CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/02

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA — First Applicant

M NKGABUTLE AND 291 OTHERS — Second to 293rd Applicants

versus

BADER BOP (PTY) LTD — First Respondent

MINISTER OF LABOUR — Second Respondent

Heard on : 19 September 2002

Decided on : 13 December 2002

JUDGMENT

O'REGAN J:

[1] This application for leave to appeal concerns an order made by the Labour Appeal Court (the LAC) ~~(the LAC)~~ interdicting the National Union of Metalworkers and 292 of its members who are employed by Bader Bop (Pty) Ltd from participating in or furthering a strike in support of organisational demands made by the union and its members. The key question in the case is whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognise its shop stewards. The LAC held that such strike action is unlawful and unprotected.

[2] The applicants approached this Court in March 2002 seeking direction as to the procedure they should follow in making an application to this Court for leave to appeal against the judgment of the LAC. As the question of the appropriate procedure to be followed in such cases was pending before the Court in another matter at the time,[1] and as the respondent did not object to this process, directions were given excusing the applicants from obtaining the certificate required by rule 18(2).[2] The application for leave to appeal was opposed. It was enrolled and counsel were instructed to address not only the issue of leave to appeal, but also the merits of the dispute. The second respondent, the Minister of Labour, was not a party to the dispute in the LAC but was cited as the second respondent in the application for leave to appeal as the application challenged the constitutionality of the Labour Relations Act 66 of 1995 (the Act). The applicants gave notice to the Minister of their intention to appeal against the judgment of the LAC by letter on 8 January 2002 and the application for leave to appeal was served on him during May 2002.

[3] On 19 July 2002, the Minister of Labour indicated his intention not to oppose the application for leave to appeal and his willingness to abide the decision of this Court. However, on 10 September 2002 just before the application was to be heard, the Minister filed both an application to intervene in the proceedings and an application for condonation of the late filing of the application to intervene. In the

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1 In the case of *National Education, Health and Allied Workers Union v University of Cape Town and Others* Case No CCT 2/02, as yet unreported judgment of this Court dated 6 December 2002.

2 Directions were given on 6 May 2002.

condonation application the deponent, an official in the Department of Labour, seeks to explain why having been given effectively eight months' notice of the application for leave to appeal, it sought to intervene in the proceedings only shortly before the matter was to be heard.

[4] It is a matter of grave concern that the Minister of Labour should have sought to intervene in the matter so late in the day, and that no affidavits on the substantive issues to be considered in the appeal were ever lodged on his behalf. Constitutional adjudication is compromised in circumstances where the views of the executive branch of government responsible for the implementation of the legislation under challenge are not properly aired before the Court. On the other hand, the Court cannot condone unreasonable delays by the executive branch in putting its views before the Court. The explanations given by the deponent were not such as to persuade this Court that grounds for condonation existed. However, given the fact that neither of the other parties to the litigation objected to the application, the court received the brief heads prepared on behalf of the Minister. In these heads, it was made clear that the Minister supported the judgment of the LAC. This attitude has been considered by the Court in reaching its decision in this matter. It should be noted, however, that those heads contained no sustained attempt to suggest that the interpretation of the Act adopted by the LAC, to the extent that it results in a limitation of the right to strike, constitutes a justifiable limitation of a constitutional right.

[5] The question of the appropriate procedure to be followed in appeals from the

LAC has been dealt with in the judgment of this Court in *NEHAWU and Others v UCT and Others*[3] and does not need to be reconsidered here. Accordingly, I shall first set out the background to the dispute, then consider the application for leave to appeal and finally consider the merits of the application.

Background to the dispute

[6] The first respondent, Bader Bop (Pty) Ltd, manufactures leather products for the automobile industry and employs approximately 1000 semi-skilled and unskilled employees in Ga-rankuwa outside Pretoria. Since early 1999, the General Industrial Workers Union of South Africa has represented the majority of the first respondent's workers and has enjoyed the organisational rights regulated by Part A of Chapter III of the Labour Relations Act 66 of 1995 (the Act).

[7] Section 12 provides that trade union officials may have access to an employer's premises for purposes of recruiting members, or communicating with them, or for holding meetings outside working hours.[4] Section 13 provides that members of trade

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3 Above n 1.

4 Section 12 of the Act provides as follows:

> "**Trade union access to workplace**
> (1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members interests.
> (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.
> (3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in the trade union's constitution.
> (4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work."

unions may authorise their employer to deduct their trade union subscriptions from their salaries and remit the subscriptions to the trade union.[5] Section 14 provides for the recognition of elected shop stewards for certain purposes, most importantly, perhaps, to represent its members in grievance and disciplinary proceedings[6] and

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5 Section 13 of the Act provides as follows:

> "**Deduction of trade union subscriptions or levies**
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> (1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.
>
> (2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.
>
> (3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.
>
> (4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.
>
> (5) With each monthly remittance, the employer must give the representative trade union –
>
> (a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;
>
> (b) details of the amounts deducted and remitted and the period to which the deductions relate; and
>
> (c) a copy of every notice of revocation in terms of subsection (3)."

6 Section 14 of the Act provides as follows:

> "**Trade union representatives**
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> (1) In this section, 'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
>
> (2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves –
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> (a) if there are 10 members of the trade union employed in the workplace, one trade union representative;
>
> (b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;
>
> (c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives.
>
> (d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every

section 15 provides that employees of unions who are union office-bearers are entitled to reasonable amounts of time off during working hours in order to attend to union business.[7] Section 16 provides that a union may require disclosure of certain

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100 additional members up to a maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and

(f) if there are more than 1000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) The constitution of the representative trade union governs the nomination, election, term of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions –

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to –

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours –

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative."

[7] Section 15 of the Act provides as follows:

"**Leave for trade union activities**

(1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.

(2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

(3) An arbitration award in terms of section 21(7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award."

information.[8] The rights conferred by sections 12, 13 and 15 are conferred upon trade

[8] Section 16 of the Act provides as follows:

"**Disclosure of information**

(1) For the purposes of this section, 'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

(4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information –

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

(6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.

