RESEARCH ARTICLE

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STRIKE BALLOTS IN PRESENT-DAY SOUTH AFRICA: EXAMINING THE INTERSECTION BETWEEN NON-COMPLIANT TRADE UNIONS, DE-REGISTRATION, AND THE REGISTRAR

SUMMARY

The amendments introduced by the *Labour Relations Amendment Act* 8 of 2018 (*LRAA*) saw what was widely held as the reintroduction of compulsory secret and recorded strike ballots into the South African collective labour relations system. This was until the Labour Appeal Court (LAC) affirmed the status of pre-strike ballots, grounded in deference to the constitutional right to strike, and the statutory protections afforded to unions in terms of sec. 67(7) of the *Labour Relations Act* 66 of 1995 (*LRA*). This contribution examines the impact of the LAC decision, along with two further judgments that saw the respective consideration of the role to be played by the Registrar of Labour Relations (the Registrar), and the setting aside of the Guidelines on Balloting for Strikes and Lockouts. This assessment is set against the reasons why balloting was initially excluded from the *LRA*, and what the *LRA* now provides for in terms of balloting. The aforementioned flows into examining how the Registrar could hold unions to account for repeated non-compliance with the provisions of sec. 95 through the de-registration mechanism contained in sec. 106, read with secs. 99 and 100 of the *LRA*. It is accordingly argued that the Registrar is best placed to act without infringing the right to strike, and to simultaneously uphold both union democracy and the constitutional principles of accountability, transparency, and openness. This is a duty owed to union members by the Registrar. Ultimately, it is concluded that members will benefit from greater protection against violent intimidation that so frequently accompanies industrial action, thereby resulting in improved industrial relations' stability in South Africa.

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1. INTRODUCTION

Pre-strike ballots[1] in South Africa were, until recently, in a state of flux. Three initial judgments during the period immediately following the amendments introduced by the *Labour Relations Amendment Act* (hereafter, the *LRAA*)[2] involved urgent applications at the behest of employers who argued, *inter alia*, that non-compliance with the amended balloting requirements[3] should result in either interdicting[4] or suspending[5] the related industrial action.

At the time, these Labour Court judgments appeared to confirm the reintroduction of secret and recorded pre-strike ballots to the collective labour system of South Africa – a return, therefore, to the pre-1995 dispensation.[6]

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1 Whilst the term "ballot" is not defined in sec. 213 of the *LRA*, sec. 95(5)(p), which deals with the requirements for registration of a trade union, states that the constitution of a trade union that intends to register must "provide that the trade union … before calling out a strike …, must conduct a ballot of those of its members in respect of whom it intends to call the strike …". In addition, in terms of sec. 95(9) of the *LRA*, as introduced by the *LRAA*, a ballot is described as "any system of voting by members that is recorded and in secret". Accordingly, a pre-strike ballot involves a vote arranged by a trade union prior to embarking on a strike, in order to determine support amongst its members for that industrial action.

2 *Labour Relations Amendment Act* 8/2018 came into effect on 1 January 2019. The impetus behind the amendments introduced by the *LRAA*, arguably stem from the adoption of the so-called Ekurhuleni Declaration in November 2014, which had as its backdrop the demand for labour market stability in the wake of the "Marikana and other platinum strikes in 2012 and the Western Cape agricultural strike centred in De Doorns in 2012-2013". See Benjamin & Cheadle 2019:2193.

3 *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & Others* 2019 40 ILJ 1814 (LC); *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union and Others* [2019] 45883 JOL 1 (LC), and *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & Others* 2020 41 ILJ 428 (LC).

4 *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & Others* 2019 40 ILJ 1814 (LC):par. 19 and *Johannesburg Metropolitan Bus Services SOC Ltd v Democratic Municipal & Allied Workers Union* 2020 41 ILJ 217 (LC):par. 12.

5 *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & Others* 2020 41 ILJ 428 (LC):par. 24.

6 Prior to the current *Labour Relations Act* 66/1995, the previous *Labour Relations Act* 28/1956 had pre-strike ballots as front and centre to its organised labour management scheme, in terms of sec. 8 read with sec. 65. The premise simply being that a *secret* ballot was necessary to safeguard minorities within the effected workforce who might be opposed to the industrial action, as a means to then properly ensure that the majority of workers were in support of the action. In this regard, see Greenhalgh 2020:863-868, for a more detailed overview of South Africa's pre-strike balloting past, and, in particular, Benjamin & Cooper 2016:211-218, given their excellent analysis of pre-strike ballots in apartheid-era South Africa. Given the wide gamut of procedures that were required to implement ballots of this nature, Brassey 2012:18 explains that these were "mined [by employers] for technical deficiencies", which called into question the legitimacy of the ballot outcome and accordingly served as an effective weapon against strike action specifically by means of interim interdicts. See Benjamin & Cooper 2016:213-214. All pre-strike ballot provisions were accordingly removed, with no similar concept being incorporated into the 1995 *LRA*, upon transition.

Seen collectively, these judgments (in interpreting the *LRAA*[7] and its transitional provisions) held, for a variety of reasons, that what was at stake were mere procedural steps applicable to balloting,[8] and that, upon compliance with the *LRAA* amendments, the affected industrial action could continue. The impact hereof, for obvious reasons, had been preceded by numerous and widespread reporting on the expected outcomes of the amendment to the *Labour Relations Act* (hereafter, the *LRA*).[9] Understandably, the widespread condemnation or support shown towards the *LRA* amendments was largely split along the divide between organised labour,[10] and broader societal/ business interests.[11]

7 Specifically secs. 19(1) and 19(2) of the *LRAA*.

8 See, for instance, the reasoning of Gush J in *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & Others* 2019 40 ILJ 1814 (LC):1816G-I, along with that of Tlhotlhalemaje J in *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & Others* 2020 41 ILJ 428 (LC):par. 22.

9 *Labour Relations Act* 66/1995.

10 See for instance, *inter alia*, the following media reports: Anonymous "New laws an attack on Amcu: Mathunjwa", https://www.enca.com/news/new-laws-attack-amcu-mathunjwa (accessed on 20 September 2020); Mkhwanazi "'New' law has unions up in arms", http://capeargus.newspaperdirect.com/epaper/showarticle.aspx?article=42edd311-9141-46de-8663-d9f139580ece&key=r6p6NeflxQLvEzQI8%2bXjFg%3d%3d&issue=706720190915000000000001001 (accessed on 20 September 2020); Jim "Code of Practice treats African workers as violent savages – NUMSA", https://www.politicsweb.co.za/politics/working-class-must-stand-up-and-fight--irvin-jim (accessed on 20 July 2020); Omarjee "Explainer: Why unions have mixed feelings on secret ballot votes for strikes", https://www.fin24.com/Economy/explainer-why-unions-have-mixed-feelings-on-secret-ballot-votes-for-strikes-20190913 (accessed on 16 October 2020), and Sibanyoni "Secret vote before strike pits unions against each other", https://www.sowetanlive.co.za/news/south-africa/2019-09-13-secret-vote-before-strike-pits-unions-against-each-other/ (accessed on 14 September 2020).

11 See, *inter alia*, Cottle "The Labour Relations Amendment Bill – A victory for business", https://www.dailymaverick.co.za/opinionista/2018-06-04-the-labour-relations-amendment-bill-a-victory-for-business/ (accessed on 7 July 2020); African News Agency "Regulations requiring ballots for strikes imminent", https://citizen.co.za/news/south-africa/politics/2084050/regulations-requiring-secret-ballots-for-strikes-imminent/ (accessed on 21 June 2021); Molatudi "It's now law — no secret balloting, no strike", https://www.businesslive.co.za/bd/opinion/2019-05-31-its-now-law--no-secret-balloting-no-strike/ (accessed on 6 June 2020); Department of Employment and Labour "The Office of Registrar of Labour Relations says it is now illegal to embark on strike action before conducting a secret ballot of members", https://www.gov.za/speeches/employment-and-labour-labour-relations-act-amendments-strike-action-9-sep-2019-0000 (accessed on 12 June 2021); Cohen "New legislation requiring secret strike ballots is the latest in South Africa's intra-union battles", https://www.dailymaverick.co.za/article/2019-09-15-new-legislation-requiring-secret-strike-ballots-is-the-latest-in-south-africas-intra-union-battles/ (accessed on 20 September 2020); Botes "When logic fails: Labour unions reject their members' right to a secret vote", https://www.dailymaverick.co.za/article/2019-09-19-when-logic-fails-labour-unions-reject-their-members-right-to-a-secret-vote/ (accessed on 21 July 2021), and Saunderson-Meyer "A tentative move to curb union destructiveness", https://www.iol.co.za/news/opinion/a-tentative-move-to-curb-union-destructiveness-33390496 (accessed on 22 September 2021).

