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The labour relations system and the Marikana massacre

Report submitted to the Marikana Commission of Inquiry

Working Paper

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University of Cape Town

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Table of Contents

1. Objective of this submission 5
2. A chronology of labour relations events 6
3. The labour relations issues: recognition, organisational rights, collective bargaining rights and workplace representation 9
4. An analysis of the agreements 13
5. Conclusions 21
6. Recommendations 23
7. End Notes 24

1. OBJECTIVE OF THIS SUBMISSION

The objectives of the LRA include the "democratisation of the workplace", inter alia by providing a framework within which workers and their trade unions can bargain collectively with their employers to determine wages and conditions of work, and the effective resolution of labour disputes.[1] Any system of labour relations ought to have similar objectives.

It is common knowledge that the killing of 34 people at Marikana on 16 August 2012, which we will refer to as the Marikana massacre, took place during a dispute concerning wages that had not been effectively resolved, and had resulted in an unprotected strike. All or almost all of those killed were employees of Lonmin PLC (Lonmin).

Further, during the dispute in question it transpired that the trade union recognised for purposes of collective bargaining by Lonmin, the National Union of Mineworkers (NUM), did not have the support of Lonmin employees on strike. Since the massacre, another trade union, the Association of Mineworkers and Construction Union (AMCU) has been recognised by Lonmin.

The fact that a wage dispute remained unresolved for as long as it did, and resulted in an unprotected strike, can be regarded as representing a breakdown in the system of labour relations in place at the time. Our objective here is to analyse the elements of the system that were most obviously at issue in the dispute, and to what extent the breakdown that occurred can be ascribed to shortcomings in the system. We do not wish to imply a causal relationship between this breakdown and the Marikana massacre itself.

The labour relations system in place, for the purpose of this analysis, comprises statutory elements, collective agreements and certain practices that may or may not be formalised, but nevertheless have a bearing on the issues identified above. As regards the statutory elements, we will assume a basic knowledge of the Labour Relations Act (LRA), but will where necessary refer to specific provisions thereof, including interpretations by the CCMA and the courts.

Although the analysis focuses primarily on Lonmin, it would be an error to view Lonmin in isolation from the sector of which it is part, namely the mining sector and more specifically the platinum sub-sector. Lonmin is one of three major producers in the platinum sector. Where appropriate we will also refer to collective agreements and events at the other two major producers, namely Anglo-American Platinum (Amplats) and Implala Platinum (Implats).

NUM was the recognised trade union at all three major producers, on the basis that it represented the majority of their workers. At the time of making this submission, AMCU has been recognised as representing the majority at Amplats and Impala and is engaged in a protected strike affecting all three producers. The rapidity with which this has happened has taken most commentators by surprise.

The scheme of this submission is as follows: in the section that follows, section 2, we provide a chronology of events, from a labour relations perspective. Based on this chronology, and the collective agreements it refers to, we identify in section 3 what seem to be the most important elements in the system that are at issue, focusing primarily on Lonmin. In section 4 we analyse how these issues have been dealt with in the collective agreements of the three major producers. In section 5 we draw conclusions from this analysis, and in section 6 we make certain recommendations.

2. A CHRONOLOGY OF LABOUR RELATIONS EVENTS

It is convenient for the purposes of this analysis to situate the various collective agreements that have been entered into by the three major mining companies in the platinum sector in terms of a chronology of events relating to the dispute.

However it should be emphasised that this chronology is derived from collective agreements submitted by the companies concerned, courtesy of the Marikana Commission of Inquiry, as well as from certain written submissions to the Inquiry. We were not provided with all the agreements requested, and would have preferred to supplement these documentary sources with interviews with the parties. For various reasons this was not possible.

July 1997

Implats enters a "threshold agreement" between Implats and NUM and UASA. In terms of the agreement, a union wishing to exercise organisational rights must represent 35% of the workforce within a defined bargaining unit.

March 1998

Implats enters into recognition agreements with trade unions that had achieved the 35% representivity thresholds in bargaining units. It appears that NUM was recognised for the 2 – 8 category and UASA for the artisans/miners and officials categories.

June 2002

Lonmin signs a "central recognition agreement" with NUM, UASA and Solidarity, which in effect regulates organisational rights but not collective bargaining. Signatory trade unions are granted organisational rights and any other trade union seeking to exercise organisational rights must represent 33% of the employees in the bargaining unit. This bargaining unit is not defined, but it refers to Lonmin's entire operation. [2]

October 2006

Implats enters into a recognition agreement with NUM and UASA. The agreement refers to a bargaining unit but this is not defined. It also refers to thresholds of representativeness that are agreed from time to time as per a threshold agreement. No thresholds are defined in the recognition agreement.

March 2007

Implats enters into a recognition agreement with NUM (but not UASA, which appears is no longer representative or recognised). This agreement raises the threshold of representativeness to 50% plus 1 for the exercise of organisational rights, and sets a period of three months for trade unions to meet the new threshold.

February 2009

Amplats signs a recognition agreement with NUM, UASA and NUMSA (although the dates UASA and NUMSA sign do not have a year but appear to have been at about the time NUM signed). This agreement allows unions to be added and dropped during the currency of the agreement. Subsequently TAWUSA was added at some unspecified date.

19 May 2011

There is an unprotected strike at Lonmin's Karee Mine, in which workers demand the reinstatement of the NUM Branch Committee which has been disbanded, allegedly at the instance of NUM. It appears there was no AMCU presence at the Karee Mine at this point.

May/ June 2011

8 500 striking workers at Karee mine are dismissed, and cease to be members of NUM as a consequence. The majority are subsequently re-employed. Some of those that are not re-employed refer disputes to CCMA, assisted by AMCU.

