrieved by the decisions, Lufil appealed to the Labour Appeal Court.

⁴ *Lufil Packaging (Isithebe), A Division of Bidvest Paperplus (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2018) 39 ILJ 1786 (LC) at para 1.

⁵ Id at para 28.

⁶ Id.

⁷ Id at para 29.

⁸ Id.

⁹ Id at para 30.

¹⁰ Id at para 31.

Labour Appeal Court

[7] In the Labour Appeal Court, NUMSA argued that section 4(1)(b) of the LRA was unconstitutional, because it infringed the fundamental rights to freedom of association¹¹ and fair labour practices.¹² The Court found that there was no constitutional challenge to section 4(1)(b) of the LRA pleaded by Lufil nor was this contention canvassed adequately in evidence.¹³ The Court nonetheless found that the limitation was reasonable and justifiable.¹⁴ It reasoned that section 23(5) of the Constitution provides that national legislation may be enacted to regulate collective bargaining and to the extent that legislation limits a right in the Bill of Rights, including the rights of freedom of association and fair labour practices, the limitation must comply with section 36(1) of the Constitution.¹⁵ The Court emphasised the requirement of

¹¹ Section 18 of the Constitution provides that “[e]veryone has the right to freedom of association.”

¹² Section 23 of the Constitution states:

- “(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right—
 - (a) to form and join an employers’ organisation; and
 - (b) to participate in the activities and programmes of an employers’ organisation.
- (4) Every trade union and every employers’ organisation has the right—
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).”

¹³ *Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration* [2019] ZALAC 39; (2019) 40 ILJ 2306 (LAC) (Labour Appeal Court judgment) at para 31.

¹⁴ *Id.*

¹⁵ *Id.*

eligibility to join a union is determined by the provisions of its constitution, as adopted by its own decision-making body and registered by the registrar. It reasoned that this gives effect to the legitimate government policy of orderly collective bargaining at sectoral level. Moreover, the means of implementation, involving supervision of the scope of union activity by the registrar, are minimally restrictive and carefully tailored to the purpose of achieving the policy. The Labour Appeal Court accordingly found section 4(1)(b) of the LRA to be consistent with the Constitution.¹⁶

[8] The Labour Appeal Court further held that at common law, unions only have those powers that are conferred on them by their constitutions and thus they cannot create a class of members outside of the provisions of their constitution.¹⁷ Therefore, any conduct or decision contrary to its constitution is *ultra vires* (beyond the power of the actor or decision-maker) and invalid, and can be challenged by the employer from whom organisational rights are sought.¹⁸

[9] The Labour Appeal Court found that the LRA requires unions to determine in their constitutions which members are eligible to join and, by necessary implication, precludes them from admitting as members, employees who are not eligible to be admitted in terms of the union's registered constitution.¹⁹ If it is shown that the persons concerned are precluded by the union's constitution from becoming its members, any purported admission of such employees as members is *ultra vires* the union's constitution and invalid.²⁰

[10] The Labour Appeal Court held that the correct legal position, therefore, was that NUMSA had to show that it was sufficiently representative at Lufil's workplace.²¹ The

¹⁶ Id.

¹⁷ Id at paras 32-3.

¹⁸ Id at para 33.

¹⁹ Id at para 32.

²⁰ Id.

²¹ Id at para 37.

employees on which it relied in alleging that it was sufficiently representative could not be and thus were not, in law, members of NUMSA. They did not fall within the scope of eligibility as set out in its constitution. As such, NUMSA was insufficiently representative of the employees at Lufil and therefore was not entitled to any organisational rights.²²

[11] The Labour Appeal Court upheld the appeal and set aside the CCMA's arbitration award and the Labour Court's orders.²³ It reasoned that section 4(1)(b) of the LRA provides that every employee has the right to join a union, subject to its constitution.²⁴

In this Court

NUMSA's contentions

[12] NUMSA argues that this matter raises several key constitutional issues. It submits that the right to join a union is a constitutional right afforded to all workers and that it is an unfettered right.²⁵ Likewise, so is the right to freedom of association.²⁶ In this regard, section 39(2) of the Constitution requires that statutory provisions be interpreted so as not to limit these rights.

[13] NUMSA also argues that it is a registered union with sufficient representation, as 70% of Lufil employees applied for and were accepted as members of NUMSA. It accordingly submits that it has complied with the representivity provisions of the LRA²⁷ and ought to be granted organisational rights within Lufil. It argues that if the Legislature intended the scope of the union's constitution to be determinative, it would have said so. It submits that the LRA and its own constitution should be interpreted

²² Id.

²³ Id at paras 37-9.

²⁴ Id at para 20.

²⁵ Section 23(2)(a) of the Constitution.

²⁶ Section 18 of the Constitution.