With this in mind, two key articles during this period saw Fergus and Jacobs[12] as well as Grogan[13] explore the underlying rationale followed by the courts in the initial judgments – and, as importantly, the related statutory framework – with both speculating on the expected future litigation by organised labour to thereby clarify the new status of pre-strike ballots.[14] Grogan, in particular, focused on the subtle (but significant) changes made to specific provisions within the *LRA* and the impact hereof on the potential role of the Registrar of Labour Relations (hereafter, the Registrar).[15] This latter consideration lies at the heart of this study. Whilst this contribution will serve, at the outset, to unpack in more detail the crisp legislative overview provided by Grogan, the value of this contribution will lie in analysing why the Registrar, in particular, is ideally placed to fulfil the critical function of overseeing the accountability of trade unions to their members, insofar as it pertains to the decision to embark on industrial action.

Nevertheless, the speculation of expected legal proceedings seeking clarity came to pass. By May 2020, the Labour Appeal Court (hereafter, the LAC) was seized by an appeal from one of the original judgments in *National Union of Metalworkers of SA v Mahle Behr SA (Pty) Ltd* (hereafter, *NUMSA v Mahle Behr*).[16] Both reiterated the underlying constitutional right to strike in South Africa and clarified the legislative interpretation of the amendments to the *LRA* insofar as it impacted on pre-strike ballots. As will be apparent from the ensuing examination, the LAC correctly restated the position towards pre-strike balloting within the South African collective labour field – an inescapable outcome, given the core protection built directly into the *LRA*, namely sec. 67(7).[17] More on this, below.

Secret and recorded pre-strike ballots, as a long-attempted,[18] reintroduced measure to supposedly restore a modicum of order to South Africa's collective

12 Fergus & Jacobs 2020:757-778.

13 Grogan 2020:1-8.

14 Mention must also be made of Tenza 2019:263-280, whose examination of the broader context immediately preceding the promulgation of the *LRAA* serves as useful background to the present study.

15 Grogan 2020:1.

16 *National Union of Metalworkers of SA & Others v Mahle Behr SA (Pty) Ltd (Association of Mineworkers & Construction Union as Amicus Curiae); National Union of Metalworkers of SA & Others v Foskor (Pty) Ltd (Association of Mineworkers & Construction Union as Amicus Curiae)* 2020 41 ILJ 2093 (LAC).

17 Sec. 67(7) extends protection to a strike in situations where a trade union has failed to comply with a provision in its own constitution that requires a pre-strike ballot.

18 Post-1995, the genesis of an unsuccessful attempt to reintroduce strike ballots arose in 2012 via the *Labour Relations Amendment Bill*, 2012, which sought to amend the *LRA* as it was then. Rycroft 2015:7 quotes the then General Secretary of COSATU, Zwelinzima Vavi, as describing the proposed amendments as the "greatest threat to the right to strike since the fall of apartheid". The proposals never saw the light of day and were excluded from the eventual amendments introduced via the *Labour Relations Amendment Act* 6/2014.

bargaining sphere,[19] were accordingly no more, less than two years after promulgation. At least, not in terms of *external* enforcement. The focus had instead returned to that of unions (in terms of complying with their own constitutions), and their members (in needing to rely on internal union democracy measures to ensure such compliance).[20] At least, this is how it would appear upon cursory investigation. More on this below.

NUMSA v Mahle Behr was, however, not the only decision of significance during this period of transition. So too, was the ruling in *Association of Mineworkers & Construction Union v Minister of Employment & Labour* (hereafter, *AMCU v Minister*),[21] which saw the setting-aside of the *Guidelines on Balloting for Strikes or Lockouts Issued in terms of Section 95(9) of the LRA* (hereafter, the *Guidelines*)[22] in April 2021.[23]

In addition, the particularly important Labour Court decision of *Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations* (hereafter, *DEMAWUSA v Registrar*)[24] requires consideration, exploring as it does the broader question of overreach by the Registrar. But why the Registrar? In short, because the *NUMSA v Mahle Behr* judgment opens the question as to what alternative *external* mechanisms are now potentially available (in the absence of interim interdicts) to ensure trade union compliance with pre-strike balloting. The answer to this question, as identified by Grogan, requires considering the changes introduced by the *LRAA* into sec. 95(5),[25] its interplay with sec. 67(7) of the *LRA*,[26] and analysis in light of changes to secs. 99 and 100 of the *LRA*. These changes are far more significant than widely understood, presently.

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19 The number of journal articles written on topics of the violence associated with industrial action in South Africa speaks to the underlying issue at hand. See, for instance, Botha & Germishuys 2017a:351-369; Botha & Germishuys 2017b:531-552; Bolt & Rajak 2016:797-813; Calitz 2016:436-460, and Manamela & Budeli 2013:308-336. It is far less clear whether secret ballots are in any manner guaranteed to prevent strike violence (leaving aside for a moment the question of alleviating ballot-voting intimidation). Compare Benjamin & Cooper 2016:225, Grogan 2020:1, and Fergus & Jacobs 2020:766-767.

20 Fergus & Jacobs 2020:761 state: "This places enforcement in the hands of the trade union's members. In other words, ballots are 'relevant to the relationship between trade unions' (as voluntary associations) and their members" (footnotes omitted).

21 *Association of Mineworkers & Construction Union v Minister of Employment & Labour* 2021 42 ILJ 1538 (GP).

22 GN R1397 Government Gazette 2018:93(42121).

23 In addition to the *Guidelines* (despite its setting aside), the *Code of Good Practice: Collective Bargaining, Industrial Action and Picketing* GN R1396 Government Gazette 2018:38(42121) (hereafter, the *Code*) serve, in terms of promulgated instruments, as crucial touchstones in interpreting the changes introduced within the *LRA* at the commencement of 2019.

24 *Democratic Municipal & Allied Workers Union of SA v Registrar of Labour Relations* 2020 41 ILJ 1968 (LC).

25 Sec. 95(5) regulates the constitutions of registered trade unions. This is where the key change speaking directly to ballots was introduced.

26 Sec. 67(7), discussed in more detail below, extends protection to a strike in situations where a trade union has failed to comply with a provision in its own constitution that requires a pre-strike ballot.

As made clear by Grogan,[27] the significance of all of the above stems from sec. 106, outlining the grounds upon which the registration of a union can be cancelled by the Registrar. The de-registration accordingly hinges on whether the union in question complies with secs. 98,[28] 99, and 100 of the *LRA*, with the latter two sections now bringing ballot-related material into the scope of the de-registration process – a process solely at the behest of the Registrar.

Herein then the crux of the matter. The genesis of this study stemmed from the research conducted during the course of the author completing his dissertation, which focused on the accountability of trade unions to their members. The issue of balloting was considered within this broad topic, given its importance in terms of unions adequately representing the will of a workforce that was to potentially embark on strike action. But a far greater consideration was given to the role of the Registrar, as the ultimate guardian against recalcitrant labour unions who do not act in the best interests of their members.[29] With the *LRAA* having been promulgated in the final stretch of my research, careful attention was paid to its reception and the initial judgments (of which two had been handed down, and were considered).[30] It was clear that significant changes were potentially afoot, with the Explanatory Memorandum to the proposed Bill having made clear that ballots would now be understood as meaning "recorded and secret".[31] However, it was the addition of sec. 100(f) – seen in conjunction with sec. 106 – that also caught the eye (like Grogan).[32] Given what my research had shown about the impetus behind the introduction of sec. 106(2A),[33] how its overarching purpose was understood by our courts,[34] and how the need exists for Registrar oversight as a result of

27 Grogan 2020:1.

28 Given that sec. 98 regulates "accounting records and audits", and thereby falls outside the scope of this article, it will not be listed each time going forward.

29 Greenhalgh 2020:889-916.

30 Greenhalgh 2020:874-877. I was, however, less convinced that what was proposed, and had been widely written about, was to come to pass as expected – in view of the protection afforded by sec. 67(7) [Greenhalgh 2020:861-862], among other aspects. This view is similarly shared by both Fergus & Jacobs 2020:758, 761 and Grogan 2020:1, 3, 8.