July – August 2011

Most of the re-employed workers do not rejoin NUM but join AMCU. AMCU seeks organisation rights at Lonmin.

Lonmin enters new recognition agreements with NUM, Solidarity and UASA. They are to all intents and purposes the same. These agreements define two bargaining units, and raise the threshold for representativeness to 50% plus one in the category 3-9 bargaining unit where the majority of workers are employed. They also provide for a transitional period of 15 months. This means the recognised unions (also referred to as the 'founding unions') have organisational and collective bargaining rights upon signing the agreement, and 15 months to meet the requirements to become a 'representative trade union.'

December 2011

Lonmin signs a limited organisational rights agreement with AMCU, on the basis that it represents a majority at the Karee Mine. Accordingly, Lonmin ceases to treat all its operations as a single unit or workplace, although this agreement contemplates full recognition for AMCU if it attains 50% plus 1 membership at Lonmin Marikana Operations.

11 January 2012

Rock drill operators (RDOs) at Implats go on strike for two demands: a net monthly salary of R9 000 and that there be no negotiations with NUM. The strike is thus an explicit rejection of a wage agreement that Implats entered into with NUM, and leads to mass resignations from NUM.

At Lonmin, AMCU members start refusing to work 'skoonteer' shift at Karee Mine.

21 February 2012

Lonmin signs 'working-in' agreements with the three recognised (founding) unions (this allows workers to work additional shifts in March and December and then take extra days off in Easter and Xmas). AMCU allegedly instruct members at Karee not to work the additional shifts because they had not been consulted before concluding the agreement.

April 2012

On 21 April a NUM member who is scheduled to work a 'skoonteer' shift is assaulted and dies.

5 May 2012

Lonmin and AMCU sign addendum to Karee limited organisational rights agreement, giving AMCU office facilities and the right to participate in statutory forums at Karee Mine. After reaching this agreement, resistance by AMCU members to the 'skoonteer' shifts dissipates.

12 June 2012

A 'working-in' agreement very similar to those signed with NUM, UASA and Solidarity is signed with AMCU for the Karee Mine.

21 June 2012

RDOs allegedly hold a meeting at Karee Mine, and march on the Karee Mine administration offices pursuant to a "request" that their wages be increased to R12 500 per month. Management agrees to refer the matter to the Lonmin Executive Committee (Exco) and report back.[3]

28 June 2012

Lonmin Exco meets, and decides to request further information on RDO salaries, including what RDOs are paid at other mines.

27 July 2012

After further expressions of dissatisfaction by RDO representatives and workers, Lonmin Exco decide to implement an RDO allowance which it believed brought the remuneration of the RDOs in line with their counterparts at Implats and Amplats.

31 July 2012

The RDO allowance is communicated to RDOs via their line managers. According to Lonmin management, AMCU has declined to become involved in the issue of a RDO allowance.

August 2012

It appears the granting of the allowance to the RDOs generated dissatisfaction both amongst those who did not receive it and amongst the RDOs that considered it inadequate, and this initiated the chain of events that culminated in the massacre.

At this point less than 20% of employees at Karee were NUM members and AMCU had membership of 50.57%.

11 to 16 August 2012

Events on these days are dealt with in detail in a number of witness statements leading up to the massacre of striking workers on 16 August 2012.

Post August 2012

By November 2012 AMCU represented a majority at all Lonmin operations in Marikana area.

In February 2013 AMCU became a party to the 2009 Amplats agreement.

Implats signs a recognition agreement with AMCU in respect of all its Rustenburg operations, for a bargaining unit defined as category A to C4. It seems that this agreement revokes the 2006 agreement with NUM.

3. THE LABOUR RELATIONS ISSUES: RECOGNITION, ORGANISATIONAL RIGHTS, COLLECTIVE BARGAINING RIGHTS AND WORKPLACE REPRESENTATION

Based on the above chronology it is clear that whilst a variety of collective bargaining agreements have been negotiated, recognition agreements play a central role in the labour relations system that is in place at the three major platinum producers. Since recognition agreements predate the LRA, and some commentators believed the LRA would render them obsolete, it is necessary to begin our analysis by considering their role.

Prior to the introduction of the LRA, a system evolved whereby employers and trade unions operating outside the industrial council system would determine a threshold for recognition, by way of what was generally known as a recognition agreement. Recognition entitled a trade union both to what we now know as organisational rights and to collective bargaining rights in the workplace. There was therefore generally one threshold for the exercise of both rights.

Very often, and particularly in a workplace where the workforce comprises predominantly lesser skilled workers, this threshold was set at fifty percent plus one of the workforce employed in what is termed the bargaining unit. Partly this was because no distinction was drawn between organisational and collective bargaining rights, and partly because, for purposes of wage bargaining, any agreement arrived at would have to be extended to the entire bargaining unit. This was both for reasons of equity and practical reasons. To this extent, a principle of majoritarianism was adopted.

Since the adoption of the LRA it clearly becomes necessary to differentiate between organisational and collective bargaining rights. Whereas the LRA by and large leaves the question of a threshold for collective bargaining for the parties themselves to determine, it indicates thresholds for organisational rights. A sufficiently representative trade union is entitled to certain rights (notably stop order deductions and access). A trade union that represents a majority in the workplace is entitled to certain other rights (notably to elect trade union representatives).

Although the term “sufficiently representative” is not defined, it follows from the above that it must mean a trade union with less than a majority in the workplace. CCMA arbitration awards have granted rights such as access and stop order facilities to trade unions representing less than ten percent of the workforce.[4] The approach adopted by arbitrators in these awards appears to be to apply the same threshold to all these rights, although there are policy considerations as to why a lower threshold should apply in the case of stop order facilities, as discussed below.