²⁷ Sections 11, 14, 16, 18 and 21 of the LRA.

less restrictively in the light of section 39(2) of the Constitution and in so doing would give effect to the fundamental rights guaranteed in sections 18 and 23 of the Constitution. In this regard, NUMSA relies on *POPCRU*²⁸ and *SATAWU*²⁹ as authority for the proposition that a limitation of rights should be interpreted less restrictively despite the terms of its constitution.

[14] NUMSA's core argument on the wording of section 4(1)(b) of the LRA is to the effect that an interpretation of this section must recognise that the phrase "subject to its constitution" is one that must be applied in such a way so as to ensure that unions and their members can exercise their right to freedom of association. This, NUMSA argues, must be interpreted to mean that provided the union and its members are satisfied that its constitution governs their relationship, the employee has a right to join that union, which in turn, entitles it to claim organisational rights from the employer. In other words, if the union and its members are in agreement as to the relationship between themselves, then it is not for a third party (including employer) to challenge that relationship by looking at its constitution.

[15] NUMSA contends that it and the majority of Lufil's employees entered into a contractual relationship. Whilst Lufil's industry is not listed in NUMSA's scope of industries, it is also not precluded. Lufil's employees have applied for membership and NUMSA has granted such membership. Against this factual background coupled with a proper interpretation of section 4(1)(b) of the LRA, it argues that Lufil lacks *locus standi* to challenge its employees' membership of NUMSA.

[16] It also relies on a less restrictive interpretation of section 4(1)(b) of the LRA when reading the words "subject to its constitution". It argues that those words if read restrictively, would limit the right to freedom of association. Therefore, the words should be restricted to mean between a union and its members *inter se* and should not

²⁸ *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) (*POPCRU*).

²⁹ *SATAWU v Moloto N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) (*SATAWU*).

be subject to outside interference by an employer. It argues further that no employer should interfere in the internal workings of a union. In this regard, NUMSA relies on the cases of *Mabote*,³⁰ *Bidvest*³¹ and *Nestoil*.³²

[17] NUMSA also argued that nowhere in its Constitution is there any express reference to any obligation regarding eligibility being limited to the scope of the union. On the finding that it acted *ultra vires* its constitution, NUMSA contends that the Labour Appeal Court erred in relying on *Van Wyk*³³ as authority for this, as it ought to have relied on *MacDonald's Transport*³⁴ in accordance with the principle of *stare decisis*.

Lufil's contentions

[18] Lufil submits that NUMSA chose to provide in its constitution that only employees in specific industries are eligible to become members. The LRA makes it clear that effect must be given to a union's constitution.

[19] Lufil further submits that the Legislature could never have intended that a union could qualify for organisational rights under the LRA in breach of its own constitution. It argues that NUMSA must abide its constitution.

[20] It also argues that this case is limited to whether a union must establish that the employees it claims are members for the purposes of obtaining organisational rights, lawfully joined that union. The Labour Appeal Court's judgment, if upheld, will not

³⁰ *National Union of Mineworkers obo Mabote v Commission for Conciliation, Mediation and Arbitration* (2013) 34 ILJ 3296 (LC) (*Mabote*).

³¹ *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA* (2015) 36 ILJ 1292 (LC).

³² *Nestoil Plc v National Union of Petroleum and Natural Gas Workers Suit No: NIC/LA/08/2010* (*Nestoil*).

³³ *Van Wyk v Dando & Van Wyk Print (Pty) Ltd* (1997) 18 ILJ 1059 (LC).

³⁴ *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union* [2016] ZALAC 32; (2016) 37 ILJ 2593 (LAC) (*MacDonald's Transport*).

permit employers to question union membership in other contexts, such as representation in disciplinary proceedings.

[21] Lufil submits that at common law, a union has no powers outside of those given to it in its constitution. If it admits a member contrary to its constitution, it acts *ultra vires* and unlawfully. It is Lufil's argument that this position is reinforced by the LRA. The LRA requires unions who seek organisational rights to register a constitution that prescribes the criteria for membership. It makes the granting of organisational rights dependent on membership. The only plausible reading is that unions can only rely on lawfully admitted members when they claim organisational rights.

[22] Lufil submits that it would be impermissible to allow a union to rely on its own unlawful conduct to engage coercive state power against an employer. NUMSA's argument that it can admit workers in any industry is completely inconsistent with the text of its constitution. The constitutional rights to join a union and to associate support the Labour Appeal Court's approach. Both rights are meaningless unless unions can elect who is and who is not admitted. They must be held to their agreements on that question. Allowing union conduct contrary to its constitution undermines both rights. Lufil also contends that international law and comparative law support the Labour Appeal Court's interpretation.

