

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA ✓
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. S.B.K. KAVUMA, JA

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CONSTITUTIONAL PETITION NO.08 OF 2004

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BETWEEN

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- 1. DR. SAM LYOMOKI }
- 2. MUDENYA RICHARD }
- 3. MBABAZI KIGUNDU }
- 4. SAM SSALI KIGUNDU }
- 5. UGANDA PRINTERS
JOURNALISTS MEDIA PAPER AND
ALLIED WORKER'S UNION }
- 6. UGANDA MEDICAL WORKERS UNION }.....PETITIONERS

25

AND

THE ATTORNEY GENERAL.....RESPONDENT

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JUDGMENT OF TWINOMUJUNI, JA

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1. INTRODUCTION

This petition was brought under article 137 of the Constitution and the Rules of the Constitutional Court (Petitions for Declarations under article

137 of the Constitution) Directions L.N. No.4 of 1996. The petitioners are seeking the following declarations:-

- 5 **"(a) That the definition of an employees association in Section 1(cc) of the Act in as far as it sets the minimum number of persons required to form an employees association is inconsistent with and contravenes articles 29(1)(e) and 40(3)(b) of the Constitution.**
- 10 **(b) that the definition of a Trade Union in section 1(cc) of the Act in as far as it prescribes 1000 persons as the minimum number required to form a trade union is inconsistent and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.**
- 15 **(c) That Section 2(1) of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) of the Constitution in as far as it -**
- 20 **(i) ordains the National Organization of Trade Unions as the only principal organization of employees in Uganda;**
- (ii) provides for compulsory affiliation of every trade union registered under the Act to the National Organization of Trade Unions.**
- 25 **(d) That Section 6(3) of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) of the Constitution in as far as it prohibits the registration of a trade union whose membership is less than 1000 persons.**

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- (e) That Section 17(e) of the Act is inconsistent with and contrary to articles 29(1)(e) and 40(3)(a) and (b) of the Constitution in as far as it sets 51% as the minimum percentage of employees required to have subscribed willingly to a trade union before employer recognizes that trade union.
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- (f) That Section 28 of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(a) and (b) of the Constitution in as far as it subjects a proposed amalgamation of one or more trade unions to the prior consent of a Registrar of Trade Unions.
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- (g) That Section 70 of the Act is inconsistent with and contravenes the fundamental freedoms enshrined in articles 20, 21(1), 29(1)(e) and 40(3)(a) and (b) of the Constitution in as far as it allows a Minister of Labour, Gender and Community Development to amend the Second Schedule to the Act by addition thereto.
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- (h) That trade unions are free to form and affiliate to any centre or umbrella organization of their choice and those other organisations or centres are entitled to recognition as alternatives to NOTU and to enjoy the immunities and privileges conferred by the Act to such centres or organizations.
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- (i) That the workers organized under the Unions that decided to form and affiliate to the Central Organization of Free Trade Unions were at liberty to exercise their constitutional right.

(j) An order that the respondent pays the costs of this petition to the petitioners."

5 The petition is supported by the affidavit of the 1st petitioner. The gist of the affidavit is that the Trade Union Act, 1976 establishes one organisation called, the National Organisation of Trade Unions (Uganda) herein after referred to as NOTU. All Trade Unions in Uganda are compelled to affiliate with NOTU. The petitioners being unhappy with the manner NOTU is being managed, decided to form another centre
10 called the Central Organisation of Free Trade Unions (Uganda) (COFTU). On seeking its registration under the Act, the government declared it unlawful and refused registration, hence this petition.

15 The respondent filed an answer to the petition. The answer is a total denial of all the averrements made in the petition. It is supported by an affidavit of one Sam Serwanga, a Senior State Attorney in the Attorney General's Chambers. He deponed that in his capacity as an advocate, he does not find any provision of the Trade Union Act, Cap.233 to be inconsistent with or in contravention of any provision of the Constitution
20 of Uganda, 1995. The answer is further supported by a supplementary affidavit sworn by another State Attorney, Margaret Nabakooza, in which she deponed that in many European countries, like United Kingdom, Austria, Lavia, Ireland and Slovakia, they have only one National Trade Union Centre, just like NOTU. At the trial, the facts deponed to in the
25 affidavits were not in dispute except the legal issues of Interpretation.

2. A BRIEF HISTORY OF THE TRADE UNION MOVEMENT IN UGANDA

In order to be able to appreciate why the impugned provisions of the Trade Union Act, 1976 have become controversial, it is necessary to have a glimpse at the history of the trade union movement in Uganda since independence, in 1962. At that time trade unions were governed by The Trade Union Ordinance, 1952. The ordinance remained in force until it was repealed by The Trade Unions Act, 1965 which came into force on the 2nd July 1965. The purpose of the Act was stated to be: -

"to amend and consolidate the law relating to the registration of trade unions, and other purposes connected therewith."

The Act gave power to the Minister to appoint a Registrar and Assistant Registrars whose main duty was to keep and maintain a register of trade unions in which particulars as may be prescribed by the Minister were recorded, and such other books and documents as the Minister may direct.

All trade unions were required to register with the Registrar. A trade union was defined as: -

"any combination whether temporary or permanent, of more than thirty persons, other than an employees' association, not deemed a trade union under the provisions of Section 48 of the Act, the principal object of which are under its constitution the regulation of relations between employee and employer, or

between employees and employers, or between employers and employees, whether such a combination would or would not, if this Act had not been enacted, have been an unlawful combination by reason of some or more of its objects being in restraint of trade."

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An employees association was also defined as:-

"any combination or association whether temporary or permanent of thirty or more persons in the same type of employment, or in the same trade or industry, whether agricultural or otherwise, the principal object of which is the regulation of the relations between the employees and their employer or between themselves, whether or not it is required to notify its establishment under the provisions of section 48 of this Act."

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In order to be eligible to be registered, the application form had to be signed by at least 10 members of the union. A trade union was deemed to be formed if at least 30 employees or employers agreed in writing to form a trade union. The requirement of at least 30 employees or employers could be waived in case of any trade or business where the employees are not more than 30 in number.

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No trade union which was not registered under the Act would be allowed to operate but the trade unions were allowed to be the negotiating bodies for the employees. The Act bound the employers to negotiate with registered branches. In that Act, there was no requirement that the union

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would only be recognised by the employer if 51% of the employees were members.

5 Under Section 24 of the Act, trade unions were free with prior consent of the Registrar to amalgamate to form federations or congresses by whatever name called, which would also be required to register with the Registrar. Section 64 excluded soldiers, policemen, prisons officers from membership of trade unions.

10 It will be observed that under the 1965 Trade Unions Act, the Minister exercised purely regulatory powers through the Registrar and did not supervise or control the operations of the trade unions. There was no single national trade union centre to which all other unions were required to affiliate.

15 After the publication of what is known as the Binasisa Commission Report on Trade Unions of 1968, this arrangement was brought to an end by The Trade Unions Act, 1970 which came into force on 31st December 1970. The purposes of the new Act were stated to be: -

20 **"to establish and regulate an integrated employees' trade union, to dissolve the former Uganda Labour Congress and all other trade unions registered under the Trade Unions Act, 1965, to provide for the formation of branch unions, and for other**
25 **purposes connected therewith."** [Emphasis added]

Section 1 of the Act established a single trade union called Uganda Labour Congress which was to be the only trade union in Uganda. All the properties, rights, liabilities and obligations of the former Uganda Labour Congress and all other registered Unions were vested in the new Uganda Labour Congress by virtue of the Act. The newly established union was permitted to operate branches which could amalgamate with the prior consent of the Registrar of Trade Union. All the members of the abolished trade unions became automatic members of the Uganda Labour Congress.

All the branches of the Congress were required to be registered with the Registrar as long as they had at least 1000 employees. Section 18(1)(e) of the Act provided: -

"a registered branch union, members of which are his employees, shall be the negotiating body with which the employer shall be bound to deal in respect of all matters relating to the relations between him and those of his employees who fall within the scope of membership of the registered branch union, if at least ten per Centum of such employees are members of the branch union"

[Emphasis added]

To register, a branch union had to have a minimum of 1000 members. Other than those radical changes, most provisions of the 1965 Act were retained and the Minister and the Minister's powers remained regulatory through the office of the Registrar of Trade Unions.