The same organisational rights which an arbitrator may grant by way of an award may also be the subject of a collective agreement, in terms of section 18 of the LRA, and a protected strike.[5] In the case of section 18, a trade union representing a majority in the workplace may enter into a collective agreement with the employer determining the threshold that a newcomer union must meet in order to qualify for rights of access and stop order facilities. The provision is clearly calculated to regulate trade union competition.

The amendments to the LRA adopted in 2014 include a provision that to some extent mitigates the situation where a trade union sets a threshold for competitors that is unreasonable or unfair. It provides in section 21(8C) that a CCMA commissioner can through an arbitration award grant a minority union (or two or more minority unions acting jointly) the rights of access, stop orders and leave for trade union activities even though they do not meet the thresholds for these rights set in a section 18 agreement. The conditions are that the parties to the section 18 agreement have been given the opportunity to participate in the arbitration proceedings, and the applicant union(s) represent a “significant interest, or a substantial number of employees, in the workplace”. In other words, a CCMA arbitration award can override the thresholds set in a collective agreement between an employer and a

majority trade union provided the conditions in the amendment are met.[6] The amendments have yet to be promulgated.

There are limited circumstances in which a protected strike would avail a trade union that is denied rights such as access and stop order facilities, since any trade union seeking these rights will represent less than half the workforce. However a protected strike was clearly viable at Lonmin's Karee mine in 2011, because the trade union seeking the organisational rights (AMCU) did in fact represent a majority of the workforce at the mine. This is doubtless why Lonmin acceded to their demand, as indicated above.

It would appear that the issue that was actually in dispute between AMCU and Lonmin at this juncture was that Lonmin did not consider the mine a separate workplace. It is not clear whether this issue was canvassed in the dispute referred to the CCMA, however in terms of the central recognition agreement negotiated between Lonmin and NUM, Solidarity and UASA in 2002, all of Lonmin's mining operations constituted a single workplace. The same approach was adopted in the separate recognition agreements it negotiated with NUM, Solidarity and UASA in 2011.

It could have been argued that for the purposes of the exercise of organisational rights the Karee mine should be regarded as an independent operation, in accordance with the definition of a workplace in the LRA. Of the criteria for "independence" (as it is somewhat unfortunately described in the definition) the one that is most pertinent in case of the Karee mine is its size. This was presumably why an agreement granting limited organisational rights in respect of the Karee mine was subsequently entered into with AMCU.

It can also be argued that the interpretation of the workplace in a recent judgment handed down in an urgent application in the gold mining sector is distinguishable, amongst other reasons in that it relates to a wage agreement. The considerations that apply to determining a threshold for organisational rights are not the same as those that apply to collective bargaining, or to the extension of collective bargaining agreements to persons who were not party to the negotiations.[7]

Another aspect concerning the definition of a workplace should be noted. It is "the place or places where the employees of an employer work". However as well as the employees of the employer, it is also the place where the employees of a multiplicity of other employers work, including sub-contractors and labour intermediaries of various sorts. According to data published by the major platinum producers, as many as thirty percent of the "workforce" of (some) producers is employed on this basis.[8]

The mine is to all intents and purposes their workplace, although not legislatively recognised as such. It is unknown what role if any these workers played in the events at Marikana.

Within the workplace, however it may be defined, there is also the issue as to how the bargaining unit is defined. In the case of Lonmin, as detailed below, a different threshold applies to workers in the "upper" bargaining unit, in which skilled workers and supervisory staff are employed, and different trade unions are recognised. This represents one way in which the relations between different trade unions operating in the same workplace can be managed. Another is to expand the bargaining unit, and apply a majoritarian principle, as appears to have happened in the case of the current Implats agreement with AMCU.

The policy justification for having lower thresholds for organisational rights than for collective bargaining rights is that trade unions need organisational rights to get a foot in the proverbial door. This is most obviously the case in respect of stop order rights, since it appears the practice of verifying trade union membership through stop order forms is now widespread. There is therefore an argument for the need to differentiate between particular organisational rights, with a lower threshold for stop order rights. The exercise of stop order rights is also

arguably the least likely of the suite of rights provided in the LRA to exacerbate inter-union competition or rivalry.

How inter-union competition or rivalry is resolved emerges as a critical question which the LRA, in the absence of a bargaining council, does not squarely address. Clearly, however, the solution is not for either employers or trade unions to rely on definitions of a workplace or bargaining unit or thresholds that effectively frustrate the exercise by workers of their freedom of association, or are perceived to do so. This would not be in accord with the objective of democratising the workplace and, as the above chronology illustrates, is likely to backfire. This would seem to be the clearest labour relations lesson to be drawn from Marikana.

It is in any event doubtful whether the LRA can be expected to resolve the question of trade union rivalry or competition, which also relates to how effectively members are represented, particularly at a workplace level. As indicated above, the LRA provides for trade union representatives to be elected in the workplace. It is not obvious why this applies only in the case of a trade union representing a majority in the workplace, since in a functional labour relations system, it would be the role of these trade union representatives, or shaft-stewards as they are sometimes called in the mining sector, to raise with management any grievances in the workplace that might escalate into a dispute.

In the light of the aforegoing it is noteworthy that the first intimation of worker dissatisfaction with NUM was in May 2011, and concerned representation at the workplace. Although the LRA, correctly, regards the election and removal of trade union representatives as a matter that is appropriately regulated by the constitution of the trade union concerned, a practice has evolved whereby the election and removal of trade union representatives is in effect regulated by recognition agreements.[9]

This is another issue that needs to be interrogated.