[23] Lufil placed emphasis on the common law of voluntary associations and contract. In particular, it relies on *Ramakatsa* where Yacoob J in relation to political parties emphasised that parties have to comply with their constitution.³⁵

³⁵ *Ramakatsa v Magashule* [2012] ZACC 31; 2012 JDR 2203 (CC); 2013 (2) BCLR 202 (CC) where at para 16 Yacoob J wrote:

"I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party."

[24] Organisational rights require the employees at Lufil to be recognised as members in terms of NUMSA’s constitution. In this case, Lufil’s employees cannot be members because they fall outside the scope of NUMSA’s constitution. Lufil argues that NUMSA’s members at its workplace have not reached the eligibility threshold for it to obtain organisational rights.

Jurisdiction and interests of justice

[25] This matter raises key constitutional issues which include the right to fair labour practices, the right to freedom of association, and how section 4(1)(b) of the LRA, which advances these rights, should be interpreted.

[26] The Constitution guarantees the right to freedom of association, both generally and in relation to employment. The LRA gives effect to the right to freedom of association and the right to organise, through chapters II and III respectively.

[27] The jurisprudence of this Court in relation to section 167(7) of the Constitution is well established.³⁶ This Court has held in a number of cases that the interpretation and application of legislation which is specially mandated by the Constitution will inevitably be a constitutional matter.³⁷ This will include the LRA, which was enacted to give effect to the fundamental rights conferred by the right to fair labour practices under section 23 of the Constitution.³⁸ NUMSA, in this regard, argues that

³⁶ Section 167(7) of the Constitution states:

“A constitutional matter includes any issue which involves the interpretation, protection and enforcement of the Constitution.”

³⁷ *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) (*NEHAWU*) at para 14. See further *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) at para 30; *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC) at para 15; *Aviation Union of South Africa v South African Airways (Pty) Ltd* [2011] ZACC 31; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) at para 28; and *SATAWU* above n 29 at para 10.

³⁸ Section 1 of the LRA provides:

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—

section 4(1)(b) of the LRA must be interpreted harmoniously with these rights. This Court's decision in *NEHAWU* reinforces the position that the interpretation and application of the LRA is a constitutional issue.³⁹

[28] Since the rights to freedom of association at the workplace, fair labour practices as well as the interpretation of constitutionally mandated legislation are at issue, this Court's jurisdiction is engaged.

[29] Having determined that this Court has jurisdiction to hear this matter, the question remains, is it in the interests of justice for this Court to grant leave to appeal? Ngcobo J in *NEHAWU*, held that whether it is in the interests of justice to grant leave to appeal requires the consideration of a number of factors.⁴⁰ One of them being the prospects of success.⁴¹ This Court has to consider whether there are reasonable prospects that it will materially reverse or alter the decision of the Labour Appeal Court. For reasons which will be expanded upon later in this judgment, there are no reasonable prospects that this Court will materially alter the decision of the Labour Appeal Court.

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- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
 - (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation
 - (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
 - (d) to promote—
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.”

³⁹ *NEHAWU* above n 37 at para 14.

⁴⁰ *Id* at para 25.

⁴¹ *Id*.

Issues

[30] The central issue is whether NUMSA can obtain organisational rights in terms of the LRA from Lufil, whose employees fall outside of NUMSA's scope as defined in its constitution. NUMSA argues that if it is precluded from reaching employees falling outside of its scope as defined in its constitution, this is in fact a limitation of the right to freedom of association and the right to fair labour practices.⁴²

[31] In addressing this issue, relevant are two provisions of the LRA, the first being the requirements for the registration of unions⁴³ and secondly an employee's right to

⁴² Section 8(a)(i) of the LRA provides:

- “Every trade union and every employers' organisation has the right—
- (a) subject to the provisions of Chapter VI—
 - (i) to determine its own constitution and rules”.

NUMSA exercising its right under this section determined and adopted its constitution.

⁴³ Section 95 of the LRA provides as follows:

- “(1) Any trade union may apply to the registrar for registration if—
- (a) it has adopted a name that meets the requirements of subsection (4);
 - (b) it has adopted a constitution that meets the requirements of subsections (5) and (6);
 - (c) it has an address in the Republic; and
 - (d) it is independent.
- (2) A trade union is independent if—
- (a) it is not under the direct or indirect control of any employer or employers' organisation; and
 - (b) it is free of any interference or influence of any kind from any employer or employers' organisation.
- (3) Any employers' organisation may apply to the registrar for registration if—
- (a) it has adopted a name that meets the requirements of subsection (4);
 - (b) it has adopted a constitution that meets the requirements of subsections (5) and (6), and
 - (c) it has an address in the Republic.
- (4) Any trade union or employers' organisation that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another trade union or employers' organisation that it is likely to mislead or cause confusion.
- (5) The constitution of any trade union or employers' organisation that intends to register must—
- (a) state that the trade union or employers' organisation is an association not for gain;

