

**NUMSA & others v Bader Bop (Pty) Ltd & another  
[2003] 2 BLLR 103 (CC)**

**Division:** Constitutional Court  
**Date:** 13/12/2002  
**Case No:** CCT14/02  
**Before:** Chaskalson, Chief Justice, Langa, Deputy Chief Justice, Goldstone, Kriegler, Madala, Mokgoro, Ngcobo, Sachs, Yacoob et O'Regan, Judges

**Flynote**

**Appeal to the Constitutional Court**

*Appeal – From Labour Appeal Court to Constitutional Court – Grounds for leave to appeal to Constitutional Court discussed and applied.*

*Constitutional Court – Jurisdiction – Court has jurisdiction to entertain appeals from Labour Appeal Court where judgment restricts constitutional rights of applicant.*

*Interpretation of statutes – Proper approach to interpreting LRA – Act to be interpreted where possible in accordance with international law and the Constitution.*

*Labour Appeal Court – Appeal to Constitutional Court – Grounds for further appeal discussed and applied.*

*Organisational rights – Minority unions – Minority unions entitled to strike in support of rights conferred by LRA only on majority unions.*

*Strikes – Right to strike – Unrepresentative unions entitled to strike in support of demands for organisational rights – Strike by minority union in support of demand for recognition of elected shop stewards lawful and protected.*

**Sections of the LRA considered:**

Sections 12 to 15

[Section 20](#)

[Section 21](#)

[Section 64](#)

[Section 65\(1\)\(c\)](#)

[Section 65\(2\)\(a\)](#)

**Editor's Summary**

The applicant union sought to persuade the first respondent to grant it organisational rights contemplated in the LRA. However, as the union represented a minority of its employees, the first respondent was not prepared to recognise the union's shop stewards or to bargain with it. The union referred a dispute to the CCMA, and informed the company that it intended calling its members out on strike in support of its demand that the first respondent recognise its elected shop stewards. The first respondent applied unsuccessfully for an interdict, and then appealed to the Labour Appeal Court. The

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Labour Appeal Court granted the interdict.<sup>a</sup> In an application for leave to appeal<sup>b</sup> to the Constitutional Court, the applicants contended that the Labour Appeal Court had incorrectly interpreted the LRA, alternatively, that the LRA was unconstitutional because it unreasonably limited their right to strike.

As to the application for leave to appeal, the Court held that the applicants' contention that the LAC's judgment infringed their right to strike raised a constitutional matter. The Court accordingly had jurisdiction to entertain the appeal. To grant leave to appeal would be in the interests of justice because the LAC's judgment limited the applicants' constitutional rights to collectively bargain and to strike; the judgment also affected other unions whose members were similarly situated. Although the LAC had not issued a certificate on prospects of success, that court was divided over the manner in which the LRA should be interpreted. Although the constitutional issue was not pertinently raised in the LAC, all the judges were clearly alert to the constitutional implications of the case. While the legislature had established specialist courts for labour disputes, the Court was obliged to ensure that constitutional rights were protected. It was accordingly in the interest of justice that the appeal should be entertained.

Turning to the merits, the Court noted that the mechanism for the enforcement of organisational rights is to be found in [section 21](#) of the LRA, which provides ultimately for arbitration of disputes concerning claims for such rights. Ordinarily, where the LRA provides for arbitration of a class of disputes, the employees concerned may not strike. However, as an exception to this rule, the LRA permits sufficiently representative trade unions and employers to choose between arbitration and industrial action should conciliation proceedings fail. It is not clear which options are available to those unions that are not sufficiently representative to secure organisational rights under the Act. The question *in casu* was whether the LRA must necessarily be interpreted to preclude non-representative unions from acquiring organisational rights through industrial action. In determining that question, the purposes of the LRA and its interpretative provisions must be noted. Furthermore, the Constitution must be interpreted with regard *inter alia* to international law. The two relevant ILO conventions were those relating to freedom of association and collective bargaining. An important element of freedom of association is the right of employees to choose which unions they wish to join. A majoritarian union system is not incompatible with freedom of association as long as minority unions are allowed to exist. The ILO has held that the right to strike is essential to collective bargaining, but recognises that certain limitations on that right do not necessarily constitute infringements of freedom of association. Freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent them in individual workplace grievances and to strike to enforce bargaining demands. The constitutional right of freedom of association is impaired if workers are not permitted to have their own union represent them in workplace disciplinary and grievance matters, but must be represented by a rival union which they have chosen not to join. To prohibit a right to strike over a demand that is itself related to a fundamental right constitutes a limitation on the constitutional right to strike. The jurisprudence of the enforcement committees of the ILO suggests that an interpretation of the LRA which permits minority unions to strike over the recognition of shop stewards would be more in accordance with the principle of freedom of association and other constitutional rights than the contrary interpretation.