3.1 Policy considerations regarding the regulation of organisational rights by collective agreement

The reason the practice of negotiating recognition agreements endures is in our opinion twofold. Firstly, there is no bargaining council within the mining sector, as well as a number of important sectors of the economy. If there were, the bargaining council constitution would regulate the collective bargaining relationship and all the trade union parties to the council would in terms of section 19 of the LRA be granted access and stop order rights at all workplaces within the jurisdiction of the council. There would also be a remedy for a trade union that was unfairly denied membership of such a council.[10]

Nothing in the LRA prevents an employers' association from negotiating with unions in respect of a sector outside that framework, and this in fact happens with the Chamber of Mines in respect of its members in the gold and coal mining sectors. However the Chamber's members in the platinum mining sector opted not to bargain collectively at sector level, but at the level of the company or mine, if at all. The fragmented state of labour relations in platinum is also evident from the variety of different approaches in the agreements we are concerned with here.

Secondly, the organisational rights in the LRA provide a fairly rudimentary framework for trade union representation in the workplace. This is because it is a framework which has to apply to all kinds of workplaces, in all sectors of the economy, and can obviously not take into account the specific features of a sector such as mining within such a framework.

It is therefore appropriate that the framework the LRA provides should be seen as a default option, rather than as a substitute for collective agreements that determine the ambit of certain organisational rights. The primary advantage of setting thresholds for organisational

rights by way of collective agreement is that it is possible to take into account the specific features of the mining sector in general, and platinum in particular.

The premise of this submission is that, as a general proposition, collective bargaining is better able to take account of the specific features of a sector than would be possible by way of arbitration proceedings. However the determination of thresholds for organisational rights by bargaining is subject to a number of caveats.

Firstly, and most importantly, in the context of the events at Marikana, the parties to a collective agreement, including both employers and trade unions, may have a vested interest in maintaining a status quo that is perceived as beneficial to either or both parties. Accordingly, parties may set inappropriate or unfair thresholds for new entrants, such as a competitor trade union.

The 2011 recognition agreements between Lonmin and NUM, Solidarity and UASA respectively illustrate this danger. Whereas the 2002 central agreement set a threshold of 33 percent of the workers employed in a bargaining unit, the 2011 agreement set a threshold of 50 percent plus one in what is referred to as the category 3 to 9 bargaining unit (the "lower bargaining unit") and 20 percent in the "B to C upper bargaining unit." Moreover "unions which are party to this agreement" are afforded fifteen months from the date of signature to achieve representative status.[11]

Whilst section 18(1) permits an employer and a trade union with majority membership in the workplace to stipulate a threshold in respect of the rights referred to in sections 12, 13 and 15 of the LRA, arguably it does not entitle them to set a threshold which is higher than the LRA itself envisages. This, it appears, is what the 2011 Lonmin recognition agreement did, by setting a threshold of 50 percent plus one for these rights. Whilst the amendment to the LRA would enable an aggrieved trade union to apply to the CCMA for an award that overrode such an agreement, it does not give the CCMA jurisdiction to interfere with provisions calculated to favour the "founding" trade unions, as the grace period of fifteen months seeks to do.

Secondly, a collective agreement between employers and trade unions in respect of the workplace as defined in the LRA will not address the question as to how workers of sub-contractors and labour intermediaries are to exercise organisational rights. This is unfortunately not an issue which the 2013 amendments to the LRA satisfactorily address. While in theory nothing precludes employers and trade unions from negotiating an agreement which recognises the right of workers of sub-contractors and labour intermediaries to exercise organisational rights on the workplace of the client (the mine, in this instance), it does not seem likely this will happen without some form of external pressure.

Thirdly, and in any event, a framework of itself is no guarantee that workers on mines will be effectively represented. Whether or not there is effective representation in the workplace or at sectoral level is first and foremost a question of trade union practice.

4. AN ANALYSIS OF THE AGREEMENTS

In the light of section 3, we propose to examine in this section how the collective agreements the major producers and trade unions have entered into have addressed what we regard as the key labour relations issues. We have framed these issues in terms of a series of questions, as set out in 4.1 to 4.7 below.

4.1 For the purpose of recognition, is the workplace a single place or several places?

Implats

In the 1997 Threshold Agreement with NUM and UASA it appears that the workplace was defined as 'the Rustenburg operations', i.e. a single place.[12]

Recognition Agreements are signed in 1998 that refer to the above Threshold Agreement for purposes of thresholds, etc. We assume that the workplace is still defined as Rustenburg operations, i.e. a single place.[13]

A 2006 Recognition Agreement with NUM and UASA does not define 'workplace' but is for 'Rustenburg operations', i.e. a single place.

A 2007 Threshold Agreement with NUM defines 'workplace' as all the shafts and sections of the Company's Rustenburg Operations, i.e. a single place.

The current 2013 Recognition and Procedural Agreement with AMCU uses the LRA definition of 'workplace' but the agreement continues to refer to the Rustenburg Operations, i.e. a single place.

Amplats

In 2009 a Recognition Agreement is signed with NUM, UASA and NUMSA, to which TAWUSA become a signatory at a later date, and to which AMCU becomes a signatory in February 2013. It is unclear which unions, other than AMCU, remain recognised. Recognition can be obtained for an Operational Unit (there are nine listed in an annexure) and 'group-wide', so the workplace can be a single place or several places.

Lonmin

In the 2002 Central Recognition Agreement with NUM, UASA and Solidarity the workplace is a single place (i.e. Lonmin comprising Western Platinum and Eastern Platinum, excluding only the Western Platinum Refinery).

Separate recognition agreements are signed with NUM, UASA and Solidarity in 2011 that are to all intents and purposes the same. The agreement is with Lonmin Platinum comprising Western Platinum and Eastern Platinum (which appears to also be referred to as the Marikana Operations), i.e. a single place.