31 *Memorandum on the Objects of the Labour Relations Amendment Bill*, 2017 GN R1273 Government Gazette 2017(41257):166.

32 Greenhalgh 2020:888.

33 Greenhalgh 2020:890-892, which speaks to the powers of the Registrar in terms of sec. 106(2A), both in terms of labour associations found to be "non-genuine", or where they are in non-compliance with the statutory requirements regulating document keeping (and, by implication, the underlying actions/procedures that result in those documents): "As such, the powers afforded the Registrar to either deregister a currently registered union or to refuse to register a new union, serve perhaps as the single biggest deterrent against union malfeasance in respect of requirements contained in Chapter VI Part A ["Registration and regulation of trade unions"] of the LRA" (footnotes omitted).

34 In *National Entitled Workers Union v Director, Commission for Conciliation, Mediation and Arbitration* 2011 32 ILJ 2095 (LAC):2103C-D, the LAC states as follows: "[T]he purpose of s 106 of the LRA [is] … the protection of vulnerable employees from abuse of the trust that had been placed in the 'union' by unscrupulous officials whose involvement in the 'union' is for no other reason than to advance their own selfish financial interests".

the behaviour of (certain) trade unions in our past,[35] the subtle changes made by the *LRAA* that seemingly sat adjacent to the core changes were always first in mind.

In light hereof, with industrial action forming one of the pillars of collective bargaining in this country,[36] any changes to the process surrounding the role of trade unions in representing workers in the exercise of one of their key organisational weapons, is of critical importance to the broader industrial relations field. This article will serve to unpack this aspect, broadly stated. This cumulative analysis will assess the possible role of the Registrar in providing oversight of trade unions in terms of pre-strike ballots, measured against the best interests of their members.

2. THE STATUTORY FRAMEWORK

2.1 THE *LABOUR RELATIONS ACT* 66 OF 1995

As point of departure, sec. 95 of the *LRA* regulates the "[r]equirements for registration of trade unions". Sec. 95(5), in turn, stipulates what is to be included in the constitutions of trade unions that wish to register.[37] In particular, sec. 95(5)(o)-(q) is peremptory in nature, requiring of unions intending to register to "establish the circumstances and manner in which a ballot must be conducted",[38] providing that the union "must conduct a ballot" prior to calling a strike,[39] and that they may not discipline those members who refuse to participate in a strike if no ballot was held, or no majority voted in favour of the same.[40] It is important to note that the aforementioned provisions were unchanged by the amendments introduced, with their having formed part of the *LRA* since its initial promulgation.[41] Related hereto, it stands to reason that any trade unions that were duly registered following 1995, in terms of the *LRA*, technically had to comply by regulating the aforementioned within their constitutions. *How* this was to be done, was a decision left to the union in question, to decide.

35 Reference can, for instance, be made to several cases where the question before the courts was whether unions were functioning as "non-genuine" labour associations. See, for instance, *inter alia*, *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations & others* 2010 31 ILJ 2886 (LC); *Unica Plastic Moulders CC v National Union of SA Workers* 2011 32 ILJ 443 (LC); *General Domestic & Professional Employers' Organisation v Registrar of Labour Relations* 2011 32 ILJ 316 (LC), and *National Entitled Workers Union & Others v Director, Commission for Conciliation, Mediation & Arbitration & Others* 2011 32 ILJ 2095 (LAC). See further fn 110 and fn 120.

36 "It has been acknowledged that without the threat of strike action, collective bargaining would be futile" (Subramanien & Joseph 2019:1-39). See further Myburgh 2018:713.

37 The registration, in this instance, is in terms of secs. 96 and 97 of the *LRA*.

38 Sec. 95(5)(o).

39 Sec. 95(5)(p).

40 Sec. 95(5)(q).

41 Grogan 2020:1.

With this in mind, the changes made to pre-strike balloting need to be understood in light of sec. 67(7) of the *LRA*.[42] Simply put, at the point of the (then-new) *LRA* being created, it was not deemed sufficient to merely leave out reference to pre-strike balloting.[43] Rather, a positive right of protection or shield was added to the *LRA* to specifically protect against the past threat of both interference in the right to strike (this then by means of interim interdicts suspending/blocking industrial action on the grounds of non-compliance with balloting procedures), or due to any subsequent action being deemed unprotected.[44]

That said, at risk of stating the obvious, a further point needs to be emphasised. The *LRA* requires of registered unions to make provision in their constitutions for the conducting of "a ballot".[45] No mention, prior to the 2019 amendments to the *LRA*, speaks to the need for a *secret or recorded* ballot in the context of trade unions.[46]

2.2 THE *LABOUR RELATIONS AMENDMENT ACT* 8 OF 2018

The following *LRAA* changes are notable. First, a new sec. 95(9), which states that, for the purposes of interpreting sec. 95(5), "ballot" is understood as meaning to "include[s] any system of voting by members that is recorded and in secret". Secondly, sec. 95(8) is what empowered the Minister of Employment and Labour (hereafter, the Minister) to publish the Guidelines "for the system of voting as contemplated" in sec. 95(9). Thirdly, the additional wording in sec. 99(c), which regulates records of ballots (including "any documentary or electronic record of the ballot"), must be kept for a period of three years. Fourthly, the completely new sec. 100(f), which introduces a link back to all of the records to be kept in terms of sec. 99, thereby including balloting documentation. Fifthly, the Transitional provisions within *LRAA* itself,[47] which influenced the initial judicial interpretation of the new balloting measures.

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42 Sec. 67(7) reads as follows: "The failure by a registered trade union … to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lockout may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lockout." It must be noted that sec. 67(7) falls within Chapter IV of the *LRA*, duly entitled "Strikes and lock-outs", with sec. 67 itself being titled "[s]trike or lock-out in compliance with this Act"; in other words, strikes (or lockouts) deemed to be "protected".

43 For a more detailed discussion of the period that heralded South Africa's transition to a new constitutional dispensation, and the impact of this on the design of the *LRA*, see Greenhalgh 2020:806-816.

44 See the Explanatory Memorandum to the first draft of the *LRA*, by way of the justification for their removal – Ministerial Legal Task Team 1995:303 – given the impact on workers dismissed as participants in those former "technically irregular" strikes.

45 The specific wording of sec. 95(5)(o) reads: "[T]he trade union … before calling a strike or lockout, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lockout".

46 The *LRA* made provision for a "secret ballot" in only one other context, namely that of workplace forums. See Greenhalgh 2020:866.

47 This by virtue of sec. 19(1)-(2).

The *Guidelines* (and *Code*) are addressed in the ensuing section. What of the rest? At the outset, sec. 95(9) is obviously significant in that it introduces, for the first time in the new *LRA* in terms of trade unions, reference to a system of voting that is "recorded and in secret".[48] The outcome being that registered unions' constitutions are to make provision for a balloting system in alignment with the amended *LRA*, albeit with due acknowledgement again to the shield of sec. 67(7). More on this in the discussion below. Suffice it to state that the minor change to sec. 99(c), coupled as it is to sec. 95(9), is to be expected.[49] However, as was explained by way of the introduction, the seemingly insignificant change to sec. 100 is anything but inconsequential.

To reiterate why it is of such consequence, we need to get slightly ahead of ourselves. It will be recalled from the introductory section that sec. 106 is of crucial relevance, given that it regulates the power of the Registrar to de-register trade unions, specifically, sec. 106(2A), read with sec. 106(2B) of the *LRA*. Importantly, nothing in sec. 106 was changed by the 2019 amendments. Rather, sec. 106(2A)(b) – as it always did since its introduction in 2002[50] – includes as grounds for the de-registration process non-compliance with secs. 99 and 100 of the *LRA*. Sec. 99 extends to unions a "[d]uty to keep records". Sec. 100 extends to unions the "[d]uty to provide information to the Registrar". Prior to the 2019 amendments, these two sections were largely independent of one another. Indeed, they were both drawn together under sec.106. However, as will become apparent, the simple addition of sec. 100(f) suddenly introduced the possible involvement of a proactive Registrar into the internal balloting affairs of trade unions. This specific point underpinned the facts, and the decision reached, in *DEMAWUSA v Registrar*. Given its importance to what is being argued in this paper, it will be considered separately below.