After the take-over of Government by the Idd Amin Military regime, The Trade Unions Act of 1970 was amended by the Trade Union Act, 1970 (Amendment) Decree, 1973 whose purpose was stated to be: -

5 **"to amend The Trade Unions Act, 1970, To re-establish The Freedom of employment, To Form Autonomous Trade Unions And Other Matters Connected Therewith."**

10 Apparently someone persuaded the new military Government of Idd Amin that the 1970 Act had abolished freedom of employment and the right to form autonomous trade unions and that the name **"Uganda Labour Congress"** was not appropriate. So the new decree abolished the name and established the National Organization of Trade Unions (NOTU) and re-established the formation of trade unions whose
15 minimum membership had to be at least 1000. All the unions had to affiliate to NOTU and to be registered by the Registrar. The decree provided that an employer would not be bound to recognise or negotiate with a union unless 51% of his employees were registered with the union. The decree conferred on NOTU more powers, beyond mere regulation of
20 trade unions as had been the case hitherto, as follows: -

"Section 1(2): The purposes of which the National Organisation of Trade Unions is established are: -

- 25 **(a) to formulate policy relating to the proper management of trade unions and the general welfare of employees;**
- (b) to coordinate and supervise the activities of trade unions in order to ensure that undertakings entered into by individual**

unions or by the National Organisation of Trade Unions on behalf of its affiliated unions are duly honoured;

(c) to plan for and, in collaboration with other interested bodies or persons, administer workers education programmes;

5 (d) to serve as a link between the registered trade unions on the one hand, and the Government and other international organisations on the other, regarding all matters of mutual interest; and

10 (e) to serve generally as consultant on all matters relating to trade union affairs.

Again, apart from these major changes, the rest of the 1970 Act was retained. A new Section 16 A was enacted to provide for the formation and registration of union branches of the registered Trade Unions. Again,
15 amalgamation of the Unions could be done with the prior consent of the Registrar.

In 1976, The Trade Unions Decree, 1976 was enacted whose purposes were stated to be: -

20 **"to amend and to consolidate the law establishing and regulating the National Organisation of Trade Unions and providing for the formation by employees of autonomous trade unions and branch unions of their own choice, and for other purposes connected
25 therewith."**

Apart from the consolidation of The Trade Unions Act, 1970 and The Trade Union Act 1970 (Amendment Decree) 1973, this 1976 Decree did not introduce any significant changes in the substance of the trade union law. The Trade Unions Decree 1976 is now called the Trade Union Act,
5 1976 and it is the one whose impugned provisions are the subject of this petition.

3. THE ISSUES

10 The following such issues were framed and agreed upon:-

1) *Whether sections 1(e), 1(cc), 6(3) and 17(1)(e) of the Trade Unions Act are inconsistent with and contravene articles 29(1)(e) and 40(3)(a) and (b) in as far as they limit members required for the formation of Employees Associations, Trade Unions and set a
15 minimum for recognition of Trade Unions by the Employers.*

2) *Whether section 2(1) of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3) (a) and (b) of the Constitution.*

20 3) *Whether Section 28 of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.*

4) *Whether Section 70 of the Act is inconsistent with and contravenes article 20 of the Constitution.*

25 5) *Whether remedies prayed for should be granted.*

4. COUNSELS' SUBMISSIONS

At the hearing, Mr. Joseph Luswata represented the petitioners and Mrs Robinah Rwakojo, a Principal State attorney, assisted by Ms Freda Kabatsi, a State Attorney, represented the respondent.

Mr. Joseph Luswata, learned counsel for the petitioners, made the following arguments in support of the first issue: -

(a) Sections 1(e), 1(c), 6(3) and 17(1)(e) set a minimum number that must be present in order to form employees association or a trade union, i.e. 30 and 1000 respectively. Section 17(1)(e) gives an employer a right not to recognise a trade union until 51% of his/her employees are members of that union. In counsel's view, this meant that if an organisation has less than 30 employees or more but less than 30 are willing to associate, those who are willing, even if they are 29 would not be able to associate. This contravenes articles 29(1) (e) and 40(3) (a) and (b) of the Constitution.

(b) In case of trade unions, if a sector does not comprise of one thousand members willing to associate, they cannot form a trade union. If they cannot, then it means that they cannot collectively bargain contrary to articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.

(c) The requirement that 51% of employees must be members of a trade union before an employer recognises it is equally unconstitutional because if an employer does not recognise the union then it has no locus standi and cannot advocate for improvement of conditions of workers. In his view, there is no justification for such a condition at

all. The definition of "**Trade Union**" or "**Employees Association**" **should** be free of any numbers and should only focus on common goals or interests. He saw no reason why an organisation, sector or company should not have many Trade Unions.

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In reply, Mrs Rwakojo submitted that freedoms of association guaranteed under articles 29(1)(e) and 40(3) of the Constitution are not absolute. They can be derogated from. The setting of minimum numbers in the Act was required in order to establish some order in the exercise of the freedom of association to prevent a proliferation of numerous small employees associations and trade unions. She argued that trade unions can be easily manipulated by politicians and they tend to loose the aims for which they were established. In order to be viable, they need to compose of the requisite minimum number of employees.

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On the second issue, Mr. Luswata submitted that section 2(1) of the Act established NOTU as the only labour centre in the country and all trade unions are required to affiliate with it at the apex. This deprives the unions and its members the right of association, as they have no choice to choose with whom to associate and takes away their right not to associate if they choose to. He pointed out that section 2(e) of the Act gives regulatory, policy and enforcement roles to NOTU some of which contain limitations to the freedom of association that cannot pass the test in article 43(2)(e) of the Constitution. In his view, the Act contains many provisions that can regulate trade unions without requiring them to belong to one centre. He gave an example of sections 6, 8, 9, 24, 32, 41,

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42, 44, 45, 46, 56 e.t.c. which he submitted were enough to protect members of the trade unions and public interest.

5 Mrs Rwakojo did not agree. She argued that the requirement for all trade unions to affiliate with NOTU does not violate the Constitution. She said it was necessary to have one centre to prevent workers forming opportunistic unions and to centralise the formulation of trade union Policy. In her view, this was a good thing for the workers of Uganda and did not go beyond what is acceptable in a democratic society.

10 On the third issue, Mr. Luswata submitted that the requirement in section 28 of the Act that before unions can amalgamate, they must seek the consent of the Registrar was clearly unconstitutional and contrary to articles 29(1)(e) and 40(3)(a) and (b) of the Constitution. In his view, once associations are formed, they should be free to merge and need no permission from anyone. If permission is sought and refused, members of the unions lose the right to collective bargaining contrary to article 15 40(3)(a) and (b) of the Constitution.

20 Mrs Rwakojo's reply was that section 28 was intended to ensure that workers are not cheated through amalgamations and moreover, the Registrar's refusal to consent to amalgamation of any unions can be appealed from. In her view, the provision was reasonable.

25 On the fourth issue, Mr. Luswata pointed out that section 70 of the Act gave the Minister in charge of the Trade Union Act power to amend schedule II thereof. He submitted that this included power to exclude

any person from participation in trade union activities, yet the power to participate in trade union activities is so fundamental and should not be left in the hands of one individual. To do so conflicts with article 20 of the Constitution.

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Mrs. Rwakojo's short reply was that section 70 of the Act did not authorise such a thing and that whatever the Minister did under the authority of that section was not final but appealable in courts of law.

