



- (1) Reportable: NO
(2) Of interest to other Judges: Yes



Signature

12 August 2026

Date

THE LABOUR OF SOUTH AFRICA, CAPE TOWN

Case no: C601/2021

In the matter between:

MASSMART LIMITED T/A MASSMART LOGISTICS

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER A VAN DIEMAN N.O.

Second Respondent

T UAWU OBO MEMBERS

Third Respondent

Heard: 23 June 2023

Delivered: 12 August 2026

JUDGMENT

COETZEE, AJ

Introduction

- [1] This is an unopposed application for the review of an arbitration award (*the award*) made by the second respondent under the auspices of the first respondent.
- [2] In terms of the award, the third respondent, a trade union, was granted certain organisational rights. More particularly, the third respondent was granted the rights in terms of sections 12 and 13, respectively, of the Labour Relations Act 66 of 1995 (*the Act*) to have access to the applicant's workplace and to deductions of trade union subscriptions from its members employed by the applicant, respectively.
- [3] The arbitration proceedings and the award made in relation thereto is the subject of this application. Therefore, it is prudent to examine what transpired in relation to the arbitration proceedings. However, before doing so, it is necessary to deal with the applicable legislative provisions.

The applicable legislative provisions

- [4] Statutory organisational rights are contained and defined in chapter 3, part A of the Act (sections 11 to 22).

[5] The statutory organisational rights in terms of the Act can be acquired only by a (i) registered trade union, (ii) which is '*sufficiently representative*', (iii) in a workplace, (iv) of an employer.¹ Only the second requirement - '*sufficiently representative*' - was in dispute in the arbitration that is the subject of this review application.

[6] Section 21(8) of the Act refers to '*a representative trade union*'. In turn, the phrase '*a representative trade union*' is defined in section 11 of the Act as a registered trade union, or two or more registered trade unions acting jointly, that are '*sufficiently representative*' of the employees employed by an employer in a workplace. This is how the phrase '*sufficiently representative*' comes into focus.

[7] The real issue in dispute in the arbitration before the second respondent was whether the third respondent is a trade union that is '*sufficiently representative*'.

[8] Section 21(8) of the Act, provides as follows:

'(8) If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner-

(a) must seek-

¹ See: Darcy du Toit et al, 'Labour Relations Law, A Comprehensive Guide', Seventh Edition, pp292 and 293.

- (i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and
- (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;

(b) must consider-

- (i) the nature of the workplace;
- (ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;
- (iii) the nature of the sector in which the workplace is situated;
- (iv) the organisational history at the workplace or any other workplace of the employer; and
- (v) the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed-term contracts, part-time employees or employees in other categories of non-standard employment; and

- (c) may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.’

[9] The phrase ‘*sufficiently representative*’ is not defined. The factors that should be taken into account in determining whether or not a trade union is ‘*sufficiently representative*’ are listed in section 21(8) of the Act. Thus, section 21 of the Act guides an arbitrator where there is a dispute as to whether a trade union is ‘*sufficiently representative*’.

[10] In deciding whether a union is ‘*sufficiently representative*’, the arbitrator must follow two guidelines:

[10.1] firstly, an arbitrator should seek to minimise the proliferation of unions in the workplace and encourage a system of representative unions in the workplace, as well as to minimise the financial and administrative burden on the employer which would arise if organisational rights were granted to more than one union. However, this does not mean that minority unions should be refused organisational rights if they are found to be sufficiently representative for the purpose of exercising those rights;² and

[10.2] secondly, an arbitrator must consider the nature of the workplace, the nature of the organisational rights the union seeks to exercise, the nature of the sector, the organisation history at the workplace or any

² See: section 21(8)(a) of the Act.

other workplace of the employer, and the composition of the workforce in the workplace.³

[11] While the first list of factors may steer the arbitrator towards higher thresholds, the second may suggest lower thresholds.

[12] The arbitrator's task is to balance the different factors contemplated in section 21(8)(b), while giving primacy to the guidelines in section 21(8)(a).