In 2011 a Limited Organisational Rights agreement is signed with AMCU that applies to Lonmin Platinum at Karee Mine. The Karee Mine is part of the Lonmin Marikana Operations so the agreement is a break with Lonmin's policy of treating the workplace as the Marikana Operations (or Western and Eastern Platinum), i.e. the workplace is now two places. But the agreement envisages that AMCU will reach a threshold of 50% plus 1 at Lonmin Marikana Operations, at which point it will be granted full organisational rights, i.e. the workplace will again become one place.

4.2 Within the workplace as defined, is there one bargaining unit or more than one?

Implats

In 1997 Threshold Agreement there are three bargaining units: the 2-8 category; the artisans and miners category; and the officials category.

The 1998 Recognition Agreement refers to the above three bargaining units.

The 2006 Recognition Agreement with NUM and UASA does not define bargaining units but presumably is still referring to the above three units.

A 2007 Threshold Agreement with NUM defines only one bargaining unit: Patterson Grades A3 to C5. This appears to be the sole bargaining unit.

The current 2013 Recognition and Procedural Agreement with AMCU defines a recognition unit: Category A to C5, and a bargaining unit: Category A to C4. The difference is simply that the salaries for C5 employees are regulated through a performance appraisal system.

Amplats

The 2009 Recognition Agreement provides for two recognition units: the Operators Unit (A1 to B7) and the Supervisors Unit (C1 to D1). Recognition leads to representation in the Central Collective Bargaining Forum (CCBF); it is unclear whether bargaining in the CCBF is separate for the two recognition units, i.e. there are two bargaining units, or there is a single bargaining unit.

Lonmin

The 2002 Central Recognition Agreement refers to bargaining units but these are not defined (presumably they are defined in an earlier agreement). However, given that the agreement recognises UASA and Solidarity it is likely that there were three bargaining units: the 3-8 category; the artisans and miners category; and the officials category.

The 2011 Recognition Agreement refers to two bargaining units: Category 3-9 Bargaining Unit; and the Category B and C Upper Bargaining Unit.

The 2011 Limited Organisational Rights agreement signed with AMCU makes no reference to a bargaining unit but a later addendum refers to one bargaining unit (although without defining it).

4.3 Within the bargaining unit (or units) as defined, is the threshold for organisational rights and collective bargaining rights the same or are there different thresholds?

Implats

In the 1997 Threshold Agreement a single threshold of 35% was set across the bargaining units for the exercise of organisational rights - it is unclear whether this applied to collective bargaining rights.

It is unclear whether the 1998 Recognition Agreements applied to collective bargaining rights.

The 2006 Recognition Agreement with NUM and UASA refers to the thresholds set from time to time in Threshold Agreements and deals with all the organisational rights as well as recognising the two unions as collective bargaining representatives. It therefore appears that

the 35% threshold applies across the organisational rights and also for collective bargaining rights.

A 2007 threshold Agreement with NUM deals only with setting thresholds; a single threshold is set of 50% plus 1 for organisational rights; there is no reference to collective bargaining rights.

The current 2013 Recognition and Procedural Agreement with AMCU sets one threshold of 30% for access and stop order rights, and a threshold of 40% for the rights in respect of trade union representatives and leave for trade union activities as well as for collective bargaining, and a threshold of 50% plus 1 for section 18 rights and the right to appoint a Coordinator.

Amplats

There are different thresholds. A 40% threshold at the level of the Operational Unit, for either the Operators recognition unit and/or the Supervisors recognition unit, for accessing all the organisational rights as well as the right to participate in the Operational Unit Participative Forum and the Central Participative Forum. But to get collective bargaining rights a union must reach a 50% threshold in an operational unit, for either the Operators recognition unit and/or the Supervisors recognition unit. The right effectively entitles the union to send one representative from each Operational Unit(s) in which it has 50% representivity to the CCBF. Alternatively, if a union has 30% representivity group-wide in either the Operators recognition unit and/or the Supervisors recognition unit, it gets collective bargaining rights (and can send one representative from each Operational Unit in which it is recognised (i.e. where it has 40% representivity).

Lonmin

The 2002 Central Recognition Agreement grants the signatory unions the organisational rights in the LRA. It does not provide thresholds for achieving these rights. It makes reference to bargaining units in which the unions have 'sufficient representation' (sic), presumably the existing bargaining units, and the establishment of a Bargaining Forum. 'Sufficiently representative' is defined as 33% of employees in a bargaining unit. So it appears that the agreement granted the unions organisational rights and set a threshold of 33% per bargaining unit for collective bargaining rights.

The 2011 Recognition Agreement provides for different thresholds for each bargaining unit: 50% plus 1 in the Category 3-9 Bargaining Unit; and 20% plus 1 in the Category B and C Upper Bargaining Unit. These thresholds apply to organisational rights and collective bargaining rights in the two bargaining units. However, it is important to note that NUM, UASA and Solidarity are granted these rights on signing the agreement and have 15 months to meet the thresholds, so it is probable that at the time of signing the agreements all the unions had lower levels of representivity than these thresholds.

The 2011 Limited Organisational Rights agreement signed with AMCU grants only the rights of access and stop orders, although a later addendum adds trade union representatives, meetings and access to offices and facilities as well as participation in certain forums at Karee Mine. It does not grant collective bargaining rights. It should be noted that it does not set thresholds for these rights. As with previous recognition agreements these rights are granted on signature, rather than with reference to a threshold (although, as noted above, the agreement envisages that AMCU will reach a threshold of 50% plus 1 at Lonmin Marikana Operations, at which point it will be granted full organisational rights (and presumably collective bargaining rights)). An obvious question is why AMCU received only limited organisational rights and was not given full organisational rights and collective bargaining rights, like NUM, UASA and Solidarity, which also had 15 months to reach one or other of the thresholds.