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5. CONSIDERATION OF AND FINDINGS ON ISSUES

I. INTERPRETATION

Guiding Principles of Constitutional Interpretation:

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Principles of constitutional interpretation in Uganda have been very extensively articulated in numerous cases decided by the Constitutional Court of Uganda and the Supreme Court of Uganda. Some of the famous cases in which this has been done are:

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- 1) **Silvatori Abuki and Anor vs. Attorney General Constitutional Case No.2/1997.**
- 2) **Attorney General vs. Abuki (2001) 1LRC 63.**
- 3) **Major General Tinyefuza vs. Attorney General, Constitutional Case No.1 of 1996.**
- 4) **Attorney General vs. Major General Tinyefuza, Constitutional Appeal No.1 of 1997.**

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5) **Dr. James Rwanyarare and Anor vs. Attorney General,
Constitutional Petition No.5 of 1999.**

6) **Zachary Olum and Anor vs. Attorney General,
Constitutional Petition No.6 of 1999.**

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This is to mention only a few. In this petition, I do not intend to go through all of them. I shall only mention a few which I consider relevant to the determination of issues in this particular petition. They are to be found in the judgment of the court in the case of **Dr. James Rwanyarare and 8 others vs. Attorney General, Constitutional Petition No.7 of 2002,** and they are:

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(1) The onus is on the petitioners to show a prima facie case of violation of their constitutional rights. Thereafter, the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of article 43 of the Constitution.

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(2) Both purpose and effect of an impugned legislation are relevant in the determination of its constitutionality.

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(3) The Constitution is to be looked at as a whole. It has to be read as an integrated whole with no one particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument. See South Dakota vs. North Carolina 192, US 268(1940) L.E.D.448.

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(4) The Constitution should be given a generous and purposive construction especially the part which protects the entrenched

fundamental rights and freedoms. See Attorney General vs. Momoddon Jobo (1984) AC 689.

5 (5) Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms. See Constitutional Petition No.5 of 2002 (supra).

II. THE LAW

10 In Uganda Constitution, unlike in many Constitutions of countries of the Commonwealth, the provisions which guarantee the freedom of Association and the right to form and participate in trade unions is unambiguous and very clear. They are to be found in articles 29(1)(e) and 40(3) of the Constitution. Article 29(1)(e) provides: -

15 **"Every person shall have the right to freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations."**

20 Article 40(3) provides: -

"Every worker has a right: -

(a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;

(b) to collective bargaining and representation; and

(c) to withdraw his or her labour according to law."

The expression "**freedom of association**" is not defined in the Constitution. Decided cases on freedom of association in East Africa are not easy to come by. So we have to turn elsewhere in the common law jurisdictions for guidance. One definition is to be found in the Privy Council decision in Collymore vs. Attorney General [1970] AC 532 at 547, a case originating from Trinidad and Tobago in which Wooding CJ, stated:

"Freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religions or social, political or philosophical, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good governance of the country."

In another case from the same country in T.I.C.G.F.A. and Attorney General vs. Seereeram [1975] 27 W.I.R. 329, the court of Appeal held that freedom of association included the freedom to disassociate or not to associate at all. HYATALI CJ, stated that the right to disassociate was a natural concomitant of the right to associate.

In Uganda, like in many countries in the World, freedom of association is not absolute. It is subject to limitation contained in article 43 of the Constitution which stipulates: -

5 **"(1) In the enjoyment of rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or public interest.**

(2) **Public interest under this article shall not permit:-**

10 **(a) political persecution;**

(b) detention without trial;

15 **(c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.** [Emphasis added]

20 So, in this petition and in respect of every impugned provision of The Trade Union Act, 1976, the court must consider and answer two questions: -

(a) Does the impugned provision infringe the freedom of association guaranteed in articles 29(1)(e) and 40(3) of the Constitution?

25 (b) If the answer is in affirmative, is the provision justifiable within the meaning of article 43(2)(c) of the Constitution?

If the answer to both these questions is in affirmative, then the impugned provision does not violate the Constitution and cannot be successfully challenged in this court. If the answer to (b) above is in the negative, then the impugned provision contravenes the Constitution and must be declared null and void.

III. ISSUE NO.1

In this issue, four sections of The Trade Unions Act, 1976 are challenged as being in contravention of or inconsistent with the freedom of association articles of the Constitution. They are: -

- Section 1(e) which is the definition of an "**Employee association**".
- Section 1(cc) which is the definition of "**trade union**".
- Section 6(3) which stipulates that a union must have at least 1000 members before it is registered as such.
- Section 17(1)(e) which provides that for a union to be recognised by an employer, at least 51% of his or her employees must be a registered members of that union.

I will consider each section separately except sections 1(cc) and 6(3) which I will consider together for reasons which will be easy to appreciate.

Section 1(e)

In this section an employees association is defined as follows: -

5 **"any combination or association whether temporary or
permanent of thirty or more persons in the same type of
employment, or in the same trade or industry, whether
agricultural or otherwise, the principal object of which is
the regulation of the relationship between the employees
and their employers or between themselves whether or not
it is required to notify its establishment under section 55."**

10 [Emphasis added]

15 It is the contention of the petitioners that the requirement that to
form an employees association, there must be at least thirty
employees of the same trade or industry is an unjustifiable
infringement of the freedom of association and contravenes
articles 29(1)(e) and 40(3) of the Constitution. Counsel for the
petitioners did not see why employees of a small business
numbering 29 or less should not associate for the purpose of
20 dealing with their employer or with each other.

25 On the other hand, Mrs. Rwakojo for the respondent explained that
the requirement of 30 employees minimum to form an employers
association is meant to establish some order in labour relations and
not to limit the freedom of association. She did not explain how
such limitation could establish order. In her view, the provision
was reasonable because freedom of association was not absolute.

I do not find any difficulty in deciding that the provisions of section (1) (e) of The Trade Unions Act impose a limitation on the freedom of association guaranteed under articles 29(1)(e) and 40(3) of the Constitution. This is because in labour relations, that provision prevents 29 or less employees, employed in same business or industry, from forming an association for purposes of regulating relations with their employer or among themselves. The freedom of association guaranteed under the Constitution can be enjoyed by two or any other number of people unless there is a justifiable reason against it. The only remaining question then is whether the limitation can be justified under article 43(2)(c) of the Constitution. The burden to make the justification is on the respondent - the state which seeks to assert that the provision is justified. Counsel for the respondent did not give any sound reason to justify the provision.

Employees Associations are not trade unions at all. In his book "**TRADE UNION LAW IN UGANDA**", Sabastian Angeret, a former Lecturer at Law Development Centre, now in private practice, comments at page 7 on Employees Associations as follows: -

"It has been pointed out (by Scott and Roger in 'The Development of Trade Unions in Uganda') that employees' associations were introduced as probationary trade unions, that is, as embryonic organisations which would be afforded time to gain organising experience before becoming fully

5 fledged trade unions. During that time, they would be exempt from compliance with the strict regulatory provisions to which trade unions were subject. At the same time they would not enjoy the rights and privileges conferred on trade unions such as the right to sue and be sued in its own name, the capacity to enter into contracts, and the right to own property. In the result they were not expected during that probationary period to undertake or fulfil any significant industrial relations function such as collective bargaining. Their only right was the right to exist and to prepare themselves to gain admittance to the status of trade unions."

Further on page 8 he states: -

15 "As already indicated employees' associations are not expected to assume any significant industrial relations functions. Thus, an employees' association is prohibited either by itself or through any person from collecting even from its own members or from any other person any subscription or pecuniary contribution to its funds other than annual contribution to an office expense fund or welfare fund. These funds are used solely for defraying office rent, salaries for menial or part-time staff, stationery, postage and other office expenses and for welfare purposes respectively. The welfare purposes however may be subject

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to such restrictions and conditions as the Minister may prescribe."

On the same page Mr. Angeret concludes: -

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"The main object behind employees' associations is as has been noted, to enable them in the course of time to mature into and be registered as trade unions. Provisions are therefore made for the registration of these associations as trade unions. This may be on the voluntary application of the association itself on achieving the necessary organisational framework or on the order of the Minister. An order directing an employees' association to register itself as a trade union may be made by the Minister whenever he is satisfied that an employees' association is conducting its affairs in such a manner that it should be regarded as a trade union. Where there is failure to comply with any such order any officer who is responsible for any such disobedience commits an offence. It should however be noted that an application by an employees' association to be registered as a trade union is also subject to the conditions of registration which are considered in the next chapter."