(7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The Commission must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.

(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information

unions who are "sufficiently representative of the employees employed by an employer in a workplace".[9] The rights conferred by sections 14 and 16, however, are conferred upon trade unions that have as members a majority of the employees employed in the workplace.[10]

[8] On 16 August 1999 the first applicant (the union) wrote to the first respondent (the employer) claiming to represent a large number of its employees. Several meetings between the union and the employer then took place at which the union sought to persuade the employer to grant it the organisational rights contemplated by sections 12 - 15 of the Act. It was common cause between the parties, however, that the union represented not a majority, but only about 26% of the workers at the employer's workplace. The employer's attitude was that it was willing to afford the union access to its premises as contemplated by section 12, and stop-order facilities as contemplated by section 13. As the union was not representative of a majority of its workforce, it was not willing to recognise the union's shop stewards, nor was it willing to bargain collectively with the union.

[9] The union then declared a dispute over the question of organisational rights

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which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award."

9 Section 11 of the Act. The Act contains no further definition of the meaning of "sufficiently representative". However, section 18 of the Act does permit a majority trade union to enter into a collective agreement with an employer to provide a specific threshold for the exercise of these rights. See further discussion below at para 38.

10 Section 14(1) of the Act.

and, in particular, the question of the recognition of its shop stewards and its right to bargain collectively on behalf of its members. That dispute was referred to conciliation at the Commission for Conciliation, Mediation and Arbitration (the CCMA) but, despite a meeting at the CCMA, remained unresolved. Thereafter the union informed the company that it intended to institute strike action in terms of Chapter IV of the Act.

[10] The employer's view was that the union was not entitled to take strike action to demand the recognition of its shop stewards and it accordingly approached the Labour Court for an interdict. The union argued that it was entitled to take strike action, that it had followed the necessary procedures and that the strike was therefore protected in terms of the Act. The Labour Court dismissed the application for an interdict, whereupon the employer appealed to the LAC, which upheld the appeal and granted the interdict.

[11] The Court, however, divided sharply. Two judgments were written in support of the grant of the interdict, one by Zondo JP, and one by Du Plessis AJA, and a dissent was noted by Davis AJA. The difference between the judgments turned on an interpretation of section 14 of the Act, read with section 21 and Chapter IV of the Act. The majority view, broadly speaking, is that the Act confers the right upon unions to have their shop stewards recognised only when the union is representative of a majority of the workers in a workplace. If a union is not a majority union, it cannot demand as of right that its shop stewards be recognised, nor may it lawfully strike to

make such a demand. The minority judgment takes the view that such a reading of the Act, which results in the limitation of a right to strike, should be avoided.

[12] The applicants then approached this Court, arguing that on the interpretation of the relevant provisions of the Act adopted by the majority of the LAC, the provisions constitute an infringement of their right to strike enshrined in section 23 of the Constitution. They contended that the provisions could be construed consistently with the Constitution. In the alternative, they argued that if the interpretation adopted by the LAC was correct, the Act was unconstitutional in that it constituted an unjustifiable limitation of the right to strike. Section 23 provides that:

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

[13] In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.

[14] Two questions now arise for consideration. First, whether the application for leave to appeal should be granted and secondly, if it should, the merits of the appeal.

The application for leave to appeal

[15] Two issues arise in this regard – the question of whether the Court has jurisdiction in the matter and, if it does, the question of whether it is in the interests of justice for the Court to entertain the appeal. In terms of section 167(3)(b) of the Constitution, this Court has jurisdiction to decide constitutional matters and issues connected with constitutional matters. The issue in this case concerns the interpretation of provisions of the Labour Relations Act. The applicants argue that the interpretation adopted by the majority of the LAC constitutes an infringement of their constitutional right to strike; alternatively they argue that the Act itself limits unjustifiably the constitutionally entrenched right to strike. The issues in the case clearly constitute constitutional matters.[11]

[16] The next question that arises is whether it is in the interests of justice that leave to appeal be granted. The Court has already developed principles governing the phrase "interests of justice".[12] An important consideration relevant to the interests of justice for the purposes of this case is the nature of the constitutional issue at stake and its importance.[13] Here we are concerned with the interpretation of provisions of the Act. The interpretation adopted by the LAC restricted the ability of the union and its

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11 *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) at para 11.

12 See, for example, *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-9; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 10; and *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (5) SA 703 (CC) (appeal against interim execution order) at para 8.

13 *Khumalo v Holomisa,* id at para 14.

members to strike in the circumstances of this case. This restriction, the applicants argue, results in a limitation of their constitutional right to strike. The LAC interpretation, if it stands, will affect all trade unions and their members who are similarly situated. The importance of the issue thus extends beyond the interests of those directly involved in it. This is an important consideration in determining whether it is in the interests of justice to entertain the appeal.

[17] This Court has also held that prospects of success on appeal will be an important though not determinative criterion.[14] In this regard, no certificate has been provided by the LAC[15] indicating its views on whether there are prospects of success or not. However, the LAC was divided on the interpretation of the relevant provisions of the Act. Moreover, the conclusion of the court of first instance, the Labour Court, coincided with that of the dissent in the LAC. A reading of the provisions of the Act makes it clear that there is no express provision prohibiting strikes by minority unions and the issue requires a careful consideration of the provisions of the Act in the context of the Constitution. In the circumstances, I am satisfied that there are sufficient prospects of success on appeal.

[18] Both respondents argued that the constitutional matter had not been adequately raised in the LAC and that accordingly it would not be in the interests of justice for this Court to entertain the appeal. There can be no doubt that, where possible,

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14 See *Fraser v Naude*, above n 12 at para 10; and *Minister of Health v Treatment Action Campaign*, above n 12 at para 10.