What then remains to address, briefly, are the transitional provisions of sec. 19 of the *LRAA*. By way of background, bear in mind that it would be unlikely for already registered trade unions to have constitutional clauses regulating (or even requiring) secret and recorded ballots, much less so for pre-strike ballots. A union's constitution would accordingly need to be amended, in order to bring it into alignment with what is statutorily required. Amending a constitution is not necessarily a simple matter, particularly in the case of the larger, national unions.[51] It was arguably with this reality in mind

48 The addition of the word "includes", whilst unfortunate, is most likely a non-event. Note the comment of Godfrey *et al.* 2018:2173, who questioned whether this might need to be interpreted by the courts, in order to determine if the provision is suggesting that a recorded and secret ballot is *also* (as in, *additionally*) envisaged, over and above whatever mechanism was already in place. This is, however, offset by reading the clause against the Preamble of the *LRAA* – a point made by the LAC in *NUMSA v Mahle Behr*:paras. 8-9, where it was accepted as merely extending the meaning of a ballot to now mean in secret and recorded.

49 As it stands, sec. 9 *LRAA* simply saw the addition of words to clarify the inclusion of "any documentary or electronic record of the ballot" having to be kept for three years – the actual time period was unchanged.

50 *Labour Relations Amendment Act* 12/2002:sec. 21.

51 See, in this regard, the comments of Fergus & Jacobs 2020:773-775. To this could be added that such constitutional processes functioning smoothly would be on

that the legislature deemed it necessary to include transitional arrangements into the *LRAA*, in order to facilitate the expected adjustments that would need to be made in light of the amendments.[52]

Sec. 19(1) requires the Registrar to do two things, within 180 days of the commencement of the amendment, regarding trade unions whose constitutions do *not* make provision for "recorded and secret ballots". First, in terms of sec. 19(1)(a), is to "consult" with unions on the "most appropriate means to amend the[ir] constitution" to now comply with the amended sec. 95 of the *LRA*. Secondly, in terms of sec. 19(1)(b), the Registrar is to "issue a directive" which specifies a (further) time period within which such amendment of the union's constitution is to take place.[53]

Sec. 19(2) references sec. 19(1), by then stating that, until such time as the union complies with the directive issued by the Registrar, *and* the requirements of secs. 95(5)(p) and 95(5)(q) of the *LRA*,[54] then unions *must* conduct a secret ballot before engaging in a strike or lockout.

To conclude, whilst on the face of it, secs. 19(1) and 19(2) of the transitional provision appears to be fairly straightforward, it and the broader view/purpose of the *LRAA* were to make their way through the South African labour courts before being settled in the LAC in *NUMSA v Mahle Behr*, discussed below.

2.3 THE GUIDELINES AND CODE

Given the discussion so far of the statutory framework pertaining to pre-strike balloting, the keen observer might have noted that the *Guidelines* promulgated

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the assumption that all was also running smoothly within the union's leadership structures – with no manoeuvring for internal power or infighting being present – something (sadly) not necessarily a given in the context of South Africa's organised labour context, as evidenced by the media coverage (and legal action) involving NUMSA's most recent Congress. See Bell "Numsa's week of reckoning", https://www.news24.com/citypress/columnists/terrybell/inside-labour-numsas-week-of-reckoning-20220724 (accessed on 21 November 2022); Sithole "Numsa ready to take on ex-deputy president in court", https://www.iol.co.za/the-star/news/numsa-ready-to-take-on-ex-deputy-president-in-court-0e31a412-6d76-49b4-b37b-d88deb3feb8d (accessed on 21 January 2023); Magubane "Contempt case against Numsa fails in court", https://www.news24.com/fin24/economy/labour/contempt-case-against-numsa-fails-in-court-20220823 (accessed on 21 January 2023), and *Ntlokose v National Union of Metalworkers of SA* 2022 43 ILJ 2562 (LC).

52 Grogan's take on the reasons underlying the transitional provisions is made slightly more firmly: "The lawmakers realised that some unions wouldn't take kindly to the provision[s of the amendment] and might take some persuasion. So a transitional provision was tagged on to the end of the amending Act which authorises the registrar to help induce them to do so". See Grogan 2020:1.

53 It is apposite to point out that the 180 days following the coming into effect of the *LRAA* ended on 30 June 2020. Of course, as important is the point that nothing would have prevented unions from amending their constitutions *without* waiting for a directive to do so, in other words, voluntarily.

54 These two provisions require a pre-strike ballot to be conducted, and prohibit disciplining members who do not support the industrial action if no ballot was held.

on 19 December 2018 by the Minister, were issued in terms of sec. 95(9) of the *LRA*. They should have been issued in terms of sec. 95(8) of the *LRA.* The latter clause was amended to insert the reference to guidelines for "the system of voting as contemplated in" sec. 95(9). It is, therefore, not surprising that *AMCU v Minister* saw the *Guidelines* being set aside.[55] Whilst being issued in terms of the incorrect empowering section was understandably a significant factor in the court's decision,[56] a further factor was the peremptory wording/status of the *Guidelines*.[57]

Nonetheless, despite the *Guidelines* no longer being in force,[58] as explained earlier, it and the *Code* do serve the function of contextualising the legal terrain within which the Registrar was operating, in the period following the introduction of the *LRA* amendments. As such, this deserves the briefest of expositions into their content.

The *Guidelines* spanned a mere seven pages (which included a draft union constitution provision)[59] and comprised twelve clauses. Along with reference back to secs. 95(5)(p) and 95(5)(q),[60] and affirming that pre-strike ballots must be recorded and in secret,[61] the *Guidelines* set out details regarding where

55 The Department of Labour's acting deputy director-general was reported as stating, in May 2022, that the "government did not challenge the decision in the AMCU case because it believed that the court was correct in limiting the minister's power". Paton "Govt is bringing back secret strike ballot to protect union members from intimidation", https://www.news24.com/fin24/companies/govt-is-bringing-back-secret-strike-ballot-to-protect-union-members-from-intimidation-20220513 (accessed on 21 August 2022).

56 AMCU's primary contention was premised on an *ultra vires* decision being taken by the Minister, specifically that the Minister had issued the Guidelines in terms of the incorrect provision: *AMCU v Minister*:paras. 28-29.

57 The court considered par. 9 of the *Guidelines*, and held that, whilst the latter speaks of being "indicative of the procedures that *should* be followed when conducting a secret ballot" (emphasis supplied), the various sub-paragraphs within it are "couched in mandatory terms" [*AMCU v Minister*:par. 35]. AMCU's argument was that sec. 95(8) provides that guidelines "may" be issued, and that the mandatory provisions within the *Guidelines* are accordingly not provided for by its empowering provision – which is a further *ultra vires* decision [*AMCU v Minister*:par. 36]. The court was in agreement again. Simply stated, sec. 95(8) "does not empower the [M]inister to impose mandatory obligations on trade unions". *AMCU v Minister*:par. 40.

58 Suffice it to state that the opportunity exists for the *Guidelines* to be re-issued in such a manner as to properly take into account all that has transpired within our courts to date, as examined during this article.

59 Entitled "Draft clause for trade unions/employers' organisation constitutions about secret ballots in respect of strikes or lockouts", in Annexure One of the *Code*. The clause commenced with the exception of "[d]espite any other provision in [the union] Constitution", a strike "may only be called in terms of this Constitution after a secret ballot has been conducted" [clause 1.1], before paraphrasing the wording of secs. 95(5)(q), and 99(c) [clause 2].

60 It can be added that the *Guidelines* incorrectly referenced these provisions, by swapping them around/attributing a summary of what they stated to the incorrect subsections.

61 Clause 4.

ballots were to be held,[62] requirements surrounding a notice of the ballot,[63] ballot papers,[64] the voter's roll (including reference to electronic and postal ballots),[65] scrutineers and observers of the ballot,[66] balloting and counting,[67] and recording of the ballot.[68] As such, the *Guidelines* were certainly not free of issues, some of which have been highlighted earlier.[69] However, for the purposes of this study, it remains clear that the legislature had attempted to provide an overarching framework for a collective labour system that would see trade unions incorporate recorded and secret pre-strike ballots into their internal processes.