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As can be seen, employees associations are toothless and have no power to carry out any harmful activity against their employer or the government. They cannot collect money and need not be

5 recognised by the employer. They are not required to register unless they wish to do so. The Minister has the power to intervene and regulate how they operate at every stage. So what makes them harmful, undesirable or dangerous when they are composed of less than thirty employees! In my judgment, those are even more toothless. I am equally unable, like counsel for the petitioners to see why such small and toothless associations should be prohibited. In my judgment, section 1(e) of the Act contravenes freedom of association guaranteed under articles 29(1)(e) and 40(3) of the Constitution. To the extent that it prescribes a minimum of 30 employees in order for the association to be formed, it is null and void. Even two people should be free to associate for purposes of protecting their social, political, economic welfare and for other lawful purposes.

15 Sections 1(cc) and 6(3) of the Act:

20 The definition of "**trade union**" in section 1(cc) includes requirement that there must be a minimum of 1000 employees. Section 6(3) requires that for a trade union to be registered, it must have at least 1000 members. It was submitted for the petitioners that membership in trade unions should not be restricted in terms of numbers. Counsel submitted that in order to conform with articles 29(1)(e) and 40(3) of the Constitution, any number of employees should be left free to form a trade union. In reply, Mrs
25 Rwakojo pointed out that the regulation of minimum number of

trade union membership was justified because the bigger the trade unions, the better for its members.

In Mr. Sabastian Angeret's book (supra), he comments on the matter of minimum membership as follows: -

"(a) One thousand persons - Firstly it should be composed of one thousand or more persons who are either employees or employers. The number of one thousand appears to have been fixed primarily with trade unions of employees in mind. Indeed when the number was first increased from six to thirty by the Trade Unions Act 1965, the increase was justified on the ground that it would encourage the formation of viable unions and that potential membership is in fact greater. This same argument may have been responsible for the increase of the number to one thousand by the Trade Unions Act, 1970. However it may have the added reason that the Binaisa Commission on Trade Unions of 1968 recommended that it was desirable to have fewer trade unions of employees. It however has resulted in there being only one organisation of employers in Uganda."

From this statement, it can be seen that the requirement of 1000 minimum membership which first appeared in the Trade Unions Act, 1970 was enacted after careful thought, consideration and research. The reason was to avoid too many small unions everywhere. There was also a recommendation of the Binaisa

Commission on Trade Unions of 1968 that it would be better to have fewer but economically viable trade unions. The limitation was therefore not arbitrary in the circumstances of 1970. I am not convinced that the situation has changed now to justify me to condemn the restrictions. I believe when the situation warrants, Parliament will make the necessary adjustments. My conclusion on this is that though the limitation appears, not to remove but to limit freedom of association, the limitation is justifiable and the two sections under consideration do not contravene the Constitution.

Section 17(1)(e) of the Act:

This section requires that for an employer to recognise a trade union, 51% of his employees must be registered members of the union. I do not intend to say much about this requirement. I have studied the arguments for and against this requirement. I agree that it places a limitation on the freedom of association guaranteed by articles 29(1)(e) and 40(3) of the Constitution. However, I have no hesitation in holding that the limitation is justified. It would be chaotic if an employer was faced with a situation where in one business or industry, he had to negotiate with two or more trade unions representing employees who have common interests. It is reasonable to require that employees with common interests and in same employment organise themselves, or at least the majority of them, in one union. This section is justifiable.

IV. ISSUE NO.2

The issue is whether Section 2(1) of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution. Section 2(1) provides: -

"The National Organisation of Trade Unions established by The Trade Unions (Amendment) Decree, 1973 (published on 8th day of December, 1973), and functioning immediately before the commencement of this Act, shall be the only principal organisation of employees in Uganda, and all registered trade unions shall affiliate thereto."

As we have seen above, in Uganda, freedom of association is not limited to an individual's right to enter into consensual arrangements to promote the common-interest objects of the associating groups. It includes the right to form and join political parties, trade unions and other civic organisations of ones choice. In her book,

"FUNDAMENTAL RIGHTS IN COMMONWEALTH CARRIBBEAN CONSTITUTIONS" Margaret Demerieux states that

"the definition (of freedom of association quoted earlier in this judgment) omits a crucial element of the right as a fundamental freedom regulating the constitutional relationship between the state and the individual, or individuals, by failing to state that the right and protection

it gives should mean in the first place, and as a positive component, that the state and public authorities, may not prevent or 'hinder' persons from entering into consensual arrangements described in the passage quoted, and that the state is not permitted to form, for example, trade unions to which workers are compelled to belong, or to forbid membership in private unions."

As we have seen above on the legislative history of trade unions in Uganda, the state enacted The Trade Unions Act, 1970, in which all existing trade unions and congresses were abolished. The Act established only one trade union called The Uganda Labour Congress. I am not aware whether this provision was ever challenged because clearly, it conflicted with article 18(1) of the Constitution of Uganda of 1967. The Act prohibited the formation of any other trade union. Only branches of the Uganda Labour Congress could be established. The Trade Unions Act (amendment) Decree 1973 and the current Trade Union Act, 1976 authorise the formation of trade unions but they must be affiliated to a state created organisation called National Organisation of Trade Unions (NOTU). No trade union is allowed to exist and register unless it is affiliated to NOTU. NOTU was given powers and functions in section 2(2) of the Act which make it the all-powerful Uncle SAM with powers to virtually run all trade unions. The Minister of Labour and the Commissioner for Labour who is also the Registrar of Trade Unions, control the trade unions through NOTU. Once a trade union gets affiliated to NOTU, it is

not allowed to withdraw unless it wants to cease to be a trade union as such. All this is in evidence in the affidavit of the first petitioner which is not challenged. The question is: is this consistent with the enjoyment of freedom of association guaranteed under articles 29(1)(e) and 40(3)(a) and (b)? In my judgment, there is a glaring contradiction between the provisions of section 2 of the Act and those of the Constitution.

As already stated, freedom of association is not absolute. It is subject to the provisions of article 43 of the Constitution which I have already produced above. If the section is found to fall within the perimeters and standards set by that article, then the provisions of the section are justified. If not, they are null and void.

The dilemma of the state can be understandably demonstrated by the following historical account of NOTU found in "**TRADE UNION LAW IN UGANDA**" (supra). At page 41, he states: -

"In Uganda, as in practically all other countries, trade unions realised the need to form themselves into umbrella organisations invariably called federations or congresses of trade unions in order to enhance their effectiveness. Thus, the first such organisation in Uganda called the Uganda Trades Unions Congress (UTUC) was formed in 1955. Unfortunately the UTUC was from the very beginning characterised by internal wrangles for power which eventually led to the formation of a splinter organisation,

5 the Uganda Federation of Labour in 1961. Although the UFL had a brief life, it was replaced as a rival organisation to the UTUC by yet another splinter organisation from UTUC, the Federation of Uganda Trade Unions (FUTU) which was formed in 1964.

10 Due to the internal power struggles in these organisations, the rivalry between them, the resultant negative effects on the trade union movement as a whole and the consequent instability in the overall industrial relations situation in the country, the Government began to show a very keen interest in these organisations with a view to introducing some order into them and thereby restore much needed stability to the industrial relations situation.

15 It was an obvious desired goal of the Government that all trade unions in the country should be united under one strong central organisation. Initially the Government pursued extra-legal measures in an attempt to achieve this objective. Thus 1967 the Government sponsored the merger of the rival UTUC and FUTU into a single organisation, the Uganda Labour Congress (ULC). Unhappily however, this merger did not improve matters in any meaningful way as even the Uganda Labour Congress was also continually harassed by the old rivalries and wrangles which had again reared their heads in the new organisation. The confusion in the Uganda Labour

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Congress reached such a point that the Government appointed a committee of inquiry which reported in 1968.