As to whether the LRA could be interpreted in a manner which did not restrict the applicants' rights, the Court noted that the majority of judges in the LAC had been influenced by the provisions which enjoin commissioners, when deciding whether unions

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are "sufficiently representative" to qualify for organisational rights, to *inter alia* "minimise the proliferation of trade unions". The Court held that these provisions have no application when the dispute is about whether a union is a majority union. While the LAC's interpretation of the LRA was plausible, the LAC failed to take sufficient account of the ILO conventions and did not avoid the limitation of constitutional rights. The question was whether the LRA could be interpreted in a manner that did not limit those rights. The LRA expressly confers organisational rights on representative unions. These rights are enforceable through [section 21](#). Representative unions are given a choice between arbitration and strike action if conciliation fails. However, the LRA does not expressly preclude unions that do not meet the statutory thresholds from acquiring organisational rights through collective bargaining backed by industrial action. This is confirmed by [section 20](#), which expressly states that nothing in the Act precludes the conclusion of collective agreements regulating organisational rights. This provision expressly confirms the internationally recognised right of majority unions through collective bargaining to attempt to gain access to the workplace, recognition of their shop stewards and other organisational rights. [Section 21](#) must not be interpreted to deny unions that are unrepresentative the right to pursue organisational rights through the ordinary mechanisms of collective bargaining. Where employers and unions are entitled to bargain collectively, it must be presumed that both parties are entitled to resort to industrial action. Nothing in the LRA suggests that unions with insufficient representation cannot strike in support of demands for organisational rights.

The Court held further that it was immaterial that the applicants had initially sought to acquire rights in terms of [section 14](#) of the LRA and had referred the matter under [section 21](#). By the time the matter was argued, the first respondent was fully informed of the applicants' position. It would have been inappropriate to determine the legal issue on the basis of the manner in which the union had initially characterised the dispute.

The Court added that its judgment was likely to have little effect on industrial relations practice because majority unions which do not qualify as "sufficiently representative" will rarely be able to launch an effective strike to secure organisational rights.

The Court (*per* Ngcobo J) held further that the LRA does not preclude an unrepresentative union from obtaining organisational rights. Unions are permitted to regulate organisational rights outside the framework of the Act. Nothing prevents unrepresentative unions from concluding agreements regulating organisational rights, provided such agreements do not limit the organisational rights of majority unions. Once it is accepted that unrepresentative unions are entitled to bargain over organisational rights, it follows that they may strike in support of such rights. Since the LRA does not confer on unrepresentative unions the right to refer disputes over organisational rights to arbitration or to the Labour Court, the limitation imposed by [section 65\(1\)\(c\)](#) does not apply to them.

The appeal was upheld.

## Judgment

### O'Regan J

- [1] This application for leave to appeal concerns an order made by the Labour Appeal Court ("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.

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- [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,<sup>1</sup> 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).<sup>2</sup> 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 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.

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- [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 & others v University of Cape Town & others*<sup>3</sup> 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 1 000 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.<sup>4</sup> [Section 13](#) provides that members of trade unions may authorise their employer to deduct their trade union subscriptions from their salaries and remit the subscriptions to the trade union.<sup>5</sup> [Section 14](#) provides for the recognition

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of elected shop stewards for certain purposes, most importantly, perhaps, to represent its members in grievance and disciplinary proceedings<sup>6</sup> and

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[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.<sup>7</sup> [Section 16](#) provides that a union may require disclosure of certain information.<sup>8</sup> The rights conferred

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by sections 12, 13 and 15 are conferred upon trade unions who are "sufficiently representative of the employees employed by an employer in a workplace".<sup>9</sup> 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.<sup>10</sup>

- [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 to 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 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.

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- [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

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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.<sup>11</sup>
- [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”.<sup>12</sup> 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.<sup>13</sup> 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 members to strike in the circumstances of this case. This restriction, the

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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.<sup>14</sup> In this regard, no certificate has been provided by the LAC<sup>15</sup> 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, 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.<sup>16</sup>
- [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

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by a judgment of that Court, that will be a factor in favour of granting leave to appeal.