In turning briefly to the *Code*, the first observation to make is that it is far lengthier: 53 pages in total, covering as it does aspects beyond mere balloting (and accordingly, falling outside the scope of this study).[70] The single clause that does focus on balloting is nonetheless noteworthy, given what has been discussed thus far. Clause 19, entitled "Ballot of members", states at the outset that the *LRA* "does not require the conduct of a ballot as a requirement for a protected strike", since sec. 67(7) "states quite explicitly that the failure by a registered trade union … to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of a strike".[71] Rather, as per clause 19(2), the obligation to hold a pre-strike ballot "flows instead from the constitution of a registered trade union", which, in turn, flows from the requirement found in sec. 95(5)(p) of the *LRA* – "that a trade union … that seeks registration must provide in its constitution" for a pre-strike ballot, and that the "ballot must be a secret ballot".[72] The clause then culminates by reiterating that registered unions "are obliged to comply with their constitutions even though the failure to do so does not have the consequence of invalidating the protected status of the strike".[73]

62 Clauses 5 to 7.
63 Clauses 9.1 and 9.2.
64 Clauses 9.3 to 9.5.
65 Clauses 9.6 to 9.9.
66 Clauses 9.10 and 9.11.
67 Clauses 9.12 and 9.13
68 Clauses 9.14 and 9.15.
69 See, for instance, Fergus & Jacobs for their views on a range of questions and issues requiring clarification regarding the practicalities of the ballot procedures – Fergus & Jacobs 2020:771-772, spanning "who is to be balloted", to what would the "threshold of support" have to be? To this can be added that certain processes within the *Guidelines* would have been in need of more serious exposition – by way of example, clause 9.10. The clause stated that a union "may employ" independent scrutineers, but the qualification was added that, unless provided for in terms of either a collective agreement or the union's constitution, "there is no obligation to do so". Then came the self-evident contradictory final sentence of the clause: "In *all* the ballots there *will be* a scrutineer" (emphasis supplied).
70 At risk of repeating the obvious, the Code's title references collective bargaining, industrial action, and picketing.
71 Clause 19(1).
72 Clause 19(2).
73 Clause 19(3).

3. JUDICIAL CLARIFICATION

3.2.1 *NUMSA V MAHLE BEHR*

On 8 June 2020, Murphy AJA[74] handed down judgment in the LAC in *NUMSA v Mahle Behr.*[75] This was the first decision on appeal that directly considered the implications of the initial judgments, and the interpretation (to date) placed upon the transitional provision within the *LRAA*. In essence, the issue before the LAC was "whether the Labour Court's interpretation of s 19 of the LRAA is correct"[76] – together with ascertaining what the "scope and application" of sec. 19 is.[77]

At the outset, the LAC confirmed that sec. 67(7) of the *LRA* "applies only to trade unions … that have complied with the requirements of s 95(5) of the LRA by including balloting requirements in their constitutions".[78] On the facts, the court accepted as common cause that NUMSA's constitution did not provide for a recorded and secret ballot, nor that it complied with the requirements of sec. 95(5)(p)-(q).[79] The court reasoned that the transitional provision of the LRAA was "enacted to add to these provisions by empowering the [R] egistrar to embark upon a process whereby trade unions … could amend their constitutions to provide for recorded and secret ballots".[80]

In turning to the question of interpretation, following an evaluation of sec. 39(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*),[81] the LAC reasoned that the LRAA's transitional provision "must be read purposively", and that an interpretation that thereby "better promotes the preservation of the right to strike … ought to be preferred".[82]

The LAC then examined the steps expected of the Registrar in light of sec. 19(1) of the *LRAA*,[83] and accordingly concluded that the *LRAA* is clear, in that "no obligation" arises on the part of the union until the Registrar has consulted with and issued the directive, in terms of sec. 19(1)(a)-(b).[84]

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74 Waglay JP and Phatshoane ADJP concurring.

75 *NUMSA v Mahle Behr* 2020 41 ILJ 2093 (LAC). The Association of Mineworkers & Construction Union (AMCU) was joined as *Amicus Curiae*. Furthermore, it must be noted that Foskor (Pty) Ltd was also joined as the other employer in the matter, as had been the case in the initial *Mahle Behr* decision.

76 *NUMSA v Mahle Behr*:par. 1.

77 *NUMSA v Mahle Behr*:par. 10.

78 *NUMSA v Mahle Behr*:par. 6.

79 *NUMSA v Mahle Behr*:par. 9.

80 *NUMSA v Mahle Behr*:par. 7. Further to this, at paras. 8-9, the LAC affirmed the following. First, that sec. 95(9) and its wording of a ballot that now "includes any system of voting … that is recorded and in secret" was added by the *LRAA*. Secondly, that the Minister could, in terms of sec. 95(8), issue guidelines for the system of voting. Thirdly, that the "preamble to the LRAA records that the purpose of these provisions was simply to extend the meaning of ballot to include any voting by members that is recorded and in secret" [*NUMSA v Mahle Behr*:paras. 8-9].

81 *NUMSA v Mahle Behr*:paras. 10-12.

82 *NUMSA v Mahle Behr*:par. 12.

83 *NUMSA v Mahle Behr*:par. 13.

84 *NUMSA v Mahle Behr*:par. 14.

Of equal importance, the LAC held that the particular duty imposed on unions "is not to amend its constitution in a manner it deems fit" (in order to bring about alignment with the new definition of a "ballot" in sec. 95(9) of the LRA), but rather – that unions "comply with the [R]egistrar's directive as to the appropriate means, period and procedures to amend" their constitution.[85] In terms of considering sec. 19(2), it was reasoned to provide a clear obligation to conduct a secret ballot of union members "only once a directive… has been issued by the [R]egistrar", this being "pursuant to consultations as envisaged in terms of" sec. 19(1)(a).[86] Coupled to this, the LAC reiterated that the *LRAA* provisions were "transitional" in nature, and operate once the registrar issues the directive to bring about the amendment, and that secret and recorded ballots are then a requirement "*pending the adoption of the amendment*".[87] Consequently, once the amendment is adopted, the obligation on the part of the *LRAA* for secret and recorded ballots falls away. Instead, it then remains a requirement in terms of a union's compliance with its own constitution (in other words, in terms of sec. 95(5) of the *LRA*).

Turning again to the facts, upon the LAC not finding evidence that the Registrar had either issued a directive or consulted with NUMSA (or other trade unions), the decision in the court *a quo* was then held to be based on an "incorrect assumption", with its "interpretation [being] inconsistent with the plain language of s 19(1), and further, unjustifiably limits the right to strike".[88]

A final observation to be made regarding the decision of the LAC speaks to a document submitted by AMCU (as *amicus curiae* in the matter),[89] which the LAC considered as informing unions of the changes brought about by the *LRAA*, and as directing them "to 'work through their constitutions' and come up with amendments that will give effect to the new requirements".[90] As such, the Court reasoned that the document "seems to be a preliminary advice intended to precede the necessary consultations" with unions, "on the most appropriate means to amend their constitutions".[91] Given that no form of amendment, nor time frames are mentioned in the document, it was held not to amount to the "directive" required by the amended *LRA*.[92] In the absence of the latter, the LAC, therefore, ruled that the respondents had failed to prove that a directive had been issued, and accordingly, NUMSA had no legal obligation to conduct a secret ballot, and no cause existed to interdict NUMSA from engaging in their strike. The appeal was upheld.[93]

85 *NUMSA v Mahle Behr*:par. 14.
86 *NUMSA v Mahle Behr*:par. 15.
87 *NUMSA v Mahle Behr*:par. 15 (emphasis supplied).
88 *NUMSA v Mahle Behr*:par. 18. In emphasising this point further, the court states that NUMSA therefore did not have "an opportunity to engage with the [R]egistrar on the content, form and time frame of any amendment to its balloting procedures and requirements". *NUMSA v Mahle Behr*:par. 18.
89 *NUMSA v Mahle Behr*:paras. 19-21.
90 *NUMSA v Mahle Behr*:par. 21.
91 *NUMSA v Mahle Behr*:par. 21.
92 *NUMSA v Mahle Behr*:par. 22.
93 *NUMSA v Mahle Behr*:paras. 22-23.

Several points can be made regarding the decision reached by the LAC. First, it affirmed the purpose and consequence of sec. 67(7), and its role as the "shield" to the effects of strike ballot irregularities. Secondly, the need to preserve the right to strike was emphasised, in light of a purposive interpretation subsection 39(2) of the Constitution. This serves to reiterate that the *LRAA* amendments have to be interpreted so as to not impact on the fundamental right to strike, as a central tenet to collective bargaining in this country. Thirdly, the interpretation of the transitional provision of the *LRAA* was clarified. Fourthly, and directly coupled to the aforementioned, is the role of the Registrar, which is central to unions amending their constitutions to bring about alignment with the new *LRA* provisions dealing with strike ballots.