[13] Finally, and for the sake of completeness, I record that the requirement of a 'workplace' for the exercise of organisational rights was not disputed in the arbitration and neither in the review application. In the award, at paragraph 23, the second respondent accepted that the applicant '*...is a national workplace and that the Brackengate is not independent of Massmart's national office...*'. Given that this is an unopposed review application, there was no challenge to this finding. Thus, it is not in dispute that the Brackengate/Cape Town distribution centre, where the third respondent's members are employed, does not qualify as an independent 'workplace', as contemplated in section 213 of the Act

The arbitration proceedings:

³ See: section 21(8)(b) of the Act.

[14] The transcript⁴ of the arbitration proceedings formed part of the record of the arbitration proceedings (*'the arbitration record'*) that was filed in this review application, as well as the bundles⁵ submitted by the applicant and the third respondent, respectively, for purposes of the arbitration.

(i) *The case for the third respondent at the arbitration*

[15] The case for the third respondent at the arbitration was that its membership was based in Cape Town, i.e. at the applicant's Cape Town distribution centre. They had engaged with another trade union, USASA, who informed them that they had been '*...granted rights for a specific region which is KZN. Hence we believe that it should be fair that Massmart grants us rights within this particular DC which we are claiming that we have 125 members at and it is the majority within the particular DC. So I think that is the basis of our case today Commissioner.*'⁶ The third respondent contended that their members were the majority at the applicant's Cape Town Distribution Centre.

[16] The third respondent questioned whether there had been thresholds put in place for the granting of organisational rights, as they had not received communication in this regard. The third respondent also queried how the existing trade unions, South African Commercial Catering and Allied Workers Union (*'SACCAWU'*), Transport and Allied Workers Union of South Africa

⁴ See: pp1 to 26 of the arbitration record.

⁵ See: pp47 to 58 of the arbitration record for the applicant's bundle; and pp59 to 71 of the arbitration record for the third respondent's bundle.

⁶ See: arbitration transcript, p6, lines 5 to 11.

(‘TAWUSA’) and United Association of South Africa (‘UASA’), who are herein collectively referred to as *‘the three trade unions’*, were granted organisational rights and what their numbers were when such organisational rights were granted. In this regard, it also pointed to the dwindling percentage of the three trade unions, particularly TAWUSA and UASA.⁷

[17] Clive Fredericks (*‘Fredericks’*), who represented the third respondent at the arbitration, stated that *‘...from the respondent’s submissions, he has communicated through to an official of ours, Mr Pambo a threshold of 20%, but there is no tangible document that speaks of that.’*⁸ Vukile Pambo (*‘Pambo’*) is *‘Mr Pambo’* referred to by Hendricks.

[18] Fredericks did not dispute that the 20% threshold requirement was communicated to Pambo. However, he questioned the application of the 20% threshold requirement in relation to SACCAWU, TAWUSA and UASA. In this regard he stated that: *‘But when the respondent says that historically SACCAWU has always been had these rights, but if you refer to page 1 of their bundle, then it speaks to SACCAWU having 13%. Then it raises the question about the 20% thresholds, it is even more alarming where on the same page you see TAWUSA with 19% as well as currently you see UASA with 1.4% and then you see TAWUSA currently with 8.1%. So the question is, the question that I am left with in other words Commissioner which I do not think it has been satisfactorily answered, how was this threshold recorded, how was it*

⁷ See: arbitration transcript, p6, line 23 to p7, line 5, p19, line 24 to p21, line 24.

⁸ See: arbitration transcript, p19, line 24 to p20, line 2.

communicated and how was it affected, because my understanding is if a union falls below this threshold then section 21.11 should apply where you give the trade union notice that you are going to apply to the CCMA to withdraw the rights based on the failing membership.’⁹

- [19] Further in relation to the issue of the application of the 20% threshold requirement, Fredericks stated that: *‘So currently what we are sitting with Commissioner is that Massmart does not dispute that there are three unions within, recognised union within Massmart Logistics. One union currently has 1.4% membership. Not even discussing in terms of what the workplace is, where these people organise, in other words just in terms of numbers we are sitting with a trade union that has only 24 members within Massmart currently who is enjoying organisational rights. So then the question that we are faced with is, when as I have stated, when was the threshold implemented and how is it applied consistently? Is it a mere tactic by the employer to keep other unions outside and to keep the preferred unions within Massmart or what is the rationale and the reasoning for the 20% and how was it concluded with which union, which, from these submissions I am still not clear on the particular matter Commissioner...’¹⁰*

- (ii) The case for the applicant at the arbitration

⁹ See: arbitration transcript, p20, line 9 to line 22.