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- (b) prescribe qualifications for, and admission to, membership;
 - (c) establish the circumstances in which a member will no longer be entitled to the benefits of membership;
 - (d) provide for the termination of membership;
 - (e) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made;
 - (f) provide for membership fees and the method for determining membership fees and other payments by members;
 - (g) prescribe rules for the convening and conducting of meetings of members and meetings of representatives of members, including the quorum required for, and the minutes to be kept of, those meetings;
 - (h) establish the manner in which decisions are to be made;
 - (i) establish the office of secretary and define its functions;
 - (j) provide for other office-bearers, officials and, in the case of a trade union, trade union representatives, and define their respective functions;
 - (k) prescribe a procedure for nominating or electing office-bearers and, in the case of a trade union, trade union representatives;
 - (l) prescribe a procedure for appointing, or nominating and electing, officials;
 - (m) establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office;
 - (n) provide for appeals against removal from office of office-bearers officials and, in the case of a trade union, trade union representatives, prescribe a procedure for those appeals and determine the body to which those appeals may be made;
 - (o) establish the circumstances and manner in which a ballot must be conducted;
 - (p) provide that the trade union or employers' organisation before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;
 - (q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if—
 - (i) no ballot was held about the strike or lock-out; or
 - (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;
 - (r) provide for banking and investing its money;
 - (s) establish the purposes for which its money may be used;
 - (t) provide for acquiring and controlling property;
 - (u) determine a date for the end of its financial year;
 - (v) prescribe a procedure for changing its constitution; and
 - (w) prescribe a procedure by which it may resolve to wind up.
- (6) The constitution of any trade union or employers' organisation which intends to register may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

freedom of association with the right to join a union subject to its constitution.⁴⁴ This brings to the fore section 4(1)(b) of the LRA which lays down that such membership shall be subject to a union's constitution. The peremptory requirement of section 4(1)(b) introduces to this issue the common law of contract as it applies to constitutions of voluntary associations.⁴⁵ All these rights and common law principles have to be interpreted to bring about some equipoise in the relationship between union members and the employer.

Analysis

Freedom of association

[32] This Court has set out the importance of the right to freedom of association. The jurisprudence in this regard applies equally to the workplace.

[33] NUMSA relies extensively on the right to freedom of association, however what it fails to take into consideration is what Woolman calls the “capture” of associations.⁴⁶ He notes that there is something about the very structure of associations that makes

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- (7) The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.
 - (8) The Minister, after consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employers' organisation and guidelines for the system of voting as contemplated in subsection (9).
 - (9) For the purpose of subsection (5), “ballot” includes any system of voting by members that is recorded and in secret.”

⁴⁴ Section 4(1)(b) of the LRA provides:

“Every employee has the right-

- (a) . . .
- (b) to join a trade union, subject to its constitution.”

⁴⁵ *National Union of Metal Workers of South Africa v Congress of South African Trade Unions* [2014] ZAGPJHC 59 at para 34.

⁴⁶ Woolman “Freedom of Association” in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2014) at 44-2-3. Woolman explains that it is important for an association to have control over selective membership policies, its internal affairs, exclusionary or discharge procedures. In this context we use “capture” as explained by Woolman to describe the instances in which associations admitting members who do not fall within its object and purpose may have the effect of altering the identity of the organisation. This in turn violates the association's existing members right to disassociate.

them worth protecting because they may be vulnerable to capture. Freedom of association is a positive right as it enables individuals to organise around particular issues of concern. It allows individuals to collectively contest and ameliorate the structure of social power within its midst. The identification and pursuit of attaining certain goals makes associations worthy of protection not only from the state but also from external actors who may not share these goals. Woolman notes the following in respect of the danger of capture:

“[C]apture justifies the ability of associations to control their associations through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d’etre* of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, and for similar reasons, an association’s very existence could be at risk. Individuals, other groups or a state inimical to the values of a given association could use ease of entrance into and the exercise of voice in an association to put that same organisation out of business.”⁴⁷

[34] The import of Woolman’s statement compels consideration of how NUMSA can advance the interests of its existing members and also the interests of the newly enlisted members in the paper and packaging industry.

[35] It is noteworthy that the existing members of NUMSA may have joined NUMSA for its knowledge of collective bargaining in the metal industry and by joining NUMSA they may have intentionally elected not to join unions which operate in any other industry. The right to freedom of association in this context is not a unilateral,

⁴⁷ Id.

self-standing right to be exercised without considering other rights. There may be many reasons why members who currently fall under NUMSA's scope would not want NUMSA to diversify and add another unrelated industry to its scope. NUMSA's blatant disregard for the provisions in its own constitution may violate the existing members' right to associate and disassociate.