NUMSA v Mahle Behr shook the proverbial foundations of the prior viewpoints that the *LRAA* amendment had seen secret and recorded strike ballots both return, and were now compulsory, in South Africa's collective labour space. Rather, the LAC decision simply affirmed what had always been true in the context of the post-1995 *LRA*: Compliance by trade unions in respect of their own constitutions in terms of pre-strike ballots is a statutory requirement, but only to the extent that such remains nonetheless completely shielded by sec. 67(7). With the position in the wake of *NUMSA v Mahle Behr* now set, what remains to be addressed is the extent of the Registrar's powers to act in terms of the *LRA* amendments.

3.2.2 *DEMAWUSA V REGISTRAR*

A mere two and a half months[94] prior to *NUMSA v Mahle Behr* being heard, on 10 March 2020, Lagrange J was again to hand down judgment in a matter involving the Democratic Municipal and Allied Workers Union of South Africa (hereafter, DEMAWUSA),[95] namely that of *DEMAWUSA v Registrar*.[96]

94 Seventy-eight days, to be precise.

95 Mention can also be made of three further decisions involving DEMAWUSA. The first, *Johannesburg Metropolitan Bus Services SOC Ltd v Democratic Municipal & Allied Workers Union* 2020 41 ILJ 217 (LC), was heard on 20 September 2019 before Lagrange J, albeit in terms of a leave to appeal application tangentially related to the (at the time) ongoing strike action emanating from the earlier *Metropolitan Bus* order. The second was that of *Johannesburg Metropolitan Bus Services SOC Limited v Democratic Municipal & Allied Workers Union of South Africa* [2019] ZALCJHB 75 (2 June 2021), which related to the same facts presented by the prior DEMAWUSA/*Metropolitan Bus* matters. Again, as in the prior matter, no discussion of the merits pertaining to ballots was entered into (both being decided on purely procedural grounds). The third, *Democratic Municipal & Allied Workers Union of South Africa (DEMAWUSA) & Registrar of Labour Relations* [2020] ZALCJHB 110 (6 July 2020) was related to the ongoing strike action, but also turned on procedural matters. That said, the latter decision did at least confirm that the Registrar had, by mid-2020, opted to challenge the order against its de-registration of DEMAWUSA in terms of sec. 106(2A). Subsequent enquiries, made of the Labour Court and Registrar's Office in researching this article, confirms that by late 2022, the question of the initial de-registration process (and appeals thereto) are still to be finalised.

96 *DEMAWUSA v Registrar* 2020 41 ILJ 1968 (LC).

The genesis of the urgent application was for interim relief against the Registrar, who, in terms of sec. 106(2A)(b), had threatened to de-register the union, following the issuing of notice in terms of sec. 106(2B).[97] The Registrar's actions stemmed from enquiries made by the Registrar of DEMAWUSA regarding the "authenticity of the ballot" held in September 2019, pursuant to the court order of Lagrange J in one of the initial decisions, being *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union*.[98]

The court noted that it was not made clear whether "such an enquiry is now standard practice of the office of the [R]egistrar".[99] At its core was the Registrar's contention that the union had failed to comply with secs. 99 and sec. 100 of the *LRA* (by not fulfilling its obligation to provide proof of the ballots to the Registrar),[100] and had "failed to comply with guidelines for balloting regarding members having a secret ballot before embarking on strike action".[101] The union was accordingly "invited to make representations within 60 days"[102] for reasons as to why the union should not be de-registered.[103]

Putting aside the facts considered by the court,[104] and apart from noting that DEMAWUSA filed an application for leave to appeal against the de-registration decision,[105] a key consideration by Lagrange J revolved around the likelihood of success of the appeal, in terms of assessing the existence of a *prima facie* right for the purposes of the interim relief being sought.[106] After considering the submissions raised by DEMAWUSA and the Registrar,[107] the court concluded that the union "has an arguable case on appeal", by reasoning that:

> On the face of it, the deregistration of the union on account of an alleged failure to comply with balloting provisions on one occasion and non-provision of information connected therewith despite express requests from the [R]egistrar to furnish it, does seem a somewhat drastic step

97 *DEMAWUSA v Registrar*:paras. 6-10. See *Cancellation of registration of a trade union: Democratic Municipal and Allied Workers Union of South Africa (DEMAWUSA) (LR 2/6/2/2420)* GN R84 Government Gazette 2020:4(42988), issued by the Deputy Registrar of Labour Relations.

98 *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union* [2019] 45883 JOL 1 (LC).

99 *DEMAWUSA v Registrar*:par. 6.

100 In terms of secs. 99(c) and 100(f) *LRA*, respectively. *DEMAWUSA v Registrar*:par. 9.

101 *DEMAWUSA v Registrar* 1971-1972:par. 7.

102 In terms of sec. 106(2A)(b).

103 *DEMAWUSA v Registrar*:par. 7.

104 This includes the correspondence between the Registrar and union [*DEMAWUSA v Registrar*:par. 10], the issues as to whether the correspondence from the Registrar was properly received [*DEMAWUSA v Registrar*:par. 10], personnel changes at the union [*DEMAWUSA v Registrar*:par. 11], and a meeting between the Registrar and DEMAWUSA, and what allegedly transpired therein [*DEMAWUSA v Registrar*:par. 12].

105 *DEMAWUSA v Registrar*:par. 13.

106 *DEMAWUSA v Registrar*:par. 16.

107 *DEMAWUSA v Registrar*:paras. 16-19.

> to have taken and it is arguable that the guidelines on balloting were not intended to be binding prerequisites for the acceptable conduct of a secret ballot,[108] failing compliance with which it would not qualify as such.[109]

With this established, the court then considered the question of irreparable harm, and the balance of convenience (again for the purposes of the interim relief being sought). In this instance, Lagrange J spoke of other de-registration cases that have been brought before the South African courts having as their focus the need to protect union members from maladministration on the part of the union's own officials or office-bearers – who use the "resources of the union for their own personal interests".[110] *In casu*, the court reasoned that "there are no union members complaining of ballot rigging or any evidence that it would not be in the interests of DEMAWUSA members to allow the union to continue to operate".[111] Nor would the Registrar's own interest ("in ensuring compliance with the LRA") be prejudiced were the interim order to be awarded in favour of the union.[112] For the above reasons,[113] the court ruled in favour of DEMAWUSA.[114]

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108 The Registrar's argument in this regard was that "'the guidelines are an expression of the statutory requirement regarding secret ballots' and DEMAWUSA should have complied with them" [*DEMAWUSA v Registrar*:par. 17].

109 *DEMAWUSA v Registrar*:par. 19.

110 *DEMAWUSA v Registrar*:par. 22. Whilst no specific decisions were listed by the court, reference can be made to several cases where the question before the courts was whether unions were functioning as "non-genuine" [subs 106(2A)(a) *LRA*] labour associations, including *National Employer's Forum v Minister of Labour & Others* 2003 5 BLLR 460 (LC); *NEWU v Minister of Labour & Others* 2006 10 BLLR 951 (LC); *United People's Union of SA v Registrar of Labour Relations* 2010 31 ILJ 198 (LC); *Unica Plastic Moulders CC v National Union of SA Workers* 2011 32 ILJ 443 (LC), and *National Entitled Workers Union & Others v Director, Commission for Conciliation, Mediation & Arbitration & Others* 2011 32 ILJ 2095 (LAC). See further fn 35 and fn 120.

111 *DEMAWUSA v Registrar*:par. 22.

112 *DEMAWUSA v Registrar*:par. 22.

113 Along with the consideration of urgency. See *DEMAWUSA v Registrar*:paras. 23-24.

114 As is to be expected, the outcome saw its fair share of reporting in the media. South African Federation of Trade Unions (SAFTU) "SAFTU condemns in the strongest terms the deregistration of its affiliate DEMAWUSA", https://rebrand.ly/panelhx (accessed on 21 August 2020); Mkentane "Saftu calls on labour registrar to resign after court victory", https://rebrand.ly/qads27k (accessed on 07 June 2021); Anonymous "SAFTU demands resignation after attempts to deregister municipal workers union", https://wrp.org.uk/features/demawusa-strikers-at-metrobus-were-accused-by-molefe-of-not-holding-a-secret-ballot-before-taking-strike-action/ (accessed on 25 June 2021); General Secretary, SAFTU "SAFTU welcomes judgment suspending the deregistration of DEMAWUSA", https://globalafricanworker.com/content/saftu-welcomes-judgement-suspending-deregistration-demawusa (accessed on 16 June 2021); Sidimba "Council deregisters union", *The Star* (14 February 2020), and Sidimba "'Cut ties with deregistered Demawusa': Local Government Bargaining Council issues a written warning to municipalities and unions", *Cape Times*, 14 February 2020.