¹⁰ See: arbitration transcript, p21, line 21 to line 20.

[20] The case for the applicant at the arbitration was that it is a national business; it has a national footprint. It serves stores in South Africa, such as Makro, Builders Warehouse and Game through its distribution centre network. Its business is divided into a wholesale and retail division.¹¹

[21] The applicant showed the state of the membership of the three trade unions at various stages:

[21.1] of the applicant's staff of 1208 as November 2019, SACCAWU enjoyed a membership of thirteen percent (13%), TAWUSA a membership of twenty four percent (24%), and USASA a membership of twenty two percent (22%);

[21.2] of the applicant's staff of 1224 as January 2020, SACCAWU enjoyed a membership of twenty one percent (21%), TAWUSA a membership of nineteen percent (19%), and USASA a membership of twenty one percent (21%); and

[21.3] of the applicant's staff of 1693 as August 2021, SACCAWU enjoyed a membership of twenty four percent (24%), TAWUSA a membership of eight point one percent (8.1%), and UASA a membership of one point four percent (1.4%).

¹¹ See: arbitration transcript, p8, line 18 to p19, line 10.

- [22] Greg Nel ('Nel'), who represented the applicant at the arbitration, stated that at November 2019, the applicant had taken a decision to set a threshold of twenty percent (20%) for a registered trade union to enjoy statutory organisational rights (*'the threshold requirement'*).¹²
- [23] Nel also stated that he personally conveyed the threshold requirement to Vukile Pambo (*'Pambo'*) at a meeting held on 26 May 2021.¹³
- [24] The second respondent questioned Nel (with reference to SACCAWU, TAWUSA and UASA) as to *'...how were these rights to these three unions granted, on what basis did they obtain those rights or what was the threshold or what was the requirement for them to attain these rights at the they received these rights?'*¹⁴
- [25] In response, Nel stated that *'...Based on discussions that I have had with my principal and my principals indicate to me what they did is when these rights were granted the threshold was set at 20% and I think it goes without saying Commissioner that if we were to allow this kind of situation to continue or permit it to take place, then obviously it runs contrary to the legislation itself and it is inevitably going to result in the proliferation of unions not only in the Western Cape but for each and every DC that we have, be it KZN, be it Gauteng, be it*

¹² See: arbitration transcript, p11, line 13 and 14.

¹³ See: arbitration transcript, p11, line 13 and 14.

¹⁴ See: arbitration transcript, p18, lines 11 to 14.

*the Western Cape, we are going to have unions at each and every one of these workplaces and then obviously you know just to manage all of that is then obviously going to be administratively burdensome and unduly oneness on the employer as well. So I mean clearly the legislation discourages you know that kind of situation Commissioner.'*¹⁵ (emphasis added)

[26] Nel, in essence, contended that Fredericks' reference to and reliance on the applicant's bundle to show the dwindling number of the other trade unions was misplaced. Nel stated that the purpose of the applicant's bundle (and the percentage of membership of the three trade unions) was merely to '*... give a snapshot at a certain point in time as to where the levels were and to demonstrate that some of the levels of representation have indeed (inaudible)*'.¹⁶ It is clear from this statement, read with the tables contained in the applicant's bundle, that Nel only made a concession in relation to the fact that the levels of the representation of the three trade unions had dwindled over the years.

(iii) The award

[27] The second respondent dealt with the pertinent issue, for purposes of this review application, in paragraph 18, 19, 20, 22, 24, 25 and 26 of the award.

[28] Of particular relevance to this application is the content of paragraphs 24 to 27:

¹⁵ See: arbitration transcript, p18, line 25 to p19 line 13. See also, arbitration transcript, p23, line 1 to 8.