4.4 Within the bargaining unit (or units) is there one threshold for organisational rights or different thresholds?

Implats

In the 1997 Threshold Agreement a single threshold of 35% was set across the bargaining units for the exercise of organisational rights – it appears that this applied uniformly to all organisational rights.

It appears from the 1998 Recognition Agreements that there was a single threshold of 35% for all the organisational rights.

A 2007 Threshold Agreement with NUM deals only with setting thresholds; a single threshold is set of 50% plus 1 for organisational rights.

The current 2013 Recognition and Procedural Agreement with AMCU sets one threshold of 30% for access and stop order rights, and a threshold of 40% for the rights in respect of trade union representatives and leave for trade union activities as well as for collective bargaining, and a threshold of 50% plus 1 for section 18 rights and the right to appoint a Coordinator.

Amplats

In terms of the 2009 Recognition Agreement there is one threshold for all organisational rights: 40%. However, this is determined at the Operational Unit level and the organisational rights apply only to the Operational Unit(s) in which a union has reached 40% representivity. Note that a union needs 50% representivity in an Operational Unit to be entitled to a full-time shop steward in the unit.

Lonmin

The 2002 Central Recognition Agreement granted the signatory unions all the organisational rights without reference to a threshold.

The 2011 Recognition Agreement provides for different thresholds for each bargaining unit: 50% plus 1 in the Category 3-9 Bargaining Unit; and 20% plus 1 in the Category B and C Upper Bargaining Unit. These thresholds apply to all organisational rights without any differentiation in the two bargaining units.

The 2011 Limited Organisational Rights agreement signed with AMCU grants only the rights of access and stop orders, although a later addendum adds trade union representatives, meetings and access to offices and facilities as well as participation in certain forums at Karee Mine. It should be noted that it does not set thresholds for these rights; as with previous recognition agreements, these rights are granted on signature rather than with reference to a threshold (although, as noted above, the agreement envisages that AMCU will reach a threshold of 50% plus 1 at Lonmin Marikana Operations, at which point it will be granted full organisational rights).

4.5 What is the threshold for stop order rights within the bargaining unit (or units)?

Implats

In the 1997 Threshold Agreement it appears that this is 35%.

The threshold in the 1998 Recognition Agreements appears to be 35%.

The 2007 Threshold Agreement with NUM sets a single threshold of 50% plus 1 for organisational rights.

The current 2013 Recognition and Procedural Agreement with AMCU sets a threshold of 30% for stop order rights.

Amplats

In terms of the 2009 Recognition Agreement, as noted, there is one threshold for all organisational rights, including stop order rights: 40%. However, this is determined at the Operational Unit level, so the stop order rights will apply only to the Operational Unit(s) in which a union has reached 40% representivity.

Lonmin

The 2002 Central Recognition Agreement did not set a threshold for any organisational rights, including stop order rights.

The 2011 Recognition Agreement provides for different thresholds for each bargaining unit: 50% plus 1 in the Category 3-9 Bargaining Unit; and 20% plus 1 in the Category B and C Upper Bargaining Unit. These thresholds apply to all organisational rights, including stop order rights, without any differentiation.

The 2011 Limited Organisational Rights agreement signed with AMCU grants only the rights of access and stop orders, although a later addendum adds trade union representatives, meetings and access to offices and facilities as well as participation in certain forums at Karee Mine. It should be noted that it does not set thresholds for these rights; as with previous recognition agreements these rights are granted on signature rather than with reference to a threshold.

4.6 Does the collective agreement set a threshold for stop orders for newcomer unions, and what is that threshold?

Implats

It is not clear whether there was any provision dealing with newcomer unions in the 1997 Threshold Agreement.

It is not clear whether there was any provision dealing with newcomer unions in the 1998 Recognition Agreements.

Neither the 2006 Recognition Agreement with NUM and UASA or the 2007 Recognition Agreement with NUM sets a threshold for stop orders for newcomer unions (and neither make any reference to newcomer unions).

The current 2013 Recognition and Procedural Agreement with AMCU makes provision for processing stop order applications from members of a new union but there is not a separate threshold for stop order rights for newcomer unions (and there is no other mention of newcomer unions in the agreement).

Amplats

There is no reference to newcomer unions in the 2009 Recognition Agreement. The agreement also makes no provision for a process through which unions lose recognition. This is probably mainly because representivity leads to rights to representation on participative forums, the collective bargaining forum and other forums (as well as organisational rights). Loss of representivity in such cases simply means that there are no

longer representatives from that union in the various forums. However, it is arguably problematic for all organisational rights, especially access and stop order rights, to terminate immediately upon representivity dropping below the 40% threshold.

Lonmin

The 2002 Central Recognition Agreement set a threshold of 33% within a 'currently recognised bargaining unit' for a new union to be recognised. There is no reference to what organisational rights such a union would acquire if it was recognised, but presumably it would become a signatory to the agreement and would acquire all the organisational rights, including stop order rights.

The 2011 Recognition Agreement provides that a newcomer union (or non-founding union) would need to achieve a threshold of 35% for any of the two bargaining units. However, it also states that the threshold for organisational and collective bargaining rights in the Category 3-9 Bargaining Unit is 50% plus 1. It is unclear how this apparent contradiction is to be resolved.

The 2011 Limited Organisational Rights agreement signed with AMCU makes no reference to newcomer unions.