[36] A flaw in NUMSA's argument is its reliance on its own right and its members' right to freedom of association, without having regard to the rights of the employer. It is important to note that the LRA does not confer the right to associate only to employees. Employers have this right too.

LRA framework

[37] The Constitution, through section 23(4), recognises the creation of both unions and employers' organisations. This is provided for in the LRA which makes it peremptory for a union to have a constitution in order to qualify for registration. The constitution of a union or employers' organisation must determine a number of substantive matters, including the nature, scope and powers of the organisation. The constitution, together with any rules and regulations, "collectively constitute the agreement which is entered into by its members".⁴⁸ When members have formally adopted a constitution, it becomes legally binding on them. It governs the relationship between the members and on registration it becomes public and is available for inspection by outsiders. The Labour Appeal Court was correct to find that the role of a union's constitution gives effect to legitimate government policy of orderly collective bargaining at sectoral level.⁴⁹

⁴⁸ In *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) at 644G – 645C, the Court held that—

“[t]he constitution of a voluntary association together with all rules or regulations (if such exist) collectively constitute the agreement entered into by its members. The constitution not only determines the nature and scope of the association's existence and activities but also prescribes and demarcates the powers of the association and its office-bearers.”

⁴⁹ Labour Appeal Court judgment above n 13 at para 31.

[38] The core textual analysis in this case is the meaning of section 4(1)(b) of the LRA which provides that every employee has the right to join a trade union “*subject to its constitution*”. Section 95(5)(b) of the LRA defines clearly the qualification for and admission to membership and of course many other aspects. NUMSA submits that the phrase “*subject to its constitution*” is an internal regulatory mechanism and can be ignored at will.

[39] The LRA defines in the clearest terms the essential contents of a union’s constitution. It lists matters that the constitution of a union or employers’ organisation must deal with prior to registration. Section 95(1)⁵⁰ provides that the union must have adopted a constitution which meets the requirements of subsections (5) and (6).⁵¹ The constitution must provide for, or prescribe, qualifications for admission to membership to the union. The registrar may not register a union or employers’ organisation if its constitution does not comply with the requirements of the LRA. Section 95(5)(v) of the LRA also stipulates the procedure for the amendment of a union’s constitution.

[40] In terms of Chapter III of the LRA, a “representative union” is defined as a registered union that is “sufficiently representative” of the employees employed by an employer in a workplace. The LRA does not stipulate what sufficiently representative means, however unions that are sufficiently representative have been explicated as those unions that have as their members the majority of employees employed by an employer at the workplace.⁵²

⁵⁰ See section 95 of the LRA, which defines requirements for registration of trade unions or employers’ organisations.

⁵¹Section 95(1) of the LRA provides:

“Any trade union may apply to the registrar for registration if—

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6);
- (c) it has an address in the Republic; and
- (d) it is independent.”

⁵² Grogan *Workplace Law* 12 ed (Juta & Co Ltd, 2017) at 357 notes the following:

“The concept ‘sufficiently representative’ is not defined in the LRA. But the term applies to employees in the workplace as a whole, not in a particular part of it or a particular bargaining unit. ‘Workplace’ is defined as ‘the place or places at which the employees work’. When

[41] Here, NUMSA has chosen to define the scope of its membership as those being in Annexure B. In addition, the relevant clause setting out its scope also serves the purpose of prescribing eligibility.

[42] NUMSA contends that the Labour Appeal Court's decision goes contrary to the international instruments to which South Africa is a party. However, here too, NUMSA's argument must fail, as the Freedom of Association and Protection of the Right to Organise Convention⁵³ (the Freedom of Association Convention) provides that, "workers without distinction whatsoever, shall have the right to establish and, *subject only to the rules of the organisation concerned*, to join organisations of their own choosing without previous authorisation".⁵⁴

ILO Framework

[43] Section 3 of the LRA requires the interpretation of provisions of the LRA to give effect to its primary objects, compliance with the Constitution and the state's public international law obligations. In addition, section 39(2) of the Constitution requires courts when interpreting the Bill of Rights to consider international law.⁵⁵ This Court has held in a number of cases that the International Labour Organisation (ILO)

determining that issue, the CCMA has had regard to the factors enumerated in industrial court decisions dealing with claims by unions to a bargaining entitlement under the 1956 LRA. These include the history of bargaining relationships in the workplace, whether the workplace is divisible into coherent bargaining units with distinct groupings of employees with separate interests, whether the union can make a meaningful impact on collective bargaining, the growth potential of the union, and the attitudes of the majority union. The CCMA has also had regard to the fact that the LRA requires membership of 30 per cent for the establishment of a statutory council. An amendment to the [LRA] now permits commissioners to grant organisational rights to minority unions even if they do not meet thresholds set by collective agreements under section 18."

⁵³ 87 of 1948.

⁵⁴ Article 2 of the Freedom of Association Convention.