5 By that time it had become clear that part of the problem was caused by the almost total absence of any effective legal regulation of these type of organisations. It has been pointed out that under the Trade Unions Ordinance, 1952 federations or congress of trade unions were not required to register as trade unions. This meant that these
10 organisations were therefore not subject to the provisions of the Ordinance. However, under the Trade Unions act 1965, the Registrar was empowered not only to require organisations of trade unions to notify their existence to the Registrar but also to subject them to any provisions of the
15 Act."

This history of the trade union movement and the Binasisa Commission report of 1968 that fewer trade unions were preferable for the good of the economy, was followed by the
20 enactment of The Trade Unions Act, 1970. However, the dissolution of all trade unions and the establishment of The Uganda Labour Congress as the only single trade union for all workers in Uganda was an overreaction. Under article 18 of the
25 1967 Constitution, it could have been declared null and void if it had been challenged in court. The same applies to the subsequent conversion of The Uganda Labour Congress into NOTU by the 1973 Decree and its retention in The Trade Unions Act, 1976.

The affidavit of Dr. Lyomoki, the first petitioner clearly shows that even now, the problems that section 2 of the Act tried to solve are still with us. A number of trade unions and individuals do not like the policies and the management of NOTU. They wish to quit. Section 2 was enacted long before articles 29(1)(e) and 40(3) were enacted. Now it is the duty of the State to justify that the limitation to freedom of association introduced by the requirement that all trade unions must affiliate to NOTU is a

"limitation of the right (to freedom of association which does not go) beyond what is acceptable and demonstrably justifiable in a free and democratic society."

The Binasisa Commission report, 1968 (supra) recommended that it may be better to have fewer trade unions than to have a multiplicity of them. That was the justification for abolishing all of them in The Trade Union Act, 1970. It is also true that it may be better for trade unions, in their own interest, to affiliate or amalgamate in order to have a stronger voice in their relationship with their employer or the government. In many civilised and democratic countries, trade unions have affiliated or amalgamated into one national centre. This is done out of free choice of the unions and it is not enforced by legislation as in Uganda. The trade unions are free to leave such national centre if they so wish. It is also true that very many countries, some of them even smaller than Uganda, in membership and size, have more than one national trade union centres to which all the trade unions are free to

5 affiliate. This used to be the case in Uganda before 1970. I am reliably informed that the federations or congresses of those days were bitterly divided by the cold war politics of **communism** and **capitalism** which caused a lot of instability in the economic and political management of Uganda.

10 The State has not given any justification why, in the year 2005, and especially in light of articles 29(1)(e) and 40(3), it should form an organisation and force all trade unions to affiliate to it. The state did not claim that this is a justifiable practice in democratic societies. While I agree that it would be a sound policy to encourage our trade unions to affiliate under one national centre, it is unconstitutional to form one organisation by legislation and to require **all** trade unions to affiliate to it. I would hold that section 2
15 of the Act, to the extent that it requires all trade unions to affiliate with NOTU, is inconsistent and contravenes articles 29(1)(e) and 40(3)(a) and (b) and is therefore null and void to that extent.

20 V. ISSUE NO.3

The third issue is whether section 28 of the Trade Unions Act, 1976 contravenes and is inconsistent with articles 29(1)(e) and 40(3)(a) and (b) of the Constitution. The section states:-

25 **"Any two or more registered trade unions may, with the prior consent in writing of the registrar and subject to any conditions as may be specified by the registrar, amalgamate together as one trade union in any case in which at least 50**

percent of the delegates called for that purpose agree that the trade union concerned may enter into any such amalgamation."

5 The book "TRADE UNION LAW IN UGANDA" at page 18 has the following comments on amalgamation:

10 "The amalgamation of trade unions is provided for in sections 30 and 31 of the Decree. (Now sections 28 and 29 of The Trade Union Act, 1976). In order for an amalgamation to be valid two conditions have to be complied with. Firstly, the written consent of the Registrar must first be sought and obtained. The consent of the Registrar may be given subject to any conditions that he may specify for the purpose of the intended amalgamation. Secondly, each of the trade unions proposing to be amalgamated must have agreed to the amalgamation by the votes of at least fifty percent of its delegates called for the purpose of considering the question of the amalgamation. The respective trade unions are also required to inform their members of the reasons of the proposed amalgamation and the proposed conditions under which the amalgamation is to take place. Once the amalgamation is effected, notice of the amalgamation signed jointly by the secretaries of the unions concerned and five members of each trade union and endorsed by the General Secretary of the National Organisation of trade unions, must be sent to the Registrar,

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specifying the terms of the amalgamation and the proposed name of the amalgamated trade union the notice must be accompanied by a list of the names and the registered numbers of the amalgamating trade unions and a copy of the constitution and rules of the proposed amalgamated trade union. If the Registrar is satisfied that the amalgamated trade union complies with the statutory requirements, he shall register it and thereupon, the amalgamating trade unions become one trade union. However any rights and obligations which accrued to or were incurred by the amalgamating trade unions before the amalgamation, are not affected or prejudiced. Any person aggrieved by the refusal of the Registrar to approve a proposed amalgamation may appeal to the Minister whose decision after consultation with the Trade Unions Tribunal shall be final."

I do not think that this limitation is intended to limit the freedom of association or the right to join and form a trade union. It does not restrict the right of any member to associate or disassociate from any union or organisation as section 2 of the Act does. It is intended to introduce transparency so that any unions transforming themselves into other bodies, should do so transparently. Otherwise, it would be possible for them to cheat the finances of their members or to defraud their creditors if they were allowed to change their legal identity without any conditions. I find that the requirement that they obtain consent from the Registrar in order to

amalgamate is reasonable and does not contravene articles 29(1)(e) and 40(3)(a) and (b) because it is justifiable under article 43 of the Constitution.

5 VI. ISSUE NO.4:

The issue is whether section 70 of the Act is inconsistent with and contravenes articles 20 of the Constitution.

10 Section 70 of the Act provides: -

"70. INELIGIBILITY FOR MEMBERSHIP IN TRADE UNION AND INAPPLICABILITY OF CERTAIN LAW.

15 **(1)The following persons shall not be eligible to become members of a trade union: -**

(a)members of the Uganda Peoples' Defence Forces and members of any police force, or prisons service, including a local administration police force or prisons service established by law;

(b)officers of the Internal Security Organisation and External security Organisation; and

(c) other persons or categories of persons referred to in the Second Schedule to this Act which Schedule the Minister may, from time to time, amend by statutory instrument."

25 [Emphasis supplied]

The second schedule of the Act provides: -

"Persons not eligible for membership of a trade union or an employees association affiliated to a trade union.

5 (1) **Officers holding the following offices:-**

(a) **Permanent Secretaries;**

(b) **Heads of department, divisions or sections;**

(c) **School headmasters and deputy headmasters;**

(d) **Principals or directors of institutions of higher learning;**

10 (e) **Heads of departments of institutions of higher learning;**
or

(f) **Any other public officer who is on the salary scale U2 or an equivalent or similar scale or who is above that salary scale.**

15 (2) **Officers of the Bank of Uganda holding the following offices:-**

(a) **governor;**

(b) **deputy governor;**

20 (c) **secretary;**

(d) **general manager;**

(e) **heads of department;**

(f) **assistant or deputy heads of department;**

(g) **personnel.**

25 (3) **Other officers and employees, whether or not in the public service holding the following offices:-**

(4) Persons holding the office of personal secretary to any of the offices specified in paragraphs (1), (2) and (3) of this Schedule.

5 **(5) Officers or employees excluded from membership of trade unions or employees associations by mutual agreement between an employer and the trade union to which such officers or employees would otherwise belong"**

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15 If I understood learned counsel for the petitioners, his main complaint is with section 70(1)(c) which empowers the Minister to amend the second schedule from time to time by statutory instrument. His main contention is that freedoms of association guaranteed by articles 29(1)(e) and 40(3)(a) and (b) are so important that it would be contrary to article 20 to leave them at the whims of one person, the Minister.