- [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, sections 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. Sections 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.<sup>17</sup> The section provides that a union must notify an employer of

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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.

- [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"<sup>18</sup>

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

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refer the matter to arbitration for a period of 12 months from the date on which it gives notice of the strike in terms of [section 64\(1\)](#) of the Act.<sup>19</sup>

- [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;
  - (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.<sup>20</sup> 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

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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:

"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,<sup>21</sup> 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).<sup>22</sup> South Africa is a member of the ILO and has ratified both these Conventions.<sup>23</sup> 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;<sup>24</sup> and the Freedom of Association Committee of the Governing Body of the ILO. The Committee of Experts is composed of 20 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.<sup>25</sup> 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

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complex jurisprudence on freedom of association.<sup>26</sup> 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 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.<sup>27</sup>

- [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 right to strike is essential to collective bargaining.<sup>28</sup> The Committees accept that limitations on the right to strike for certain categories of workers such as essential services,<sup>29</sup> and limitations on the procedures to be followed<sup>30</sup> 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

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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,<sup>31</sup> 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 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.<sup>32</sup> This is not to say that where the legislature intends legislation to limit rights, and where

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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, [section 21\(8\)](#) and [section 21\(11\)](#).<sup>33</sup> [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.<sup>34</sup> 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 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.

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- [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 (sections 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<sup>35</sup> and capable of being referred to the CCMA for conciliation,<sup>36</sup> 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 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

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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 [section 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 to 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

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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.

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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, Kriegler, Madala, Mokgoro, Ngcobo, Sachs and Yacoob JJ concurred in the judgment of O'Regan J.)

**Ngcobo J**

**Introduction**

- [49] I have read the judgment 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 [66 of 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".[37](#) 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 raise important issues of principle".[38](#) 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

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the substance of the dispute and not at the form in which it is presented.<sup>39</sup> The label given to a dispute by a party is not necessarily conclusive.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> All of this must be taken into consideration in ascertaining the true nature of the dispute.

[53] Initially NUMSA claimed that it had a majority representation at Bader Bop and on this basis sought to assert the organisational rights in sections 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 section 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 Sewing. 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

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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.<sup>43</sup> 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 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

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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.<sup>44</sup> The Constitution guarantees to every worker the right "to form and join a trade union";<sup>45</sup> and the right "to participate in the activities and programmes of a trade union".<sup>46</sup> To every trade union, the Constitution guarantees the right to organise<sup>47</sup> and to bargain collectively.<sup>48</sup> The LRA gives effect to these constitutional rights in [section 4.49](#). One of the declared primary objects of the LRA is "to provide a framework within which employees and their trade unions, employers and employers' organisations can . . . collectively bargain to determine . . . matters of mutual interest".<sup>50</sup> The ILO Conventions: Freedom of Association and

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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 intention of Part A is not to deny organisational rights to unrepresentative unions by expressly conferring such rights on representative unions.<sup>51</sup>

[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 agreements outside the ambit of Part A. This construction gives effect to the constitutional 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".<sup>52</sup>

[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 collectively 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

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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."<sup>53</sup>

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".

[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.<sup>54</sup> The Constitution guarantees this right to

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every worker in [section 23\(2\)\(c\)](#).<sup>55</sup> 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 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.<sup>56</sup>

[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

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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 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.

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In the result I concur in the order which O'Regan J proposes in her judgment.



For applicant:

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For first respondent:

Adv JG Grogan, instructed by RC Futter Attorneys, Port Elizabeth and Knobel & Meyburgh Attorneys, Johannesburg

For second respondent:

Adv Q Pelsaer SC and E Seima, instructed by the State Attorney, Johannesburg

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## Footnotes

a *Baderbop (Pty) Ltd v NUMSA & others* [\[2002\] 2 BLLR 139](#) (LAC).

b The parties agreed with the Court's consent that if the application for leave to appeal succeeded, the Court would decide the matter on the merits without further argument.

1 In the case of *NEHAWU v University of Cape Town & 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.

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 their 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 by that 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."