4.7 How does the agreement regulate how trade union representatives are elected, operate and are removed?

Implats

The 2006 Recognition Agreement with NUM and UASA makes provision for part-time and full-time shop stewards, and a mining house coordinator. Part-time shop stewards are elected in terms of the agreement and the relevant union constitution. Full-time shop stewards are elected from amongst the part-time shop stewards in each shaft or section in accordance with the agreement. A mining house coordinator will, according to the agreement, be appointed for the Rustenburg Operations from July 2007.

The terms of office of these representatives is not spelled out. The agreement provides for training of full-time shop stewards in a range of competencies by the company. At the end of their term they can be offered alternative employment if their previous position is not open and if they meet the criteria for such alternative employment. Significantly, the agreement provides that full-time shop stewards report to the shaft or sectional manager.

The 2006 Recognition Agreement with NUM and UASA provides that a full-time shop steward is paid at the level of a B4 employee unless their prior position is graded higher in which case the shop steward gets the higher pay.

The 2013 Recognition Agreement with AMCU makes provision for part-time and full-time shop stewards, and a full-time coordinator. The election of part-time shop stewards must be in compliance with the union constitution. Full-time shop stewards are appointed. There is no indication how this appointment takes place. Similarly the full-time coordinator is appointed.

This agreement does not make reference to a term of office for a part-time shop steward, which is presumably dealt with in the union constitution. Full-time shop stewards and the full-time coordinator are appointed for a period of three years, after which the appointment must be re-confirmed. The agreement with AMCU does not mention who full-time shop stewards report to. Full-time shop stewards are graded at B4 (and if necessary upgraded to B4). The full-time coordinator will remain on their existing salary unless a separate agreement between the company and union provides otherwise.

Amplats

The Amplats also make provision for part-time and full-time shop stewards, and a Coordinator. The part-time shop stewards are elected in terms of the union constitution. The full-time shop stewards are elected by the shop stewards where the union has acquired a 50% representation in a recognition unit on the basis of one full-time shop steward per Operational Unit (there are nine Operational Units). The agreement does not say how the coordinator will be elected but states that a trade union with 30% group-wide representation in either of the two recognition units will be entitled to three coordinators.

The terms of office of full-time shop stewards are not spelled out in the agreement. The agreement does however make reference to the full-time shop steward and coordinator returning to his/her original position at the end of the term of office if "unable to successfully apply for a vacant or new position commensurate with the new competencies acquired". It should also be noted that the agreement provides for development of career paths and individual development programmes for full-time shop stewards and coordinators. The full-time shop steward reports to the Operational Unit HR Manager in fulfilment of his responsibilities.

The positions of full-time shop stewards and coordinators are graded for the purpose of establishing compensation during the term of office. However, the shop stewards and coordinators remain on their payment grade during their term of office and if this is below the grade position of shop steward or coordinator they will receive financial compensation to make up the difference (i.e. an additional acting allowance).

Lonmin

The 2002 Central Recognition Agreement with NUM, UASA and Solidarity made provision for trade union representatives as per the LRA. However an addendum introduced provision for full-time shop stewards and full-time NUM branch chairpersons and secretaries. No detail is provided in this agreement, other than provision that the full-time NUM branch chairpersons and secretaries receive the same pay and benefits as they did prior to their election (plus they will be kept on the relevant bonus system).

The 2011 Recognition Agreement with NUM makes provision for part-time shop stewards and full-time shop stewards. Also, the top five branch committee members are designated as full-time as well as the shaft committee chairperson and secretary, some of whom could play a coordinating role. The full-time shop stewards are elected as per the agreement. The agreement also stipulates that the branch committee full-time shop stewards report to the Senior Manager ER and the shaft committee full time shop stewards report to the relevant workplace Human Capital Consultant.

This agreement provides that full-time shop stewards are paid at the rate for the job they held prior to their election and will get any increases that the equivalent jobs get during the term of their election. However, the agreement states that the remuneration of the full-time union officials and coordinator will be determined in a separate agreement.

An addendum to the 2011 agreement with AMCU makes provision for part-time and full-time shop stewards who are elected for a demarcated constituency in terms of the union constitution. It does not make provision for a coordinator, or deal with the terms of office of either part-time or full-time shop stewards. The agreement is silent about who the shop stewards report to, as well as the issue of their remuneration.

5. CONCLUSIONS

5.1 Thresholds for organisational rights

The practice whereby there is one threshold for both organisational and collective bargaining rights, as in the case of the 2011 Lonmin recognition agreements, or recognition agreements that set a fifty percent plus one threshold for all organisational rights, is at variance with the LRA.

While the amendments to the LRA provide a remedy in the case of a threshold of fifty percent plus one in the case of rights such as access and stop orders, it does not seem this remedy goes far enough in addressing what might be regarded as oppressive conduct toward minority trade unions, bearing in mind that today's minority trade union may be tomorrow's majority trade union.

For similar reasons, and consistent with a commitment to freedom of association, it is justifiable to have different thresholds for different organisational rights, since the policy considerations that apply in respect of each right are different. A threshold of ten percent or less for the right to stop orders is justifiable, and in sectors where trade unions face objective difficulties in organising workers or where there are very large numbers employed.

There thus appears no justifiable reason for an approach whereby arbitrators routinely set the same threshold for the exercise of different rights. On the contrary, it is submitted that an arbitrator is required to consider an appropriate threshold in respect of each right. This submission does not, of course, only pertain to mining.

An amendment to the BCEA in terms of the Basic Conditions of Employment Amendment Act would give the Minister of Labour power to determine thresholds for the exercise of organisational rights in terms of section 12 and 13 of the LRA, but this would presumably only apply if she or he were to introduce a sectoral determination for mining, or platinum mining.[14]

While this is not impossible, a more feasible course of action would be to develop a code of good practice regarding organisational rights, either through NEDLAC or the CCMA.