15 For the reasons given in *Kem-Lin Fashions v Brunton and Another* 2002 (7) BLLR 597 (LAC).

constitutional matters must be raised at the earliest opportunity by litigants and that this Court will be reluctant to entertain an appeal where a constitutional issue has not been properly raised earlier in the litigation.[16]

[19] It is plain from all three judgments in the LAC that the judges of that Court were alert to the constitutional implications of the interpretive question at issue. Accordingly, it cannot be said that this Court has been deprived of the collective wisdom and expertise of the LAC on the constitutional matter raised here. Nor can it be said that either of the respondents were not fully and timeously alerted to the constitutional issue in the appeal. I cannot conclude that this factor should weigh against the grant of the application for leave to appeal.

[20] Finally, the first respondent argued that the legislature had established specialist courts to resolve disputes in the field of labour relations expeditiously and that therefore this Court should be slow to interfere in such disputes. This is so and is a factor relevant to the interests of justice. However, in this case the applicants argue that the decision reached by the LAC infringes their constitutional rights. This Court must uphold the Constitution and ensure that the rights entrenched in it are protected. The Court would be shirking that duty were it to hold that it should never entertain appeals from the LAC. Where, as in the present case, the applicants argue that their rights (and the rights of others) are being infringed by a judgment of that Court, that will be a factor in favour of granting leave to appeal.

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16 See *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 50-60.

[21] In all these circumstances, it is in the interests of justice for this Court to entertain the appeal and I turn now to consider the merits of the appeal.

Relevant statutory provisions

[22] Chapter III, Part A of the Act regulates organisational rights. In particular, as described above, section 12, 13 and 15 of the Act confer enforceable organisational rights upon "sufficiently representative" trade unions. These rights relate to access to the workplace, stop-order facilities and time off for union activities. Section 14 and 16 confer enforceable organisational rights on unions who are representative of a majority of the employees at a particular workplace. As stated above, section 14 relates to the recognition of union shop stewards, while section 16 relates to the disclosure of information.

[23] The mechanism for enforcement of the organisational rights conferred by Chapter III, Part A of the Act is provided, in the first place by section 21 of the Act.[17]

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[17] "**21. Exercise of rights conferred by this Part**

(1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union's certificate of registration and must specify –

(a) the workplace in respect of which the trade union seeks to exercise the rights;

(b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and

(c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

(4) If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

The section provides that a union must notify an employer of the rights it is seeking to exercise and must then meet with the employer to conclude a collective agreement in respect of those rights. If an agreement cannot be reached, either the union or the employer may refer the dispute to the CCMA which must seek to resolve the dispute through conciliation. If that fails, either party has a right to refer the matter to arbitration.

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(5) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on the other party to the dispute.

(6) The Commission must appoint a commissioner to attempt to resolve the dispute through conciliation.

(7) If the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.

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

(a) must seek –

(i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of representative trade union in a workplace; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;

(b) must consider –

(i) the nature of the workplace;

(ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;

(iii) the nature of the sector in which the workplace is situated; and

(iv) the organisational history at the workplace or any other workplace of the employer; and

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

(9) In order to determine the membership or support of the registered trade union, the commissioner may –

(a) make any necessary inquiries;

(b) where appropriate, conduct a ballot of the relevant employees; and

(c) take into account any other relevant information.

(10) The employer must co-operate with the commissioner when the commissioner acts in terms of subsection (9), and must make available to the commissioner any information and facilities that are reasonably necessary for the purposes of that subsection.

(11) An employer who alleges that a trade union is no longer a representative trade union may apply to the Commission to withdraw any of the organisational rights conferred by this Part, in which case the provisions of subsections (5) to (10) apply, read with the changes required by the context."

[24] Ordinarily the scheme of the Act is that where a dispute may be referred to arbitration, it is not a matter that can constitute the basis for a strike. Section 65(1)(c) provides that:

> "(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if –
>
> (a) . . . .;
>
> (b) . . . .;
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;".[18]

However, section 65(2) creates an exception to this rule. It provides that:

> (2) (a) Despite section 65(1)(c), a person may take part in a strike or lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.
>
> (b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice."

Accordingly, a trade union or employer still dissatisfied after the failure of the section 21 conciliation proceedings may opt for industrial action or for arbitration. If a union opts for strike action, however, it may not then refer the matter to arbitration for a

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18 See *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)* (1997) 18 *ILJ* 671 (LAC) at 675 C-D per Froneman DJP.

period of 12 months from the date on which it gives notice of the strike in terms of section 64(1) of the Act.[19]

[25] So far, the scheme of the Act is clear. Sufficiently representative trade unions, and those unions that claim to be sufficiently representative, may seek to enforce those organisational rights which they claim the Act confers upon them by adjudication (mediation and arbitration) or by industrial action. It is not clear what options (if any) those unions that are not sufficiently representative to be the beneficiaries of the rights conferred by Chapter III, Part A of the Act have to obtain organisational rights. There is no express provision of the Act regulating their position. The question that arises is whether the Act must necessarily be interpreted to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer, or through industrial action.

[26] In determining the proper meaning of this Act in this respect it is important to note the purpose of the Act expressly stated in section 1:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

19 In his judgment in the LAC, Zondo JP pointed to two anomalies in section 65(2)(b). The first relates to the fact that it is only a union which is barred for a period of twelve months from the notice of a strike from referring an organisational rights dispute to arbitration; and secondly, the fact that an employer can, arguably, defeat the union's right to strike as conferred by section 65(2)(b). See *Baderbop (Pty) Ltd v NUMSA and Others* 2002 (2) BLLR 139 (LAC). Neither of these issues arises for consideration in this case.

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."

The first purpose of the Act is thus to give effect to constitutional rights.[20] Secondly, the Act also makes clear that it is intended to give legislative effect to international treaty obligations arising from the ratification of International Labour Organisation (ILO) conventions. South Africa's international obligations are thus of great importance to the interpretation of the Act. Thirdly, the Act seeks to provide a framework whereby both employers and employees and their organisations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.