20 Article 20 provides: -

"20(1) Fundamental rights and freedom of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

The only justification that learned counsel for the respondent gave in support of section 70 is that it is for better organisation of the trade union movement and is in the interest of workers.

5 I hold the view that most of the provisions of section 70 are justifiable and the petitioners did not insist that they were not. Chapter IV of our Constitution contains some of the most important provisions of the Constitution. The Constitution permits the Legislature to enact laws in derogation of the fundamental
10 rights and freedoms only in order to protect the rights and freedoms of others or in public interest. As article 20 states, these rights and freedoms are not dished out by the state. They are inherent. They should only be restricted in very exceptional circumstances mentioned in article 43. The second schedule of the
15 Act deals with the following categories of employees:-

- (a) Senior officers in the public service of Uganda?
- (b) Senior officers of the Bank of Uganda.
- (c) Personal Secretaries to Senior Officers in Public and Private Sectors.
- 20 (d) Persons whose contract of employment exclude them from membership of trade unions.

Section 70(1)(c) of the Act permits the Minister, by Statutory Instrument, to amend the schedule. I think it is universally
25 accepted that certain categories of employees must not be permitted to join trade unions. Some of those categories are spelt out in section 70 of the Act and Schedule two to the Act.

From time to time other categories may arise and Parliament is too busy to be expected to amend the list as they arise. It is only reasonable that Parliament delegated that responsibility to the responsible Minister. The Minister, however, is not free to exercise this discretion arbitrarily. He must only do so in accordance with article 43 of the Constitution, namely:-

(a) to protect the human rights and freedoms of others.

(b) to protect public interest.

Even then, the protection must not go beyond what is acceptable and demonstrably justifiable in a free and democratic society;

If the Minister exceeds these limits, the Statutory Instrument made by him is liable to be challenged in court. Therefore, I think that in the circumstances, section 70(1)(c) is reasonable and does not contravene article 20 of the Constitution.

VII. ISSUE NO.5

The last issue is whether remedies which the petitioners prayed for should be granted or not.

Following my findings on framed issues, I would make the following declarations: -

(a) Section 1(e) of the Act to the extent that that it sets the minimum number of persons required to form an employees association is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.

(b) Section 1(cc) of the Act does not contravene any article of the Constitution.

(c) Section 2(1) of the Act to the extent that it:-

(i) ordains NOTU as the only principal organisation of employees in Uganda.

(ii) provides for compulsory affiliation of every trade union registered under the Act to NOTU.

is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.

(d) Section 6(3) of the Act does not contravene any article of the Constitution.

(e) Section 17(e) of the Act does not contravene any article of the Constitution.

(f) Section 28 of the Act does not contravene any provision of the Constitution.

(g) Section 70 of the Act is not inconsistent with article 20 of the Constitution.

VIII. CONCLUSION

The Trade Unions Act, 1976, was enacted long before the promulgation of the 1995 Constitution. A number of its provisions are not in conformity with it. Article 273(1) of the Constitution requires that all such laws be brought into conformity with the Constitution. The article provides: -

5 "273 (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

10 (2) For the purpose of this article, the expression "*existing law*" means the written law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date."

15 The effect of this judgment is not to condemn The Trade Unions Act or NOTU out of existence. Only those parts which have been declared to be inconsistent with and in contravention of the Constitution are affected. What remains must be construed to make sense and be in conformity with the Constitution.

20 Workers and Unions which wish to remain members of NOTU as constituted after this judgment are free to do so. However, principles of freedom of association, including the right to form and join unions of their choice, dictate that no worker or union should be forced to associate or affiliate with a union or organisation against their choice. Nevertheless, any unions which choose to

operate outside NOTU must comply with the provisions of The Trade Union Act, 1976 which have not been declared to be inconsistent with or in contravention of the 1995 Constitution.

5 In the result, this petition partially succeeds. However, as the respondent has succeeded in defending successfully many of the impugned provisions of the Act, each party will bear its own costs of the petition.

10 Dated at Kampala... *24th*this day of... *June*2005.

15 Hon. Justice *Amos Twumujuni*
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

5 CORAM: HON LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON MR JUSTICE S.G. ENGWAU, JA
HON MR. JUSTICE A. TWINOMUJUNI, JA
HON LADY JUSTICE C.K. BYAMUGISHA, JA
HON MR JUSTICE S.B. KAVUMA, JA

10 CONSTITUTIONAL PETITION NO.8 OF 2004

- 15 1. DR. SAM LYOMOKI]
2. MUDENYA RICHARD]
3. MABABAZI KIGGUNDU]
4. SAM SSALI KIGGUNDU] ::::::::::::::: PETITIONERS
5. UGANDA PRINTERS JOURNALISTS MEDIA PAPER AND
ALLIED WORKERS UNION]
6. UGANDA MEDICAL WORKERS UNION]

20 VERSUS

ATTORNEY GENERAL ::::::::::::::: RESPONDENT

25 JUDGEMENT OF A.E.N. MPAGI BAHIGEINE, JA

I have read in draft the lead judgement of Twinomujuni JA, I entirely agree with his analysis of the issues and have nothing useful to add.

30 Since the majority, including S.G. Engwau and C.K. Byamugisha, JJA, agree, the petition partially succeeds as proposed by Twinomujuni JA.

Dated this.....24th.....day of.....June.....2005.

A.E.N. Mpagi-Bahigeine.
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

**CORAM: HON. JUSTICE A. E. N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S. G. ENGWAU, JA
HON. JUSTICE .A. TWINOMUJUNI, JA
HON. JUSTICE C. K. BYAMUGISHA, JA
HON. JUSTICE S. K. B. KAVUMA, JA**

10

CONSTITUTIONAL PETITION NO. 8 OF 2004

BETWEEN

1. DR. SAM LYOMOKI)
2. MUDENYA RICHARD)
3. MBABAZI KIGUNDU)
4. SAM SSALI KIGUNDU) ::::::::::: PETITIONERS
5. UGANDA PRINTERS JOURNALISTS)
20 MEDIA PAPER AND ALLIED)
WORKS UNION)

20

AND

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF ENGWAU, JA

30 I had read, in draft, the judgment of my brother, Twinomujuni,
JA and I entirely agree with it and the declarations he has made.
I have nothing more to add.

Dated at Kampala this^{24th}..... day of^{Nov}..... 2005.


S. G. Engwau
JUSTICE OF APPEAL.

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

5 **CORAM:** *HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE,JA*
 HON. MR JUSTICE S.G.ENGWAU,JA
 HON. MR. JUSTICE A.TWINOMUJUNI,JA
 HON.LADY JUSTICE C.K.BYAMUGISHA,JA
10 *HON.MR. JUSTICE S.K.B.KAVUMA,JA*

CONSTITUTIONAL PETITION NO.08/04

BETWEEN

- 15 1. DR. SAM LYOMOKI
2. MUDENYA RICHARD
3. MBABAZI KIGUNDU
4. SAM SSALI KIGUNDU
5. UGANDA PRINTERS
20 JOURNALISTS MEDIA PAPER AND
ALLIED WORKER'S UNION
6. UGANDA MEDICAL WORKERS UNION.....PETITIONERS

AND

25 ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT OF BYAMUGISHA

30 I had the benefit of reading in draft the judgement prepared by
Twinomujuni JA. The facts are sufficiently set out therein. I agree with
the reasons he has advanced in partly allowing the petition. I have nothing
to add.

35 Dated at Kampala this th 24...day of ~~Feb~~ 2005.


C.K.Byamugisha

Justice of the Constitutional Court.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA. ✓
HON. MR. JUSTICE A. TWINOMUJUNI, JA.
HON. LADY JUSTICE C.K. BYAMUGISHA, JA.
HON. MR. JUSTICE S.B.K. KAVUMA, JA.