4. THE ROLE OF THE REGISTRAR IN TERMS OF PRE-STRIKE BALLOTS

4.1 ANALYSIS OF THE PRESENT POSITION

At this juncture, important observations can be made in light of the *DEMAWUSA v Registrar* decision. First, it would appear that the Registrar took the initiative of operating within the parameters of how the *LRAA* had been interpreted, given what had transpired in the initial judgments. The Registrar pressed for compliance with the *LRA*'s (new) requirements to hold a secret strike ballot, as it was understood at the time prior to *NUMSA v Mahle Behr*. It is submitted that *DEMAWUSA v Registrar* essentially amounted to a "test-case", where the steps taken were to assess the extent of the Registrar's powers (from a judicial perspective) as framed by the *LRAA* amendment.

Secondly, the labour court assesses the actions of the Registrar in terms of sec. 106(2A)(b), and holding there to be an "arguable case" to be answered for the "drastic step to have [been] taken", this being the de-registration attempt.[115] It must be borne in mind that the decision in *DEMAWUSA v Registrar* should be viewed against an underlying context involving a transitional phase of adjustment to significant amendments to the *LRA*. A further point also stands to be made. It must not be ignored that *DEMAWUSA v Registrar* was an urgent application, seeking interim relief, with the court considering the balance of convenience to have favoured the union, until such time that the merits could be properly aired, pending the outcome of the Registrar's appeal against the decision. It is accordingly not surprising that the court was inclined to prefer a cautious and narrow interpretation of what is required of unions during such a period.

Thirdly, the very necessary point must be highlighted regarding what was *not* questioned by the court,[116] namely whether the Registrar *should be* permitted, in terms of the *LRA*, to make these enquiries as and when deemed fit. More on this below.

Fourthly, the court focused on the need to protect the rights of union members, and it being in their interest that the union is then not de-registered. This latter consideration (of the members' interests) was placed above that of the Registrar's interest (of ensuring compliance with the *LRA*). This is of critical importance.

With this in mind, when viewed collectively, all of the above arises from a set of facts presented within the solitary court case that has (to date) considered the ambit of the Registrar's powers to de-register a non-compliant union (for failing to hold a pre-strike ballot in line with the amendments to the *LRA).* It was held that a single problematic pre-strike ballot serves as

115 *DEMAWUSA v Registrar*:par. 19.

116 This despite, as indicated in the earlier discussion, querying whether this action (of making enquiries of compliance within days of a ballot supposedly having taken place) was "now standard practice". *DEMAWUSA v Registrar*:par. 6.

insufficient grounds to justify the Registrar's interference in the internal relationship between a union and its members. This consideration of a *single* ballot with issues and no evidence of complaints from union members saw the court conclude that de-registration amounted to a disproportionate response to the alleged violation(s) committed by the union.

But herein lie the key questions. What of a situation where the union in question has demonstrated a failure to comply over the course of multiple pre-strike ballots? What of a future scenario where a union is consistently and repetitively disregarding its own constitution, in terms of conducting a (secret and recorded) pre-strike ballot? In other words, what is to be done when the transitional phase is over, and registered unions in South Africa have had enough time to effect the required changes to their constitutions, but still choose to ignore it? Who is then best placed to act, and as importantly, who would be the initiator of such action?

4.2 THE RATIONALE FOR THE INVOLVEMENT OF THE REGISTRAR

It is in response to this question that this study asserts that the Registrar is best placed to enforce compliance with the provisions of secs. 95, 99, and 100 of the *LRA*, under the threat of de-registration.

However, this is not to ignore the obvious other answer, namely the union members themselves. Central to this would be sec. 158(1)(e), which empowers the Labour Court to determine a dispute between a union and its members, "about any alleged non-compliance with … the constitution" of that union. Alternatively, there is the notion of trade union democracy, which is premised on unions being a democratically arranged organisation. If members do not like how their union is functioning, then they can vote out the offending officials, to thereby restore any desired compliance. But suffice it to state that a discussion on the actual, lived "power of members" *vis-à-vis* their unions, and the potential risks associated with members taking their own union to court, are the subject of another story, for another day.[117]

117 The suggestion by La Grange J in one of the initial judgements [*Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union and Others* [2019] 45883 JOL 1 (LC):par. 5] of how sec. 158(1)(b) could potentially be utilised by "a party with a legal interest" to compel compliance with any provision of the *LRA* (thereby, including the transitional provisions and, by implication, the amended *LRA* insofar as it applies to pre-strike ballots) is acknowledged. However, in light of the earlier discussion, this would still not trump the protection afforded by sec. 67(7), which calls into question its potential use.

Thus, in returning to the preferred solution. As an objective and neutral party,[118] with the necessary resources available to its office, the Registrar is uniquely placed to serve as "ombudsman" to the organised labour field. After all, it is mere compliance with that union's *own democratically instituted constitutional provisions* that the Registrar would seek to enforce. And to be clear, the threat of de-registration is the "means to an end", not the "end in itself". Furthermore, the Registrar can draw from past experience in matters involving the de-registration of unions, albeit then being focused on those scenarios where unions (or rather, their officials) were abusing their position within those labour associations to the point where they were held not to be "genuine trade unions".[119] The key, however, is that the Registrar, in terms of the new *LRA*, has a storied history of intervening in the affairs of unions in seeking protection of that union's membership.[120]

As such, what is being suggested is a mechanism that is *triggered* by long(er)-term, recidivistic behaviour by unions or their officials, in repeatedly ignoring their own constitutional mandate owing to their members. This would thereby include the additional opprobrium of ignoring the requirements of secs. 95, 99, and 100 of the *LRA* that are (after all) merely focused on ensuring properly functioning unions. This would then not be an attack on the constitutional right to strike, nor an attack premised on strike ballots not being held as required in terms of the *LRA* or the union's own constitution. Rather,

118 Reference can be made, in this instance, to the important additions of secs. 108(4) and 108(5), by means of sec. 11 of the *LRAA*. The former affirms both that the Registrar and deputy registrars are "independent and, subject only to the Constitution and the law", and that they "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice". The latter [sec. 108(5)] affirms that "[n]o person or organ of state may interfere with the functioning" of the Registrar (or, presumably, their office). Whilst outside the immediate ambit of this article, the origin of the aforementioned provisions stems from the legal battles between the former Minister of Labour and the then Registrar, in particular as a result of the latter's attempts to place a prominent union under administration. See *Public Servants Association of SA v Minister of Labour* 2016 37 ILJ 185 (LC) and *Minister of Labour v Public Servants Association of SA* 2017 38 ILJ 1075 (LAC), both decided in favour of the Registrar, for insightful background to the modern role of the Registrar within the South African collective labour relations field.

119 This being regulated by the *Guidelines issued in terms of sec. 95(8) of the Labour Relations Act 66/1995* GN R1395 Government Gazette 2018:20(42121).

120 See, for instance, the list of cases under fn 35 and fn 110 above. In *United People's Union of SA v Registrar of Labour Relations* 2010 31 ILJ 198 (LC) 199C-F, the following was said of the Registrar's role: "[T]hese benefits come at the price of submission to the reporting requirements established by s 100 of the LRA, all of the requirements that are intended to provide a guarantee to union members that their membership subscriptions have been utilized to further their interests … Ultimately, it is the registrar who is the underwriter of this warranty, and like all underwriters, the registrar must protect the general interest at the expense of the particular when this is necessary. The registrar is accountable to the public as a whole should a registered trade union … fail to implement the required financial and administrative controls". Lastly, note the court's view in recommending that the Registrar be approached to facilitate an intractable internal dispute in *SA Airways SOC Ltd v National Transport Movement* 2016 37 ILJ 2128 (LC) 2139E-G.

it is merely a procedural mechanism, applied by a neutral party best suited to such action, designed to bring about compliance with those core provisions within the *LRA* that are focused on ensuring administratively sound labour associations to the ultimate benefit of the membership, and union democracy.

4.3 THE PROCEDURE UNDERPINNING INVOLVEMENT BY THE REGISTRAR

What of the procedure to then be followed? And in terms of which provisions of the *LRA*? The underlying approach must be grounded within sec. 106 of the *LRA*. As demonstrated, sec. 106(2A)(b) draws compliance with secs. 99 and 100 into the scope of de-registration proceedings. A close reading of sec. 100 (regulating the duty to provide information to the Registrar) brings to light a key observation. All of the subsections, bar one, have some form of time frame attached to them.[121] The sole subsection that does *not* contain reference to a time period, or expected date by which something is to be done, is that of the new sec. 100(f), which points back to the records listed in sec. 99.