[27] The Act contains a further important interpretive instruction. Section 3 provides that:

[20] Although the Act refers to section 27 of the interim Constitution, for the purposes of interpretation of the Act, that should be read to refer to section 23 of the 1996 Constitution.

"Any person applying this Act must interpret its provisions –

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic."

Once again this provision emphasises that the Act is to be interpreted to give effect to constitutional rights and to international law obligations.

[28] Section 39(1) of the Constitution provides that:

"When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law."

As has already been acknowledged by this Court,[21] in interpreting section 23 of the Constitution an important source of international law will be the conventions and recommendations of the ILO.

[29] There are two key ILO Conventions relevant to the issue at hand: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[22] South

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21 See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 25.

22 See also the Workers' Representatives Convention, 1971 (No. 135) and the Collective Bargaining Convention, 1981 (No. 154).

Africa is a member of the ILO and has ratified both these Conventions.[23] There are also two key supervisory bodies engaged in ensuring the observation and application of these Conventions: the Committee of Experts on the Application of Conventions and Recommendations;[24] and the Freedom of Association Committee of the Governing Body of the ILO. The Committee of Experts is composed of twenty recognised experts in the field of labour law who are independent of their governments and appointed by the Governing Body of the ILO on the recommendation of its Directive-General.[25] It reviews the national reports received from member states on the implementation of the conventions.

[30] The Freedom of Association Committee hears complaints about alleged breaches of the principles of freedom of association and has developed a complex jurisprudence on freedom of association.[26] The Committee comprises three representatives each of governments, employers and workers, with an independent chairperson. Its decisions are therefore an authoritative development of the principles of freedom of association contained in the ILO conventions. The jurisprudence of these committees too will be an important resource in developing the labour rights

23 Both were ratified on 19 February 1996.

24 A useful account of the observations and surveys of the Committee of Experts on issues relating to freedom of association is to be found in the ILO publication: *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (ILO, Geneva 1983).

25 See Valticos and Von Potobsky *International Labour Law* 2nd (revised) ed (Kluwer, Deventer 1995) at 284, para 658.

26 A digest of these decisions is published. See *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th (revised) ed (ILO, Geneva 1996).

contained in our Constitution.

[31] An important principle of freedom of association is enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

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

Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.[27]

[32] Although none of the ILO Conventions specifically referred to mentions the right to strike, both committees engaged with their supervision have asserted that the

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[27] See para 141 of the *General Survey*, above n 24; and the *Digest*, id at paras 310, 313 and chapter 4 generally. See also WB Creighton "Freedom of Association" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* vol 2 4th (revised) ed (Kluwer, Deventer 1990) at 36.

right to strike is essential to collective bargaining.[28] The Committees accept that limitations on the right to strike for certain categories of workers such as essential services,[29] and limitations on the procedures to be followed[30] do not constitute an infringement of the freedom of association.

[33] These principles culled from the jurisprudence of the two ILO committees are directly relevant to the interpretation both of the relevant provisions of the Act and of the Constitution.

[34] Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution,[31] which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent

28 See the *General Survey*, above n 24 at para 200; and the *Digest*, above n 26 at paras 473-6. The right to strike is expressly protected by Article 8 of the International Covenant on Economic, Social and Cultural Rights.

29 See the *General Survey*, above n 24 at para 214.

30 Id at paras 219-21.

31 Section 18 provides: "Everyone has the right to freedom of association."

them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.

[35] The second principle relates to the right of a union to take industrial action to pursue its demands. Once again, the question is whether the workers' right to strike in order to force an employer to recognise shop stewards for the purposes of grievance and disciplinary proceedings, amongst other things, has been limited by the Act. Prohibiting the right to strike in relation to a demand that itself relates to a fundamental right otherwise not protected as a matter of right in the legislation would constitute a limitation of the right to strike in section 23. No substantial argument was submitted on behalf of the employer or the Department of Labour as to why such a limitation would be justifiable.

[36] Taking these two principles together, it can be said that the jurisprudence of the enforcement committees of the ILO would suggest that a reading of the Act which permitted minority unions the right to strike over the issue of shop steward recognition, particularly for the purposes of the representation of union members in grievance and disciplinary procedures, would be more in accordance with the principles of freedom of association entrenched in the ILO Conventions. Similarly, it would avoid a limitation of the right of freedom of association in section 18 of our Constitution; and the rights of workers to form and join trade unions and to strike; as well as the right of trade unions to organise and bargain collectively entrenched in section 23 of our Constitution. It should, however, be emphasised that no substantial

argument was addressed to us as to why an interpretation of the statute that would have the effect of limiting the constitutional rights in issue would be justifiable. It is not appropriate therefore to see grounds for such justification if an interpretation of the Act which avoids such limitation is possible.

[37] The first question that arises is whether the Act is capable of being interpreted in the manner contended for by the applicants, or whether it is only capable of being read as the respondents and the majority judgment in the LAC suggest. If it is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred.[32] This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of Parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by section 36 of the Constitution.

[38] It is now necessary to turn to consider the specific provisions of the Act in some greater detail. In reaching his conclusion that the provisions of the Act must necessarily be interpreted to deny minority unions a right to strike over organisational rights, Zondo JP relied on the procedure provided by section 21 and, in particular,

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[32] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-3. See also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85.

section 21(8) and section 21(11).[33] Section 21(8) provides that in determining whether a union is representative for the purposes of the organisational rights, the commissioner must seek "to minimise the proliferation of trade unions" in a workplace, "encourage a system of a representative union" and "minimise the financial burden" on an employer occasioned by granting organisational rights to more than one union. These principles are clearly of particular importance where the commissioner is concerned with a dispute about what constitutes "sufficiently representative" for the purposes of sections 12, 13 and 15. They can be of almost no application in relation to sections 14 and 16 where the decisive criterion is whether the union or unions concerned represent a majority of the workforce. Section 21(11) provides that an employer who considers a union to have lost its representative status may apply to the CCMA to withdraw organisational rights conferred by the statute. Du Plessis AJA also referred to section 18 of the Act to support the conclusion of the majority.[34] This provision permits employers and unions to conclude a collective agreement to establish the specific threshold necessary to exercise the rights in sections 12, 13 and 15 defined in the Act as "sufficiently representative". Du Plessis AJA reasoned that this provision, too, suggested that minority unions could not use

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33 The full text of section 21 is provided above n 17.