CONSTITUTIONAL PETITION NO. 08 OF 2004

BETWEEN

- | | | |
|----|--|-------------------|
| 1. | DR. SAM LYOMOKI | } |
| 2. | MUDENYA RICHARD | } |
| 3. | MBABAZI KIGUNDU | } |
| 4. | SAM SSALI KIGUNDU | } |
| 5. | UGANDA PRINTERS
JOURNALISTS MEDIA PAPER AND
ALLIED WORKER'S UNION | } |
| 6. | UGANDA MEDICAL
WORKERS UNION | }.....PETITIONERS |

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF STEVEN B.K. KAVUMA, JA.

I have read in draft the lead judgment of Hon. Mr. Justice A. Twinomujuni, JA. I generally agree with the reasoning and findings of my

brother on most of the issues but differ on others as I will indicate later in this judgment.

The petition was filed by Hon. Dr. Sam Lyomoki, Mudenya Richard, Mbabazi Kigundu, Sam Ssali Kigundu, Uganda Printers Journalists Media Paper and Allied Worker's Union and Uganda Medical Workers Union (hereinafter referred to as the 1st, 2nd, 3rd, 4th, 5th and 6th petitioners respectively and collectively as the petitioners).

10 They filed the petition under **article 137 of the Constitution and the Rules of the Constitutional Court (Petitions for Declarations under Art. 137 of the Constitution) Directions L.N. NO. 4 OF 1996).**

In the petition the petitioners allege, inter alia: -

20 **“3. That the definition of an “employees association” under S. 1(e) of the Trade Unions Act Cap. 223, Laws of Uganda 2000 (the Act) to the extent that it sets 30 persons as the minimum number of persons required to form an employee association is inconsistent with and contravenes Articles 29(1)(e) and 40(3)(b) of the Constitution of the Republic of Uganda, 1995. (the Constitution).**

4. That the definition of a “Trade Union” under S. 1(cc) of the Act to the extent that it sets 1000 (one thousand) persons as the minimum number of persons required to form a Trade

Union is inconsistent with and contravenes Articles 29(1)(e) and 40(3)(a) & (b) of the Constitution.

5. That Section 2 subsection 1 of the Act to the extent that it establishes the National Organizations of Trade Unions (NOTU) as the only principal organization of employees and to the extent to which it requires every trade union established under the Act to affiliate to NOTU is inconsistent with and contravenes Articles 29(1)(e) of the Constitution.

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6. That Section 6(3) of the Act to the extent that it prohibits the registration of an association of employees not composed of 1000 (one thousand) of them is inconsistent with and contravenes Articles 29(1)(e) and 40(3)(a) of the Constitution.

7. That Section 17(1)(e) of the Act to the extent that it makes it a mandatory requirement that an employer is only bound to recognize a trade union to which 51% of his, hers or its employees have willingly joined is inconsistent with and contravenes Articles 29(1)(e), 40(3)(a) & (b) of the Constitution.

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8. That Section 28 of the Act to the extent that it subjects an amalgamation of two or more trade unions to a prior consent of the Registrar of Trade Unions appointed under S.3(1) and

(2) of the Act is inconsistent with and contravenes Articles 29(1)(e) and 40(3)(a) & (b) of the Constitution.

9. That Section 70 of the Act to the extent that it allows a Minister of Gender, Labour and Social Development, by Statutory Instrument to amend the Second Schedule to the Act by addition thereto, is inconsistent with and contravenes Articles 20, 21(1), 29(1)(e), 40(3)(a) & (b) of the Constitution.” (sic)

10 The petitioners pray that court may grant the following declarations: -

“a) That the definition of an employees association in S.1(e) of the Act in as far as it sets the minimum number of persons required to form an employees association is inconsistent with and contravenes Articles 29(1)(e) and 40(3)(b) of the Constitution.

b) That the definition of a Trade Union in S.1(cc) of the Act in as far as it prescribes 1000 persons as the minimum number required to form a trade union is inconsistent and contravenes Articles 29(1)(e) and 40(3)(a) & (b) of the Constitution.

c) That Section 2(1) of the Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) of the Constitution in as far as it –

20

- i. **ordains the National Organization of Trade Unions as the only principal organization of employees in Uganda;**
- ii. **provides for compulsory affiliation of every trade union registered under the Act to the National Organization of Trade Unions.” (sic)**

10 The petition is supported by one affidavit sworn to by the 1st petitioner. The respondent filed an answer to petition in which he denied each and every allegation. The respondent’s answer is supported by an affidavit deponed to by Sam Serwanga a Senior State Attorney at the respondent’s chambers and a supplementary affidavit sworn by Margaret Nabakooza, a State Attorney in the same chambers.

At the hearing of the petition the following issues were framed and agreed:-

20 “1. **Whether section 1(e), 1(cc), 6(3) and 17(i)(e) of the Trade Unions Act are inconsistent with and contravene articles 29(1)(e) and 40(3)(a) and (b) in that they prescribe minimum limits of members necessary for the formation of employee associations, trade unions and set minimum percentages required for recognitions of trade unions by employers.**

2. **Whether section 2(1) of the Trade Unions Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.**
3. **Whether section 28 of the Trade Unions Act is inconsistent with and contravenes articles 29(1)(e) and 40(3)(a) and (b) of the Constitution.**
4. **Whether section 70 of the Trade Unions Act is inconsistent with and contravenes article 70 of the Constitution.**
- 5 **Whether the reliefs and remedies sought should be granted.”**

10

At the hearing of the petition, Mr. Joseph Luswata appeared for the petitioners. Ms Robinah Rwakoojo, Principal State Attorney, assisted by Ms Freda Kabatsi, State Attorney, represented the respondent.

The submissions of learned counsel for the petitioners and of the respondent on these issues are well summarized by my brother Twinomujuni, JA. in the lead judgment. I agree with that summary, however for the reasons I proceed to give below, my conclusions differ from those of Twinomujuni, JA.

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As regards **issue no. 1**, by prescribing minimum numbers for employee associations and trade unions, the Trade Unions Act (hereinafter called the Act) does not take away the employees' right and freedom to associate within the context of the Constitution. Nor does the fixing of minimum percentages for trade unions to be recognized by employers take away

those rights and freedoms. The Act merely seeks to limit and regulate the enjoyment of those rights and freedoms. It also seeks to ensure order and harmony between the employees and their employers at the work place and to minimize on proliferation of employee associations and trade unions to reduce inter-alia, the risk of possible disruption of work and hardship in the management of industrial relations between employees and their employers. Proliferation of employee associations and trade unions could lead to loss of vital work hours.

10 I am alive to the fact that originally employee associations were intended to be interim arrangements pending their graduation into trade unions. A close look at the Act however, reveals that employee associations are, by law, principally for regulating relations between employers and employees or between themselves. **Section 1(e)** of the Act provides: -

“1(e) employees association” means any combination or association whether temporary or permanent of thirty or more persons in the same type of employment, or in the same trade or industry, whether agricultural or otherwise, the principal object o which is the regulation of the relations between the employees and their employers
20 **or between themselves whether or not it is required to notify its establishment under section 55;”**

Employee associations could therefore, in my opinion, be involved in many of the intricacies of regulating relations between employees and employers or between themselves by virtue of the above definition.

The question now arises as to whether this regulation or limitation based on minimum numbers and percentages passes the test provided for in **article 43** of the Constitution which provides: -

“43(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit –

(a)

(b)

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

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In the case of **NTN Pty Ltd and NBN Ltd v The State 1988 L.R.C (Const)** at **page 348** when considering this test, the court held, inter alia, that: -

“What is reasonably justifiable in a democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, courts are kept out of this field. This is a new field of intrusion by the Constitution. The court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by courts. There is no legal yardstick. What has been decided by courts can

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only be a guide as to the nature of this illusive principle. The test really is an objective one. The application of the test must be considered within the context of the subject matter or circumstances of each case”.

Although this case is from a foreign jurisdiction, it is from the Commonwealth and therefore of strong persuasive value. On this authority therefore I find that in all the circumstances of this case, the test in **article 43** is met.