¹⁶ See: arbitration transcript, p22, line 10 to line 15.

24. Nel handed up in his bundle of documents, that the three trade unions currently enjoying organisational rights are SACCAWU with 24.3%, TAWUSA with 8.1% and UASA with 1.4% membership on a national level. This from a December 2020 membership of 21%, 19% and 21% respectively.

25. Although Nel stated that membership of 20% is now a requirement for the granting of organisational rights, nothing was presented either into evidence or by way of documents communicated to the other trade unions of this supposed fact. It is clear though that the respondent historically tolerated membership with similar numbers as that of UAWU.

26. I am satisfied that due to the historic granting of organisational rights to trade unions with similar numbers as that of UAWU, I considered it fair to ground UAWU the organisational rights sought.

27. Taking all the factors into consideration, I make the following award:

[29] However, before considering the said paragraphs of the award, it is necessary to deal at the outset with the approach adopted by the second respondent at the arbitration. At the arbitration, the second respondent adopted an approach in terms whereof the parties would make submissions and then he would '*...see whether or not there is going to be need for any witnesses.*'.¹⁷ The applicant had a witness who was able to give evidence on '*...for example with the issue of the workplace or any further issues in that regard as well. She is able to testify to a host of matters. Like I said, it just depends.*'.¹⁸ However,

¹⁷ See: arbitration transcript, p4, line 17 and line 18.

¹⁸ See: arbitration transcript, p3, line 16 to line 18.

the third respondent adopted a different approach in terms of which the parties would make submissions. As the arbitration proceedings progressed, it became apparent (and the arbitration transcript reflects this) that the second respondent treated the submissions made on behalf of the parties as their 'evidence'.¹⁹ This approach was problematic because it precluded the parties from testing the 'evidence' by means of cross-examination. In adopting this approach, the second respondent misconceived the nature of the enquiry. A reasonable decision-maker, tasked with presiding over statutory arbitration proceedings will not misconceive the nature of the enquiry. To this end, a reasonable decision-maker will ensure that he conducts the arbitration proceedings in a manner that is procedurally fair and that he properly considers the evidential material placed before him.²⁰

Thus, the approach adopted by the second respondent rendered the award liable to be impugned. This was not one of the grounds of review raised by the applicant. However, this defect in the arbitration proceeding reinforced the applicant's grounds of review.

[30] Central to the finding in the award that the third respondent be granted organisational rights, are the findings in paragraphs 25 and 26 thereof.

[31] In paragraph 25 of the award, the finding is made that '*nothing was presented either into evidence or by way of documents communicated to the other trade unions of this supposed fact. It is clear though that the respondent historically*

¹⁹ See: arbitration transcript, p22, line 3 to line 9.

²⁰ See: *Lesedi Local Municipality v Mphele* (2023) 44 ILJ 1967 (LC) at paras 30 and 31

tolerated membership with similar numbers as that of UAWU.' I have a difficulty with this finding. The second respondent ignored the applicant's submissions that:

[31.1] '...Based on discussions that I have had with my principal and my principals indicate to me what they did is when these rights were granted the threshold was set at 20%';²¹ and

[31.2] Nel personally conveyed the threshold requirement to Pambo at a meeting held on 26 May 2021.

[32] It is not clear from the award why these submissions, which were material, were ignored. I also do not want to speculate too far. But to the extent that it may have been ignored on the basis that it constituted hearsay evidence, it was incumbent upon the second respondent to have dealt with the admissibility of the submissions at the time when it was presented.²²

[33] It also not clear what is meant by the phrase *'... It is clear though that the respondent historically tolerated membership with similar numbers as that of UAWU.'*

²¹ See: arbitration transcript, p18, line 22 to line 25. Also, See: arbitration transcript, p23, line 21 to line 25, where the applicant made the assertion that its submission on the manner on which organizational rights were granted to the three trade unions were not dispute.

²² See: Exxaro Coal (Pty) Ltd v Chipana [2019] 10 BLLR 991 (LAC) at para 31.