⁵⁵ Section 39(2) of the Constitution provides:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

conventions and recommendations are an important source of international law to be considered in the interpretation of section 23 of the Constitution.⁵⁶

[44] The principal source of international obligations in relation to the right to freedom of association in the workplace place is the Freedom of Association Convention.⁵⁷ The Freedom of Association Convention provides in articles 2, 3 and 10 that workers' and employers' organisations shall have the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. It also provides that public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.⁵⁸

[45] The wording of section 4(1)(b) mirrors that of the Freedom of Association Convention. This indicates that the approach adopted by the LRA and the Labour Appeal Court's interpretation is not out of step with international practice.

[46] Consonant with the Freedom of Association Convention, NUMSA exercised its right to formulate its own constitution. This is also consistent with the provisions of the

⁵⁶ *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) (*Bader Bop*) at para 28. See also *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 25.

⁵⁷ *Bader Bop* id at para 43.

⁵⁸ Article 2 provides:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

Article 3 provides:

- “(1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
- (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”

Article 10 provides:

“In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.”

LRA. Having chosen to limit the scope of eligibility for membership it is fatal to its argument that its right to freedom of association is impacted.

NUMSA's constitution

[47] The contractual purpose of a union's constitution and its impact on the right to freedom of association of its current members is founded in its constitution. A voluntary association, such as NUMSA, is bound by its own 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.

[48] NUMSA's definition of its scope is binding upon it. It follows that it could amend its scope of membership, without limitation, provided it follows its prescribed amendment procedures.

[49] The clauses at issue are clear, unambiguous and do not undermine the purpose of the document. NUMSA argues rather faintly that the word *only* does not appear in clause 2(b) of its constitution, therefore, it should be interpreted to mean that any industry can be admitted. To understand this argument, it is necessary to quote the clause again. The suggestion is that to restrict membership the word *only* should precede the words:

“workers who are or were working in the metal and related industries are eligible for membership of [NUMSA].”

[50] However, the nub of the issue lies in the remaining clauses which point out very directly that eligibility for membership is limited to those categories in Annexure B. This contention, regarding the word *only*, lacks logical and legal persuasion in the context of its constitution which defines so clearly eligibility for membership.

[51] It is for this reason that the LRA sets limitations on the exercise by unions of their organisational rights by requiring unions seeking those rights, to be sufficiently representative of the employees in that particular workplace.

[52] NUMSA's argument is that, unlike the Labour Appeal Court's interpretation, the LRA does not constrain membership categories. It is necessary to scrutinise and make sense of NUMSA's argument that, although the scope is defined in its constitution, it nevertheless constitutes a yoke of restraint. This argument must be weighed against the procedural step where its scope can be amended at a heartbeat by the central committee. Paradoxically, NUMSA refuses to amend its constitution to include the paper and packaging industry and at the same time does not launch a frontal attack on section 4(1)(b) of the LRA. It rather cavalierly contends that it does not have to comply with that provision. The submission that the union and employees are entitled to ignore a provision in the union's constitution is logically inconsistent as the members and the union are bound by the contract they have entered into. Lufil is in the paper and packaging industry which is not included in Annexure B of NUMSA's constitution as part of its scope. It follows that NUMSA is not eligible to demand organisational rights. Lufil's core challenge did not attack NUMSA's suitability to represent its employees but focused its argument on its constitution which does not extend to the paper and packaging industry.

[53] 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.⁵⁹ The classic interpretative principle is that effect must be given to the ordinary language of the document, objectively ascertained within its context.⁶⁰ It must follow therefore that in the course of interpretation, preference should be given to a sensible meaning rather than "one that

⁵⁹ *Wilken v Brebner* 1935 AD 175 at 187.

⁶⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

leads to insensible or un-businesslike results or undermines the apparent purpose of the document”.⁶¹

[54] There can be no suggestion that there is an infringement of the rights contained in sections 18 and 23 of the Constitution where a union itself has chosen to circumscribe categories of membership albeit with categories as wide as NUMSA’s.

Amendment of NUMSA’s constitution

[55] The LRA makes provision for a union to amend its constitution by resolution.⁶² The amendment takes effect from the date that the registrar certifies that the change has been registered, which may be done only if the changed constitution meets the requirements for registration.⁶³

[56] 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.⁶⁴

[57] Clause 14(1) of NUMSA’s constitution provides for amendments to its constitution. Clause 14(1) provides:

- “(1) Provisions in the constitution may be amended, added or repealed at National Congress if:
- (a) General Secretaries have received at least 90 days’ written notice of the proposed amendments; and

⁶¹ Id.

⁶² Section 101(1) and (2) of the LRA.

⁶³ Section 101(3) and (4) of the LRA.