10 A further reason to note, is the fact that the freedom and right to associate in the Constitution is not absolute. It is derogable as it is not one of those covered by **article 44** of the Constitution. That article provides: -

“44. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms –

- (a) freedom from torture, cruel, inhuman or degrading treatment or punishment;**
- (b) freedom from slavery or servitude;**
- (c) the right to fair hearing;**
- (d) the right to an order of habeas corpus.”**

20 In view of the foregone, I have no hesitation to find in the negative on this issue.

On issue 2, whether section 2 (1) of the Act is inconsistent with and contravenes articles 29 (1) (e) and 40 (3) (a) and (b) of the **Constitution**, I am of the view that it does not.

Article 2(1) of the Act provides: -

“2(1) The National Organization of Trade Unions established by the Trade Unions Act (Amendment) Decree, 1973 (published on the 8th day of December, 1973), and functioning immediately before the commencement of this Act, shall be the only principal organization of employees in Uganda, and all registered trade unions shall affiliate thereto.”

Article 29(1)(e) of the Constitution provides: -

10 “29(1) Every person shall have the right to –

(a)

(b)

(c)

(d)

(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organizations.”

Article 40 provides: -

20 “40(1) Parliament shall enact laws: -

(a)

(b)

(c)

(2)

(3) Every worker has a right –

(a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests

(b) to collective bargaining and representation;
and

(c)

10 Firstly, as we have seen above, the right and freedom to associate is not absolute, it is derogable. So is the right to collective bargaining and representation. Secondly, the history of the Trade Union Movement in Uganda which reveals a propensity for unprincipled splinter rival groups to brake away from the mainstream labour movement national organizations calls, in my opinion, for the retention of one viable and strong national organization to prevent a recurrence of instability in the political and labour sectors of this country. Thirdly, the mischief the law meant to address in the labour sector still persists to today.

In his book **“TRADE UNION LAW IN UGANDA”** Sebastian Angeret at page 41 has this to say on this matter: -

20 **“In Uganda, as in particularly all other countries, trade unions realized the need to form themselves in umbrella organizations invariably called federations or congresses of trade unions in order to enhance their effectiveness. Thus, the first such organization in Uganda called the Uganda Trade Unions Congress (UTUC) was formed in 1955. Unfortunately, the**

UTUC was from the very beginning characterized by internal wrangles for power which eventually led to the formation of a splinter organization, the Uganda Federation of Labour (UFL) in 1961. Although the UFL had a brief life, it was replaced as a rival organization to the UTUC by yet another Splinter organization from UTUC, the Federation of Uganda Trade Unions (FUTU) which was formed in 1964.

10 Due to the internal power struggles in these organizations, the rivalry between them, the resultant negative effects on trade union movement as a whole and the consequent instability in the overall industrial relations situation in the country, the Government began to show very keen interest in these organizations with a view to introducing some order into them and thereby restore much needed stability to the industrial relations situation.

20 It was an obvious desired goal of the Government that all the trade unions in the country should be united under one strong central organization. Initially the Government pursued extra-legal measures in an attempt to achieve this objective. Thus in 1967 the Government sponsored the merger of the rival (UTUC and FUTU into a single organization, the Uganda labour congress (ULC). Unhappily however, this merger did not improve matters in any meaningful way as even the Uganda Labour Congress was also continually harassed by old rivalries and wrangles which had again reared their heads in the new

organization. The confusion in the Uganda Labour Congress reached such a point that the Government appointed a committee of inquiry which reported in 1968. By that time, it had become clear that part of the problem was caused by the almost total absence of any effective legal regulation of these types of organizations. It has been pointed out that under the Trade Unions Ordinance 1952, federations or congresses of trade unions were not required to register as trade unions. This meant that these organizations were therefore not subject to the provisions of the ordinance. However, under the Trade Unions Act 1965 the Registrar was empowered not only to require organizations of trade unions to notify their existence to the Registrar but also to subject them to any provisions of the Act”

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The problems mentioned in this quotation cannot, in my view, be left unattended to by law. To do so would be to invite chaos in this important sector.

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Fourthly, the state of our pre-industrial economy and the scarcity of resources to facilitate multiple national labour movement organizations call for a stronger measure of state intervention in the guidance of developments in the national labour movement and its role in the national economy in the public interest. In the absence of sufficient resources to sustain multiple national labour organization centres, the risk of manipulation both foreign and local becomes a strong reality.

Fifthly, the Employees' interests themselves in my view, would better be served in terms of networking, co-ordination between the national labour

movement and the Government and in planning and protection against manipulation, by a single principal national organization. Similarly the interests of the employers would best be catered for and assured by a single principal national organization. Further, relations between government and the labour movement would best be conducted through coordinating with a single principal national organization. All this is brought out in the evidence on record and research carried out in this case.

10 I am fortified in this view by the fact that as we saw earlier in this judgment, when applying the test set by **article 43** of the Constitution, the context and circumstances of the particular case must be taken into account.

In Uganda's case, a single principal national employees organization is still very relevant, at least for the time being. These circumstances justify the requirement that all trade unions in Uganda affiliate to the National Organization of Trade Unions (NOTU).

20 The absence of a law regulating the trade union movement in this country was, in the past, identified as one of the causes of problems in the labour sector and the entire national economy. This mode of regulation, including the aspect of affiliation to NOTU as a single national employee centre by all trade unions is still, in my opinion, necessary and justifiable. This is simple derogation permitted by the Constitution.

Uganda is not alone in maintaining a one principal national employees organization. There is the unchallenged affidavit evidence of Margret

Nabakooza, a State Attorney in the respondent's chambers who cites many countries including the United Kingdom which maintain a single principal national employees' centre. The countries cited are democracies and would pass the test in **article 43 (c)** of the Constitution.

I do not hesitate to find on this issue therefore, that the Act is not unconstitutional. I therefore find in the negative on this issue too.

10 On issues **3** and **4**, I fully agree with the reasoning and findings of my brother Justice A. Twinomujuni, JA in the lead judgment. I need not say more. Suffice it to emphasize that **section 28** of the trade Union Act is neither inconsistent with nor in contravention of **articles 29 (1) (e)** and **40 (3) (a)** and **(b)** of the Constitution. Similarly I find that section **70** of the Act is not inconsistent with nor does it contravene **article 20** of the Constitution.

In the result, I have made the following findings on issues **1, 2, 3** and **4**.

Issue 1. Sections 1(e), 1(cc), 6(3) and 17(i)(e) of the Act are not inconsistent with nor do they contravene articles 29 (1)(e) and 40(3)(a) and (b) of the Constitution.

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Issue 2. Section 2(1) of the Act is not inconsistent nor is it in contravention of articles 29(i) e and 40 (a) and (b) of the Constitution.

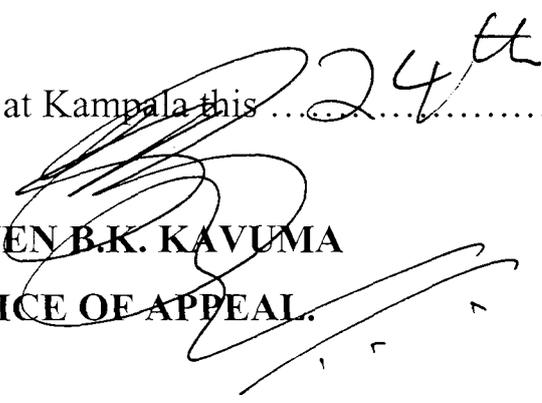
Issue 3. Section 28 of the Act is not inconsistent with nor is it in contravention of article 29(i)(e) and 40(3)(a) and (b) of the Constitution.

Issue 4. Section 70 of the Act is not inconsistent nor is it in contravention of article 20 of the Constitution.

On issue no **5, whether the petitioners should be granted the remedies they prayed for**, having found in the negative on all the four issues above,
10 I decline to grant any of the remedies sought. The petition fails in toto and I would accordingly dismiss it.

Each party to meet its own costs.

Dated at Kampala this *24th* day of *June* 2005.


STEVEN B.K. KAVUMA
JUSTICE OF APPEAL.