As such, on a plain reading of sec. 100 together with sec. 100(f), "[e]very registered trade union … *must* provide to the registrar … the records referred to in section 99".[122] When considering sec. 99, it becomes apparent that, unlike the duty to keep a list of its members,[123] both secs. 99(b) and 99(c) have time periods associated with them, namely a rolling window of three years. In the case of the latter, ballot papers or related records are to be kept for three years "from the date of every ballot".[124] Of critical importance, however, is that, prior to the *LRAA* amendments, the union was simply required to keep these records. It was, in other words, an administrative requirement attached to the internal functioning of the union. With the addition of sec. 100(f), however, these *internal* processes have now been brought into the *external* domain, via the obligated reporting to the Registrar, at the latter's request.

It is accordingly submitted that the omission of a time frame from sec. 100(f) was the deliberate intention of the legislature. Why else would some form of time period (or related limitation) not have been explicitly included (as it was with all of the other subsections of sec. 100), other than it being expected for the Registrar to make such enquiries as and when it might appear that unions are not acting in compliance with sec. 99? By implication, this then means evidence of ballots, including pre-strike ballots, as regulated by sec. 95(5) read with sec. 95(9) of the *LRA*.[125]

121 Sec. 100(a) requires a member statement by "31 March each year". Sec 100(b) requires action "within 30 days of receipt" of the union's auditor report. So too, sec. 101(c), which speaks to "within 30 days of receipt" of a written request by the Registrar, whilst sec. 101(d) and 101(e), speak to a period of 30 days following the appointment of certain officials of the union, or from when an address changed.

122 Emphasis supplied.

123 Sec. 99(a).

124 Sec. 99(c).

125 Compare, however, against Grogan 2020:1, who, most likely against the backdrop of the timeframes within the remainder of sec. 100, simply asserts that "a new subsection 100(f) [has been added] requiring unions to annually submit all ballot records to the registrar".

To conclude, the procedure to be used by the Registrar is premised on the duty of unions to keep a rolling three-year window of ballots (including pre-strike ballots), which would serve as evidence of recorded and secret ballots having been conducted (in alignment with the amended constitution of that union).[126] These records must now be provided to the Registrar.[127] Whilst a *single* non-compliant ballot has already been confirmed as insufficient grounds for the Registrar to invoke his powers in terms of sec. 106(2A) and (2B) – were the Registrar to request the balloting information and it becomes evident that the union is in non-compliance with a *series* of ballots – this could then speak to a pattern of non-compliance. It then remains for the Registrar to evaluate the threshold put forward in *DEMAWUSA v Registrar*, of whether the interests of the membership are being repeatedly infringed to the point where they face the very elements of intimidation and violence that the *LRAA* sought to prevent.[128]

4.4 THE JUSTIFICATION FOR THE INVOLVEMENT OF THE REGISTRAR

To conclude this section, I return to the questions posed earlier. What would the outcome have been had the union in question been continuously disregarding its own constitutional provisions regarding strike balloting? What if, as in *DEMAWUSA v Registrar*, the Registrar had contacted the union, requesting information into the alleged ballots being held, and no satisfactory reply or evidence of ballots was forthcoming? What if a ballot had been held, but it was not recorded, or secret, as required by that union's own constitution? What if this had been happening repeatedly, over a period of months or years? What if it had been brought to the attention of the Registrar, by concerned union members, who were fearing for their personal safety, as a result of intimidation in the absence of a secret ballot? Would these circumstances warrant the court's affirmation of the actions to be taken by the Registrar, in light of sec. 106(2A)(b)?

In answering this, the following point must be reiterated. Trade unions in South Africa have enjoyed the full statutory support and backing of the various legislative mechanisms within a broader pro-union collective bargaining system for the better part of twenty-five years. Put differently, to quote from *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union*[129] (albeit in the context of voicing the court's displeasure at the conduct of unions (and employers)[130] in terms of strike violence):

126 Sec. 99(c).
127 Sec. 100(f).
128 See *Memorandum on the Objects of the Labour Relations Amendment Bill, 2017*:182-184, 191.
129 *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union* 2018 39 ILJ 609 (LC).
130 *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* 2018 39 ILJ 609 (LC):615B-C.

> [I]t is time for everyone to grow up and usher employment relations into the modern constitutional era where parties responsibly and lawfully exercise their respective rights.[131]

The time has long since passed where trade unions can claim ignorance of the *LRA* and its underlying premise.[132] As such, it is submitted that, in the scenario of a continually recalcitrant union, ignoring both its own constitutional provisions and, by implication, the possible safety of its members, a duty is in fact *owed* by the Registrar to ensure that unions respect the underlying principles of union democracy, and their own constitutions. In *Hlungwani v SA Policing Union*,[133] which in turn cites the Constitutional Court,[134] it was said that "[t]o allow unions to operate outside their constitutions, at their discretion, would go against the core constitutional values such as accountability, transparency and openness",[135] and that a "voluntary association, such as NUMSA, is bound by its own constitution ... [i]t has no powers beyond the four corners of that document."[136] Simply stated, the spectre of violence that so frequently accompanies industrial action in South Africa stains our collective bargaining system far beyond that which can be remedied by any positives to be gleaned from the post-1995 dispensation, and remains all the more egregious in the shadow of the tragedy at Marikana. If strike ballots under the new measures are to offer even a glimmer of likelihood at reducing levels of violent intimidation, and shore up the principles of union member democracy, then it is an ideal worth striving towards. The Registrar remains best placed to do so.

131 *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* 2018 39 ILJ 609 (LC):615C.

132 Reference can be made, in this instance, albeit in terms of strike violence and the actions of both unions and employers, to the dictum penned by the late Judge Anton Steenkamp, in *In2food (Pty) Ltd v Food & Allied Workers Union & Others* 2013 34 ILJ 2589 (LC):2591G-I – cited with approval by the LAC in *Food & Allied Workers Union v In2Food (Pty) Ltd* 2014 35 ILJ 2767 (LAC):2770A-B, and in *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* 2018 39 ILJ 609 (LC):615D-E.

133 *Hlungwani v SA Policing Union* 2020 41 ILJ 2662 (LC).

134 *National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd)* 2020 6 BCLR 725 (CC).

135 *Hlungwani v SA Policing Union & Another* 2020 41 ILJ 2662 (LC):par. 18, citing *National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & Others* 2020 6 BCLR 725 (CC):par. 64.

136 *Hlungwani v SA Policing Union & Another* 2020 41 ILJ 2662 (LC):par. 17, citing *National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & Others* 2020 6 BCLR 725 (CC):par. 47.

5. CONCLUSION

There has been a pronounced judicial shift away from how the *LRAA* was initially expected to be received within the South African legal system. Whilst the *Guidelines* pertaining to balloting still needs to be re-issued, relative certainty has been obtained. Pre-strike ballots are no longer in flux.

It was in the examination of the decisions pertaining to pre-strike balloting, the interpretation of the *LRAA* and how this impacted on the *LRA* and the *Guidelines*, that what became apparent is the critical role that can be played by the Registrar in terms of navigating the broader collective labour space, post-*NUMSA v Mahle Behr.*

That this all is still subject to the central tenet of the right to strike, with the new measures seeing deferential interpretation to that end. And of course, that the shield of sec. 67(7) is very much still in place, and even more relevant now than prior to the *LRA* amendments. Thus, whilst strike ballots are indeed newly reintroduced into our collective labour relations system, they remain so, first and foremost, only by way of compliance with sec. 95 of the *LRA*, as read against sec. 67(7).

The core finding of this article is that the Registrar is best placed as an alternative to the divisive and adversarial contestation over strike balloting. And, as importantly, how this approach avoids a direct challenge to the constitutional right to strike.

Furthermore, the *how* of the Registrar's role, framed within the de-registration processes of sec. 106, and its interplay with secs. 99 and 100, is shown to align ultimately with the justification of the Registrar's involvement. It is the protection of union members against violent intimidation in cases of future repeatedly recalcitrant labour associations, grounded both in union democracy and the constitutional principles of accountability, transparency, and openness, against which the Registrar should be measured. It is submitted that the courts, unions, their members, employers, and the broader community should strive to this end. It is only in achieving this ideal that the South African collective bargaining system as a whole will be able to reap the rewards of greater industrial stability.

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