34 Section 18 of the Act provides as follows:

> "**Right to establish thresholds of representativeness**
> (1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection."

strike action to obtain organisational rights in conflict with such an agreement.

[39] The interpretation by the majority of the LAC is one which the text may plausibly bear. However, it fails to take into account sufficiently the considerations that arise from the discussion of the ILO Conventions outlined above and, in particular, does not avoid the limitation of constitutional rights. The question we must answer, therefore, is whether the Act is capable of an interpretation that does avoid limiting constitutional rights.

[40] In my view, there is such an interpretation. Part A of Chapter III of the Act expressly confers enforceable organisational rights on certain unions – unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions (section 14 and 16). These are enforceable rights and the mechanism for their enforcement is also provided for in Part A. That mechanism is conciliation followed by arbitration. Unusually, in the overall scheme of the Act, unions and employers are given a choice between arbitration and industrial action should conciliation fail. There is nothing in Part A of Chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of "mutual interest" to employers and unions and as such matters capable of

forming the subject matter of collective agreements[35] and capable of being referred to the CCMA for conciliation,[36] the condition precedent to protected strike action.

[41] Section 20 of the Act which forms part of Chapter III, Part A confirms this as follows:

> "Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."

Both Zondo JP and Du Plessis AJA were of the view that this provision did not mean that minority unions could conclude collective agreements affording organisational rights but is a "clarificatory provision" which provides that agreements between representative unions (within the definition of the section) and employers may "regulate" rights. Such a reading of section 20 is a narrow one and not one suggested by the ordinary language of the text which states that nothing in Part A of Chapter III prevents collective agreements being concluded. Any other provision of the chapter which suggests the contrary is to be read subject to this provision. In an Act committed to freedom of association and the promotion of orderly collective bargaining, which requires that employers and unions should have freedom to

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35 A "collective agreement" is defined in s 213 of the Act as follows:

> "'collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –
> (a) one or more employers;
> (b) one or more registered employers' organisations; or
> (c) one or more employers and one or more registered employers' organisations".

36 See section 134 of the Act.

conclude agreements on all matters of mutual interest, a narrow reading of section 20 is an inappropriate one. Moreover, the rights conferred by Part A of Chapter III may in any event be regulated by the collective agreements expressly contemplated by section 21. In my view, a better reading is to see section 20 as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop-stewards as well as other organisational facilities through the techniques of collective bargaining.

[42] On this approach the proper interpretation of section 21 would be different from that suggested by the judges in the LAC. There is some suggestion in all three LAC judgments that the section 21 procedure is available even to those trade unions that are admittedly not sufficiently representative to be entitled to exercise the particular organisational rights concerned. On the interpretation of the Act adopted here, section 21 is available in two circumstances. The first is where a sufficiently representative union wishes to use the procedure to determine the manner in which the rights are to be exercised. The second is where there is a dispute as to whether the union is sufficiently representative or not. Section 21 on its own terms, however, is not available to a union that admits that it is not sufficiently representative as contemplated by the Act. On the other hand, however, section 21 should not be read to deny such unions the right to pursue organisational rights through the ordinary mechanisms of collective bargaining.

[43] Where employers and unions have the right to engage in collective bargaining

on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter. There is nothing in sections 64 or 65 suggesting that there is a limitation on the right to strike in this regard. Davis AJA in his dissent in the LAC also pointed to the fact that there was no express limitation on the right to strike in this respect. It was his view that in the absence of any express prohibition, the Act should be read so as to afford the right to strike to minority unions in these cases consistently with the right to strike in the Constitution. On the interpretation adopted here, the provisions of section 65(1)(c) and 65(2) have no application to the dispute. These provisions are relevant only to those disputes which parties may refer to arbitration. Where a union concedes that it is not entitled to the rights in sections 12 - 15 because it is not representative as contemplated in Chapter III, Part A, the arbitration procedure is not open to it and accordingly section 65(1)(c) poses no bar to industrial action. The precise scope and purpose of section 65(2) is therefore of no application either.

[44] The respondent argued that because the union had sought to ground its demand in section 14 and relied on section 21 in its reference to the CCMA, it was prevented from asserting a different approach in this Court. It would be inconsistent with the overall purposes of the Act for the union to be deprived of relief because of the manner in which it had formulated the dispute. It is correct that the employer has an interest in understanding the nature of the rights asserted by the union. By the time the matter was argued in this Court, however, the employer was fully informed of the union's position. It would not be appropriate to determine the legal issue in this case

on the basis of the manner in which the union sought to characterise the dispute in the CCMA.

[45] The implications of both the approach to interpretation adopted here, and the interpretation itself will be important for labour law. However, its effect may have only a limited impact on industrial relations practice. A minority union that does not qualify even as "sufficiently representative" will rarely be able to launch an effective strike against an employer to secure access to the workplace, stop-order facilities or time off for trade union activities. The more members the union has, the more likely the employer will accept that it is sufficiently representative within the meaning of the Act, at least for the purposes of sections 12, 13 and 15. The approach preferred in this judgment will have its greatest effect in relation to the recognition of shop stewards. Unions are only entitled to have their shop stewards recognised when they can establish they are the majority unions. The limitation on the right of union members to be represented by their own shop stewards is where the nub of the constitutional complaint lies. However, the interpretation adopted does not mean that minority unions will be entitled to have their shop stewards recognised. It means only that the recognition of their shop stewards is a legitimate subject matter for bargaining and industrial action. Employers will not be obliged to recognise shop-stewards for all or any of the purposes contemplated by section 14. The precise purposes for which recognition is granted, if granted at all, will be a matter for the process of collective bargaining to resolve.