[33.1] to the extent that it meant that organisational rights were granted to unions with the same membership size as the third respondent, then it is untenable. As shown in paragraph 21 above, during November 2019 and December 2020 the three trade unions' membership hovered around the 20% threshold requirement. Thus, it cannot be said that the applicant granted membership with similar numbers as the third respondent's membership, which represents only four percent (4%) of the applicant's workforce; and

[33.2] to the extent that it meant that because the membership size of the three trade unions dwindled over the years, and yet the applicant continued to afford them organisational rights, then it is also untenable. The submission made on behalf of the applicant was that it was reviewing the organisational rights of the three unions.²³ The applicant was in the process of dealing with the trade unions as a result of their dwindling membership size. Thus, it could not be accepted, as an undisputed fact, that the applicant tolerated membership with similar numbers as that of UAWU.

[34] The award, in paragraph 26, also contains a finding which is premised on *'the historic granting of organisational rights'*. I have a difficulty with this finding.

²³ See: arbitration transcript, p12, line 16 to line 18. Also, See: arbitration transcript, p22, line 20 to line 25.

[35] There was no evidence led regarding *'the historic granting of organisational rights to trade unions with similar numbers as that of UAWU...'*²⁴.

[36] At best, Fredericks made the following submission on behalf of the third respondent:²⁵

'We believe that from a context of prior engagements with alternative unions within Massmart which I will make reference to which is UASA. They have confirmed to us that they have been granted rights for a specific region which is KZN. Hence we believe that it should be fair that Massmart grants us rights within this particular DC which we are claiming that we have 125 members at and it is the majority within the particular DC. So I think that is the basis of our case today Commissioner.'

[37] This submission, even if it is to be accepted as *'evidence'*, does not amount to evidence of *'the historic granting of organisational rights to trade unions with similar numbers as that of UAWU'*. This submission does not contain any specificity regarding the basis upon which UASA was granted organisational rights within the applicant's KwaZulu Natal operations. Thus, it cannot reasonably and/or rationally support or serve as a basis for a finding that the third respondent was entitled to organisational rights.

[38] Paragraph 27 of the award contains the following statement *'Taking all the factors into consideration, I make the following award:'*. It is not clear what the factors were that the second respondent took into consideration and which lead

²⁴ See: paragraph 26 of the award.

²⁵ See: arbitration transcript, p6, line 2 to line 11.

to the making of the award. The award does not show how the second respondent applied the guidelines as contemplated in paragraph 10 above, to the dispute before him.

[39] The content of paragraphs 14 to 21 contains generalised statements of applicable legal principles. However, the award does not reflect how, for instance, these principles were applied to the factors listed in section 21(8) of the Act and in order for the second respondent to come to the conclusion that the third respondent should be granted organisational rights. The only issue where the award shows that the second respondent applied the applicable legal principles is in relation to what constitutes the workplace.

The grounds of review

[40] The applicant raised three grounds of review, namely:

[40.1] the second respondent committed a gross irregularity in that he committed an error of fact in finding that the applicant had historically tolerated the membership of trade unions with low representativity;

[40.2] the second respondent committed a gross irregularity in that he failed to consider the applicant's submission that the threshold of representativity was communicated to the third respondent; and

[40.3] The second respondent committed a gross irregularity in that he placed too much weight on only one of the factors listed in section 21(8) of the Act.

[41] The brief analysis above of the award shows that all these grounds of review should be sustained. Thus, and for all the reasons stated above, the award is not one that a reasonable decision-maker could reach on the evidence placed before him.

Conclusion

[42] In the final analysis, the award must be reviewed and set aside. This finding does not preclude the third respondent from referring a fresh dispute in terms of which it seeks organisational rights. However, on the submissions made and 'evidence' adduced at the arbitration, the third respondent was not entitled to the organisational rights granted in terms of the award.

[43] Finally, I offer my humble apologies to the parties for the delay in the delivery of this judgment.

Order

1. The award is reviewed and set aside.
2. There is no order as to costs.



Coetzee AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv C Bosch instructed by Webber Wentzel

First to Third Respondents:

No appearance

LABOUR COURT