⁶⁴ *SA Local Government Association v Independent Municipal and Allied Workers Union* [2014] ZALAC 2; (2014) 35 ILJ 2811 (LAC) at paras 30-2; *Van Wyk* above n 33 at 910; *Sorenson v Executive Committee, Tramway and Omnibus Workers Union (Cape)* 1974 (2) SA 545 (C) at 551C-552F; *Gründling v Beyers* 1967 (2) SA 131 (W) at 139H - 140B-149F and 151C. See also Fergus and Godfrey ‘Organising and Bargaining Across Sectors in South Africa: Recent Developments and Potential Problems’ (2016) 37 *ILJ* 2211 at 2227; *Martin v Scottish TGWU* [1952] AU ER 691 (HL) (in which it was held that a union has no capacity to admit in breach of its constitution and that any decision to admit is therefore null and void); and *Yorkshire Miners Association v Howden* (1905) AC 256 (HL).

(b) at least 2/3 of members at National Congress agree.”

[58] There is a further amendment provision in clause 1 of its constitution. Clause 1(2) in describing the character of the union provides that the central committee may amend the scope of the union’s membership from time to time. In terms of clause 6(2)(b) the central committee consists of National Office Bearers and others.⁶⁵ Clearly, the central committee is the managing body within NUMSA, and consonant with clause 1(2), it is sufficient for the central committee to amend the scope of its membership.

[59] It follows from the wide powers given to the central committee that it is unnecessary to go through the formalities as envisaged in clause 14(1) when extending eligibility for membership. NUMSA could have simply passed a resolution of its central committee to amend its scope, if it sought to admit Lufil employees into membership.

[60] It is common cause that the paper and packaging industry is not listed in Annexure B of NUMSA’s constitution. It is also common cause that Annexure B was not amended in any way (whether by its formal amendment procedure as provided in clause 14(1) of its constitution or by the central committee procedure in terms of clause 1(2) of its constitution). An amendment of its constitution could so easily have been effected to incorporate the paper and packaging industry.

[61] In analysing the structure and scheme of the amendment provisions it is clear that there is no complexity, whether it be of a legal or procedural nature, in relation to the manner in which an amendment can be effected. NUMSA conceded that it has previously amended its constitution as per Annexure B to include industries way outside of the ambit of the metal industry. However, in this case, it failed to do so in relation

⁶⁵ In addition to the National Office Bearers the central committee also consists of: the Regional Chairperson; Deputy Chairperson; Treasurer; and Regional Secretary from each region plus an additional regional official elected in the regions.

to the paper and packaging industry. It is therefore difficult to conceive how a provision in a union's constitution regarding its own scope can limit its right to freedom of association.

[62] In essence, on its own self-imposed limitation, NUMSA is precluded from concluding membership agreements with workers who fall outside its scope. The essential approach in this case is not to police compliance with its internal provisions, but once it interfaces with third parties, NUMSA's conduct is circumscribed by its constitution and has wide ranging public consequences.

[63] It is therefore difficult to accept that NUMSA can choose to ignore the provisions of its own constitution and claim an infringement of its right to freedom of association and an unfair labour practice.

[64] Additionally, while the constitution of a union is seen to be a contract between the union and its members, it serves more than that purpose. NUMSA's argument loses sight of the position of outsiders. The registration of a union has also been said to promote the public's access to its constitution. The constitution of the union thus also 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. Fergus and Godfrey are helpful on this point:

“[T]he purposes of the statutory requirements for the registration of trade unions . . . extend beyond the simple regulation of relationships between unions and their members to include promoting accountability, transparency and democracy in unions' internal processes and procedures. Allowing unions to recruit or organise workers on an ad hoc basis without regard for their constitutions subverts these purposes to the potential detriment of their members and the public at large.”⁶⁶

⁶⁶ Fergus and Godfrey “Organising and Bargaining across Sectors in South Africa: Recent Developments and Potential Problems” (2016) 37 *ILJ* 2211 at 2230-1.

[65] Furthermore, as Bendix notes:

“[The LRA] attempts to protect members of unions from malpractice by office-bearers and officials. It does so firstly by providing that unions should register if they want to achieve legal representation rights and, secondly, by requiring that registration is dependent on the adoption of a proper constitution and on adherence to the certain formalities.”⁶⁷

[66] NUMSA’s own constitution as currently worded is perfectly reconcilable with the goals and values of sections 18 and 23 of the Constitution.

Interference

[67] NUMSA referred to a number of cases in relation to section 4(1)(b) of the LRA and interference by the employer in relation to trade union internal operations, where the court found that it could not have been the intention of the Legislature to unduly restrict the right to representation by a union. It submits this applies to a third party such as an employer’s organisation that cannot deny a worker that right, based on the union’s constitution.⁶⁸

⁶⁷ See Bendix *Labour Relations in Practice: An Outcomes-based Approach* (Juta & Co Ltd, Cape Town 2010) at 50.