[46] I conclude therefore that the relevant provisions of the Act can be read so as to avoid the limitation of fundamental rights occasioned by the interpretation placed upon those provisions by the LAC. It must follow that the interpretation adopted by the majority in the LAC is not the constitutionally appropriate interpretation of the relevant provisions of the Act. This reasoning, however, should not be considered to preclude the right of the legislature to limit the rights in this fashion or any other, if it can do so in a justifiable way for an important governmental purpose. Such a case was not made out and need not be considered further here. I should also add that the question of the limitation of the rights of minority unions in relation to disclosure of information as contemplated by section 16 of the Act may well raise different issues which could result in a different outcome. It is not necessary to consider that further here.

Order and costs

[47] In the circumstances, the appeal is allowed. During the hearing, both parties accepted, given that this litigation was between two non-governmental parties, that the ordinary rules of costs should apply and that costs should follow the result. Although the rule of costs in labour matters is often different to the ordinary rule, it seems appropriate that the applicants who have successfully defended a constitutional right should be entitled to their costs in this Court and in the court below.

[48] The following order is made:

1. The application for leave to appeal is granted and the appeal is upheld.

2. The order of the LAC is set aside and replaced with an order in the following terms:

   2.1 The appeal is dismissed.

   2.2 The appellant is ordered to pay the respondent's costs.

3. The respondent is ordered to pay the costs of the applicants in the Constitutional Court. Such costs to include the costs of two counsel.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J and Yacoob J concur in the judgment of O'Regan J.

NGCOBO J:

Introduction

[49] I have read the judgement of O'Regan J. I concur in the order that she proposes; however, I differ in the approach I take to the issues confronting us, in my emphasis and in the extent to which I elaborate on the reasoning, but not otherwise.

[50] The outcome of this application for leave to appeal depends upon the true issue that was in dispute between NUMSA and Bader Bop. In this Court, as in the court below, there was an issue as to the true nature of the dispute between the parties, in particular, the issue concerned the question whether NUMSA was seeking the statutory organisational rights conferred by section 14 of the Part A of Chapter III or whether it was seeking organisational rights outside those conferred by section 14. If NUMSA was seeking the statutory organisational rights, the application cannot succeed because NUMSA was admittedly an unrepresentative union and thus not entitled to these rights. However, if NUMSA was seeking organisational rights outside Part A of Chapter III, then three issues arise for our consideration, namely; (a) whether an unrepresentative union can assert organisational rights outside of Part A of Chapter III of the Labour Relations Act, 1995 (LRA); (b) if they do have that right, whether they have the right to strike in the pursuit of such organisational rights; and (c) what mechanism they have for the enforcement of such rights.

[51] The issues raised in this case require us to construe the LRA, a statute which was enacted to give effect to section 23 of the Constitution. In a recent judgment of this Court, we held that "the proper interpretation of the LRA will raise a constitutional issue".[1] In announcing this approach, we also held that this does not mean that we will hear all appeals from the LAC dealing with the interpretation and application of the LRA, but "will be slow to hear appeals from the LAC unless they

[1] *National Education, Health and Allied Workers Union v University of Cape Town and Others*, Case No CCT 2/02, as yet unreported judgment of this Court dated 6 December 2002 at para 14.

raise important issues of principle."[2] The present application raises such issues. It is in the interests of justice for us to hear this case. But first, the true nature of the dispute between NUMSA and Bader Bop must be determined.

The true nature of the dispute

[52] It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented.[3] The label given to a dispute by a party is not necessarily conclusive.[4] The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute.[5] These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process.[6] All of this must be taken into consideration in ascertaining the true nature of the dispute.

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2 Id at para 31.

3 *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 925 (LAC) at para 16; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others (1)* (1998) 19 ILJ 260 (LAC) at 269G-H.

4 *Coin Security* id at para 16.

5 *Fidelity Guards Holdings (Pty) Ltd*, above n 3 at 265B-E and 269H-I; compare also *Mine Surface Officials Association of South Africa v President of the Industrial Court and Others* (1987) 8 ILJ 51 at 59I-60E.

6 *NTE Ltd v Ngubane and Others* (1992) 13 ILJ 910 (LAC) at 920J-921A.

[53] Initially NUMSA claimed that it had a majority representation at Bader Bop and on this basis sought to assert the organisational rights in section 12, 13 and 14 of Part A of Chapter III. It would appear that the section 12 and 13 rights were readily conceded. When Bader Bop convincingly demonstrated that NUMSA had no more than 26.6% representation and that GIWUSA had approximately 66%, NUMSA accepted this, albeit reluctantly. It nevertheless persisted in seeking the organisational rights. But this time, as evidenced in a letter, dated 24 February 2000, written by NUMSA to Bader Bop, its claim was based "upon consolidation of its membership in respect of [Bader Bop's] sister plant Bader Sewing where [it] enjoys majority membership and further, in terms of sections 4(1), (2) and (3) of Chapter II of the LRA and section 27 of the Constitution." The reference to section 27 of the Constitution should be a reference to section 23. In a letter of 8 March 2000, Bader Bop disputed both NUMSA's claim and its basis.

[54] It is clear that NUMSA subsequently modified not only the basis for its claim but also its claim. It was no longer claiming majority support at Bader Bop but its claim for majority support was based on its combined membership at Bader Bop and Sewer. In addition, it also added section 4 of the LRA (freedom of association) as a basis for claiming organisational rights. The latter claim was clearly not based on Part A of Chapter III. In my view, the dispute between NUMSA and Bader Bop consisted of two alternative disputes, namely, whether NUMSA could assert majority status on the basis of its combined membership at Bader Bop and Bader Sewing; and if not, whether NUMSA was nevertheless entitled to obtain organisational rights outside of

the ambit of Part A of Chapter III.