The benefit of developing a code would be that it permits a differentiated approach, through a process of bargaining or social dialogue. The approach in a workplace employing 500 workers should not necessarily be the same as in workplace employing 50,000.

5.2 Section 18(1) of the LRA

The problem with this section is not that it is wrong in principle that a trade union representing a majority in the workplace is able to negotiate with the employer regarding thresholds for the exercise of the rights referred to in sections 12, 13 and 15 of the LRA, but the manner in which this has in certain instances been done. The amendment to section 21, viz. section 21 (8C), to some extent addresses this problem but does not go far enough. It provides that a CCMA commissioner can override a section 18 agreement and grant a minority union (or two minority unions acting jointly) the rights of access, stop orders and leave for trade union activities if two conditions are met. One of these conditions is that the minority union(s) represent a "significant interest, or a substantial number of employees, in the workplace". This condition is important because "a significant interest" suggests that the 'workplace' can be divided into recognition units (which is the practice in many recognition agreements). If this is the case then the minority union(s) could be representative for section 14 and 16 rights for that recognition unit. Practically this would mean the commissioner should be able to grant them these rights, which would require the commissioner to amend the recognition agreement to determine recognition units and include the minority union(s). A

code would provide commissioners with clear guidelines when determining disputes in this regard.

Disputes with respect to organisational rights, in particular where a section 18 agreement might be overridden, are complex and the way in which they are arbitrated could have serious implications for labour relations in the workplace. The CCMA should give consideration to creating a special division staffed by commissioners with the appropriate experience to arbitrate such disputes.

5.3 Sectoral collective bargaining

Apart from the fact that the LRA encourages collective bargaining at sectoral level, there is less danger in multi-employer sector level bargaining of employer parties and trade unions utilising collective agreements to maintain a status quo that they perceive as beneficial, but which may be unfair to competitor trade unions, or may violate the right of workers to freedom of association.

Sectoral bargaining need not be confined to wages and conditions of work. Indeed, the above analysis suggests a process of sectoral bargaining to determine a common approach on questions of organisational rights, collective bargaining rights and recognition would be beneficial to sound labour relations in the mining sector in general and platinum in particular.

The outcome of such a process might be a framework agreement that sets a uniform approach on these questions in a sector, but also permits variation according to local circumstances.

5.4 Trade union practice and the system of full-time shop stewards

An effective system of labour relations presupposes effective employer organisations and trade unions. Although major employers in the platinum sector are members of the Chamber of Mines, the Chamber of Mines does not bargain collectively on their behalf. The reluctance of the major platinum companies to use the Chamber for collective bargaining purposes has resulted in a fragmented labour relations system, with considerable scope for regulatory arbitrage.

The breakdown of effective trade union representation has been an even more serious problem. There is of course room for debate as to what makes a trade union effective, but there can be no doubt that it is not simply a question of maintaining the requisite membership. It includes having an effective leadership, both at the workplace and at the sectoral level. At the workplace level, this refers to shop stewards, who have traditionally been elected from amongst the workers, and served on a voluntary basis.

The role of the full-time shop stewards in the events at Marikana is unclear, but there must be serious doubts as to whether an employee who is paid by the employer and is regarded as accountable to their human resources manager is capable of fulfilling the function of a trade union representative. It is noteworthy in this regard that AMCU appears to have declined to accept that its full time shop-stewards are accountable in this manner. Furthermore, the training that is provided to shop stewards in terms of recognition agreements and the indication that at the end of their terms (which could be lengthy) they can be appointed to alternative positions (not their original jobs) that are appropriate to their skills, suggests that full-time shop stewards could be groomed (and develop aspirations) for a career in personnel or human resources management. This would likely result in sub-optimal representation of workers during their terms.

6. RECOMMENDATIONS

a. Section 21 should be amended to give a CCMA commissioner the power to determine recognition units in a 'workplace' and if necessary amend an existing recognition agreement.

b. Code of good practice on organisational rights and trade union representatives should be introduced.

c. A special division of CCMA should be established to deal with such disputes.

d. There needs to be further research into the mechanics of the grading system in the platinum mines, and the extent to which the aspirations of RDOs may have been frustrated as a result of this system.

e. There needs to be further research into the operation of a system of full time shop stewards in the mining sector and elsewhere, and whether it contributes to the democratisation of the workplace.

End Notes

1 Section 1, LRA.
2 There are some references in the agreement to representative unions but this appears to mean recognised unions, i.e. unions that are sufficiently representative.
3 Da Costa witness statement, 67-68.
4 See, for example, *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Company* (SA) [2003] 9 BALR 1052 (CCMA).
5 The right to strike over certain organisational rights is provided for in section 65(2), LRA, and was upheld in *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC).
6 Section 21(8C) of the Labour Relations Amendment Bill, 16B of 2012.
7 Unreported Labour Court judgment delivered on 30 January 2014 in the matter between Chamber of Mines and others v AMCU and others.
8 For example, according to data on the Lonmin and Implats websites (accessed on 6 March 2014) in 2013 26% of all workers at Lonmin were employees of contractors or intermediaries and in the same year 30% of all workers at Implats were employees of contrators or intermediaries.
9 Section 14(3), LRA.
10 Section 56 (5) and (6), LRA
11 Para 5.1.5
12 We do not have the agreement but were able to glean some information about it from UASA v Impala Platinum Ltd & others (2010) 31 ILJ 1702 (LC) and United Association of South Africa – The Union v Impala Platinum Ltd & others [2012] 7 BLLR 708 (LAC).
13 See footnote 1.
14 Item 8(d), BCEA Amendment Act.