⁶⁸ In *MacDonald’s Transport* above n 34, Sutherland JA was faced with individual employees who had been dismissed as a result of participating in a strike (in support of a demand to grant AMCU organisational rights) which was allegedly characterised by violence. The dismissed employees referred an unfair dismissal dispute to the bargaining council. The employees had made no contributions of their monthly subscriptions to AMCU. At the hearing of the dispute, the employer argued that the employees could not be represented by AMCU as they were not members of AMCU because their subscriptions had lapsed by reason of non-payment of subscriptions. The employer based its argument on a reading of AMCU’s constitution. Sutherland JA, at para 35, distinguished employer interference for purposes of collective bargaining and employer interference for purposes of trade union representation at dismissal proceedings in terms of the CCMA rules as follows:

“Certainly, when a union demands organisational rights which accord to it a particular status as a collective bargaining agent vis à vis an employer, it asserts and must establish it, itself, has a right to speak for workers by proving they are its members; sections 11- 22 of the LRA regulate that right. But in dismissal proceedings (which, plainly, are not about collective bargaining) before the CCMA or a Bargaining Council forum, the union is not (usually) the party, but rather the worker is the party. It is the worker’s right to choose a representative, subject to restrictions on being represented by a legal practitioner, itself subject to a proper exercise of a discretion to allow such representation. When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that worker’s right to choose that union.”

[68] On a proper application of the case law in relation to section 4(1)(b) of the LRA and the undisputed facts, Lufil cannot be said to interfere with NUMSA's internal workings by holding it accountable to a document it drafted and to which its existing members have agreed. The cases NUMSA relies on, in relation to the issue of interference are distinguishable on the facts of this case. These cases dealt with representation at arbitration hearings. This is noteworthy as in those cases the court had to balance the interests of the employees to have legal representation at arbitration hearings against that of the employer.

Conclusion

[69] In conclusion, the Labour Appeal Court was correct in finding that the eligibility requirement to join a trade union was defined by its own constitution.⁶⁹ When NUMSA wished to admit Lufil employees as members, it ought to have amended its constitution. Instead, NUMSA chose to proceed to litigate this matter to this Court. It is on this basis that it would not be in the interest of justice to grant leave to appeal. Leave to appeal is accordingly dismissed.

In *Mabote* above n 30, Steenkamp J dealing with the right to representation at the CCMA in terms of CCMA rule 25(1)(b)(iii), held that the phrase 'a registered trade union' refers to the status of a trade union as a registered trade union and not to its scope. He went on to hold that section 200 of the LRA and CCMA rule 25(1)(b)(iii) grant an employee and his or her chosen trade union, an unfettered right for the union to represent the employee. At paras 26-7 Steenkamp J states the following:

“What, then, to make of the restriction in section 4(1)(b) of the LRA that an employee may join a trade union “subject to its constitution”? That restriction appears to me to regulate the relationship between the trade union and its members *inter se*. It is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. *It could not have been the intention of the legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party – such as an employer's organisation – to deny a worker that right, based on the trade union's constitution.*”

Steenkamp J, speaks of representation in terms of the CCMA rules and to cases such as in this case where a trade union seeks organisational rights for purposes of collective bargaining.

In *Afgri Operations Ltd v Macgregor N.O.* (2013) 34 ILJ 2847 (LC) at para 28 the Court found that section 4(1)(b) of the LRA is an individual right which “has been limited within the contemplation of section 36 of the Constitution, to its being subject to the trade union's constitution”.

⁶⁹ Labour Appeal Court judgment above n 13 at paras 30-1.

Costs

[70] The Labour Courts have established a principle in terms of which the general rule that costs follow the result does not apply in situations where “there is a long-standing and continuing labour and employment relationship between the parties, as such orders might not be in the best interests of that relationship”.⁷⁰ The stance adopted by NUMSA in this case is inexplicable and deserving of censure by making a costs order. There were different tiers of litigation where NUMSA could have amended its constitution at any time to include the paper and packaging industry. Its conduct is unsatisfactory.

[71] On balance, however, granting costs would go against the established jurisprudence on labour matters and, more importantly, would end up penalising the union members who will ultimately have to pay the costs occasioned by the incomprehensible stance of the union’s leadership. I therefore make no order as to costs.

Order

[72] The following order is made:

1. The application for leave to appeal is dismissed.
2. Each party is ordered to pay its own costs.

⁷⁰ See *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC); 2018 (8) BCLR 951 (CC) at para 64. See also *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51.

For the Applicant:

I Pillay SC and L K Olsen instructed by
Harkoo, Brijlall and Reddy Incorporated

For the First Respondent:

A Freund SC and M Bishop instructed
by Edward Nathan Sonnenbergs
Incorporated