[55] By the time the dispute reached the Labour Court, NUMSA was asserting only organisational rights outside of Part A of Chapter III. This is apparent from its answering affidavit in which it denied that section 14(1) precludes a union from exercising the organisational rights referred to in section 14 unless the union has majority support. In support of this denial, it referred to section 20 which provides that nothing in Part A precludes the conclusion of a collective agreement that regulates organisational rights.[7] This denial coupled with the reliance on section 20 evidences an intention to seek organisational rights outside of Part A.

[56] This must be viewed against the acceptance by NUMSA that it does not enjoy majority representation at the workplace. It seems to me that where a union accepts that it is not a representative union as defined in the LRA and accepts that Part A does not confer any rights upon it, but nevertheless contends that it is entitled to section 14 organisational rights, the dispute which arises must be whether such union is entitled to organisational rights outside Part A. To assert the use of the label "section 14" as conclusive of the nature of the dispute is to elevate form over substance.

[57] In these circumstances, to describe the dispute as relating to the statutory organisational rights conferred by Part A, is to lose sight of the true nature of the dispute between NUMSA and Bader Bop. In my view, the real dispute between the

[7] Section 20 is discussed more fully at paras 63-6.

parties was whether NUMSA was entitled to obtain organisational rights outside of the ambit of Part A of Chapter III. It now remains to consider the issues that flow from this dispute.

Issues to be decided

[58] The issues that fall to be decided therefore are:

(a) Whether NUMSA is entitled to obtain the organisational rights outside of Part A of Chapter III.

(b) If so, whether NUMSA can resort to a strike in the pursuit of those rights;

(c) Whether such a strike is limited by section 65(1)(c); and

(d) Whether section 21 provides an exclusive mechanism for the enforcement of organisational rights, including those that fall outside Part A.

(a) Is an unrepresentative union entitled to obtain organisational rights outside of Part A of Chapter III?

[59] Section 4 of Chapter II of the LRA confers on workers the right to join a trade union of their choice. This right comprehends the other rights associated with it such as the right to elect trade union representatives; the right to be represented by such representatives at disciplinary enquiries; the right to organise; and the right to bargain collectively to obtain these rights.

[60] Part A of Chapter III confers organisational rights upon representative unions as defined in that Part. The effect of this is that representative unions are entitled as of right to these organisational rights – they need not bargain for them. But the extent of their entitlement again depends on whether the union concerned is a majority union or a sufficiently representative union. The question which arises is whether by conferring these rights on the representative unions, the LRA intended to deny them to unrepresentative unions. This is essentially a matter of construction.

[61] In construing Part A it is necessary to have regard to the Constitution, the primary objects of the LRA, as well as its relevant provisions and the ILO Conventions.[8] The Constitution guarantees to every worker the right "to form and join a trade union"[9]; and the right "to participate in the activities and programmes of a trade union".[10] To every trade union, the Constitution guarantees the right to organise[11] and to bargain collectively.[12] The LRA gives effect to these constitutional rights in section 4.[13] One of the declared primary objects of the LRA is "to provide a

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8 The LRA must be construed in the light of these instruments because section 3 requires that:

> "Any person applying this Act must interpret its provisions –
> (a) to give effect to its primary objects;
> (b) in compliance with the Constitution; and
> (c) in compliance with the public international law obligations of the Republic."

9 Section 23(2)(a).

10 Section 23(2)(b).

11 Section 23(4)(b).

12 Section 23(5).

13 Section 4 provides:

> "(1) Every employee has the right –
> (a) to participate in forming a trade union or federation of trade unions; and

framework within which employees and their trade unions, employers and employers' organisations can . . . collectively bargain to determine . . . matters of mutual interest".[14] The ILO Conventions: Freedom of Association and Protection of the Right to Organise (Convention 87 of 1948) and the Right to Organise and Collective Bargaining (Convention 98 of 1949) recognise these rights. Both were ratified by South Africa on 19 February 1996.

[62] In my view, Part A does not preclude an unrepresentative union from obtaining organisational rights if this part is properly construed in the light of section 23 of the Constitution, section 4 of the LRA and the ILO Conventions. Neither does the LRA. On the contrary, Part A and in particular section 20, supports the conclusion that the

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

(2) Every member of a trade union has the right, subject to the constitution of that trade union –
  (a) to participate in its lawful activities;
  (b) to participate in the election of any of its office-bearers, officials or trade union representatives;
  (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; and
  (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation –
  (a) to participate in its lawful activities;
  (b) to participate in the election of any of its office-bearers or officials; and
  (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office."

[14] Section 1(c) provides:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –
> . . . .
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
> (ii) formulate industrial policy;" (footnote omitted).

intention of Part A is not to deny organisational rights to unrepresentative unions by expressly conferring such rights on representative unions.[15]

[63] Section 20 provides that nothing in Part A must be construed as precluding a collective agreement that regulates organisational rights. Section 21(3) and (4) contemplate that the employer and the representative union will conclude a collective agreement, presumably to regulate the exercise of the organisational rights. If section 20 is construed to refer to a collective bargaining agreement contemplated in section 21, it is superfluous. But the section has a meaning if it is construed to refer to agreements conducted outside the ambit of Part A's statutory rights.

[64] Section 20 permits representative unions to regulate organisational rights outside of the ambit of Part A. It permits the modification of those rights by way of agreement but subject to limitations imposed, such as those to be found in section 18. The section is silent on collective agreements with unrepresentative unions. The LRA does not prohibit these agreements either. There is therefore nothing to preclude an agreement with an unrepresentative union which confers organisational rights on it – provided such agreement does not prevent the exercise of statutory organisational rights by a representative union. Thus construed section 20 refers to agreement outside the ambit of Part A. This construction gives effect to the constitutional rights

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[15] Section 20 provides:

> "Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."

of unrepresentative unions and the workers conferred by section 23 of the Constitution as given effect to by section 4 of the LRA. Moreover, this construction gives effect to the primary object of the LRA "to provide a framework within which employees and their trade unions, employers and employers' organisations can . . . collectively bargain to determine . . . other matters of mutual interest".[16]

[65] I agree with the comment on section 20 that:

> "The general intention behind the Act is that voluntarism (provided, at any rate, that it is collective) should prevail over state regulation. As a result, the rights conferred by the Act are generally residual: they are normally subordinate to arrangements that the parties collective craft for themselves and operate only in the absence of such an agreement (see, by way of further support for this proposition, s 21(3)). This section gives recognition to this principle, not merely by expressly preserving the rights of registered unions and employers to conclude agreements that regulate organizational rights, but also by impliedly permitting them to prevail over the rights conferred by part A. The section, in other words, impliedly serves to permit an extension, modification, waiver or complete renunciation of the statutory rights conferred by this part.[17]

After observing that the section says nothing about collective agreements with unregistered unions and that nothing in the LRA prohibits their conclusion, the author concludes that the agreement envisaged in section 20 can confer organisational rights on an unrepresentative union, but these rights "cannot have the effect of depriving registered unions of the rights conferred on them by the statute".

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16 Section 1(c) of the LRA.

17 Brassey "Commentary on the Labour Relations Act" (1999) Vol 3 (Juta, Cape Town) A3: 26.

[66] Part A therefore does not preclude an unrepresentative union from obtaining organisational rights. Unlike representative unions that have these rights conferred on them by Part A and therefore need not bargain for them, an unrepresentative union must bargain for these rights. But can such a union embark upon strike action in support of its claim to organisational rights?

(b) Does an unrepresentative union have a right to strike in the pursuit of its organisational rights?

[67] The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle. Section 64(1) of the LRA confers this right upon every worker.[18]

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[18] Section 64(1) provides:

> "(1) Every employee has the right to strike and every employer has recourse to lock-out if –
>
> (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that –
>
> (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless –
>
> (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
>
> (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
>
> (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
>
> (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the

The Constitution guarantees this right to every worker in section 23(2)(c).[19] Once it is accepted that an unrepresentative union has a right to bargain collectively to obtain organisational rights, as it must be, it must follow that it has the right to resort to strike action in the pursuit of those rights. However, the strike must comply with the procedural requirements in section 64, namely, conciliation and 48 hours notice.

(c) Does section 65(1)(c) limit such right to strike?

[68] Limitations on the right to strike are contained in section 65, which provides:

> "(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if –
>
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
>
> (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
>
> (d) that person is engaged in –
>
> (i) an essential service; or
>
> (ii) a maintenance service." (Footnote omitted.)

[69] None of the limitations set out in this section applies to a strike by an unrepresentative union. Section 65(1)(c) proscribes a strike where a party has a right to refer the dispute to arbitration or the Labour Court. That right must be derived

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> strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)."

[19] Section 23(2)(c) provides:

> "Every worker has the right –
>
> . . . .
>
> (c) to strike."

from the LRA. The LRA does not confer upon an unrepresentative union the right to refer the dispute over organisational rights either to arbitration or the Labour Court. It follows that section 65(1)(c) does not limit the right to strike. The section 65(2)(a) exception does not apply either because the organisational rights concerned fall outside the ambit of Part A.[20]

[70] The question whether such a right to strike will be effective is, in my view, irrelevant to the question whether there is a right to strike. Whether a right to strike exists is a question of law which must be determined by construing the relevant statutory provision.

(d) Does Part A provide an exclusive platform for the attainment of organisational rights?

[71] Relying on the phrase "any registered trade union" in section 21, Du Plessis AJA concludes that all registered trade unions that seek to exercise organisational rights must use the procedure in section 21. This requires some qualification. A registered trade union that claims that it has the majority or sufficient representation must use this procedure. However, a union that accepts that it is not a representative union as defined in the LRA, cannot use section 21. The section is only available to enforce the rights conferred by Part A and those rights are conferred on representative

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[20] Section 65(2)(a) provides:

> "Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15."

unions – they are not conferred upon unrepresentative unions and they cannot therefore be enforced by such unions through section 21.

[72] Du Plessis AJA points out certain anomalies that may arise if an unrepresentative union were to ignore the provisions of Part A in enforcing organisational rights. The first concerns the inequality that will arise in the application of the LRA while the second concerns the fact that the dispute resolution mechanism in subsections (8) and (9) of section 21 will serve no purpose. The point to be stressed here is one already made, namely, that Part A provides a platform for the enforcement of organisational rights conferred on representative unions in Part A – it has no application to organisational rights sought outside of Part A.

[73] As I understand the anomaly relating to unequal application of the statute, it is said to arise because an unrepresentative union can seek organisational rights outside Part A, while representative unions are required to seek those rights under Part A. In dealing with section 20, I have indicated that that section allows both unrepresentative and representative unions to conclude collective agreements to regulate organisational rights outside of Part A. To that extent therefore, both unions enjoy the same rights.

[74] Nor does the fact that representative unions have to go through section 21 of Part A while unrepresentative unions do not, result in an unequal treatment of representative unions. Part A confers organisational rights on representative unions, and they are thus relieved of the onerous duty to bargain for those rights. They are

entitled to those rights as of right if they meet the threshold representation required. By contrast, these rights are not conferred upon unrepresentative unions. To obtain them, they must bargain for them. These two groups of unions are therefore not similarly situated so as to require similar treatment.

[75] Moreover, both groups of unions are not hit by section 65(1)(c). Representative unions are exempted because section 65(2)(a) provides as such. Unrepresentative unions are exempted because the LRA does not give them the right to refer the dispute either to arbitration or to the Labour Court. The LRA does not confer organisational right on unrepresentative unions. There is no provision for their enforcement in the LRA. That being the case, the union need only submit the dispute relating to such rights for conciliation and, if conciliation fails, the union would be entitled to call a strike on requisite notice.

Conclusion

[76] I conclude therefore that NUMSA was entitled to: (a) seek organisational rights relating to shop stewards outside the ambit of Part A of Chapter III of the LRA and (b) embark upon strike action in the pursuit of such organisational rights. In the result I concur in the order which O'Regan J proposes in her judgment.

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