5 Section 13 of the Act provides as follows:

### "Deduction of trade union subscriptions or levies

- (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

- (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 –
  - (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 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 1 000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1 000 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.”
- 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 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.
- 11 *Fredericks & others v Member Executive Council for Education & Training, Eastern Cape & others* [2002 \(2\) SA 693 \(CC\)](#); [2002 \(2\) BCLR 113 \(CC\)](#) at para 11.
- 12 See, eg, *Member Executive Council for Development Planning & Local Government, Gauteng v Democratic Party & 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 & others* [1999 \(1\) SA 1 \(CC\)](#); [1998 \(11\) BCLR 1357 \(CC\)](#) at para 10; *Islamic Unity Convention v Independent Broadcasting Authority & others* [2002 \(4\) SA 294 \(CC\)](#); [2002 \(5\) BCLR 433 \(CC\)](#) at paras 15-9; *Khumalo & others v Holomisa* [2002 \(5\) SA 401 \(CC\)](#); [2002 \(8\) BCLR 771 \(CC\)](#) at para 10; and *Minister of Health & others v Treatment Action Campaign & others (1)* [2002 \(5\) SA 703 \(CC\)](#) (appeal against interim execution order) at para 8.
- 13 *Khumalo v Holomisa id* at para 14.
- 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 & another* [\[2002\] 7 BLLR 597 \(LAC\)](#).
- 16 See *Carmichele v Minister of Safety & Security & another* [2001 \(4\) SA 938 \(CC\)](#); [2001 \(10\) BCLR 995 \(CC\)](#) at paras 50-60.
- 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.
- (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 a representative trade union in a workplace; and
- (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;
- (b) must consider –
- (i) the nature of the workplace;
- (ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;
- (iii) the nature of the sector in which the workplace is situated; 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.”
- 18 See *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC) at 675C-D per Froneman DJP. (Also reported at [\[1997\] 6 BLLR 697 \(LAC\)](#) - Ed.)
- 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 & others* [\[2002\] 2 BLLR 139 \(LAC\)](#). Neither of these issues arises for consideration in this case.
- 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.
- 21 See *South African National Defence Union v Minister of Defence & 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).
- 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* 1983 ILO Geneva .
- 25 See Valticos and Von Potobsky *International Labour Law* 2 ed (revised) 1995 Kluwer Deventer 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* 4 ed (revised) 1996 ILO Geneva.
- 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 4 ed (revised) 1990 Kluwer Deventer at 36.
- 28 See the *General Survey*, above n 24 at para 200; and the *Digest*, above n 26 at paras 473–476. 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 219–221.
- 31 Section 18 provides: "Everyone has the right to freedom of association."
- 32 *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: in re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2001 \(1\) SA 545 \(CC\)](#); [2000 \(10\) BCLR 1079 \(CC\)](#) at paras 22–23. See also *De Lange v Smuts NO & others* [1998 \(3\) SA 785 \(CC\)](#); [1998 \(7\) BCLR 779 \(CC\)](#) at para 85.
- 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."
- 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 [s 134](#) of the Act.
- 37 *NEHAWU v University of Cape Town & others*, case no CCT 2/02, as yet unreported judgment of this Court dated 6 December 2002 at para 14.
- 38 *Id* at para 31.
- 39 *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 ILJ 925 (LAC) at para 16 (also reported at [\[2000\] 4 BLLR 371 \(LAC\)](#) – Ed.); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)* (1998) 19 ILJ 260 (LAC) at 269G–H (also reported at [\[1998\] 10 BLLR 995 \(LAC\)](#) – Ed.).
- 40 *Coin Security* *id* at para 16.
- 41 *Fidelity Guards Holdings (Pty) Ltd*, above n 3 at 265B–E and 269H–I. Cf also *Mine Surface Officials Association of South Africa v President of the Industrial Court & others* (1987) 8 ILJ 51 at 59I–60E.
- 42 *NTE Ltd v Ngubane & others* (1992) 13 ILJ 910 (LAC) at 920J–921A.
- 43 [S 20](#) is discussed more fully at paras 63–66.
- 44 The LRA must be construed in the light of these instruments because [s 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."
- 45 [S 23\(2\)\(a\)](#).
- 46 [S 23\(2\)\(b\)](#).
- 47 [S 23\(4\)\(b\)](#).
- 48 [S 23\(5\)](#).
- 49 [S 4](#) provides:
- "(1) Every employee has the right –
- (a) to participate in forming a trade union or federation of trade unions; and
- (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."
- 50 [S 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).
- 51 [S 20](#) provides:  
"Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."
- 52 [S 1\(c\)](#) of the LRA.
- 53 Brassey "Commentary on the Labour Relations Act" Vol 3 1999 Cape Town Juta at A3: 26.
- 54 [S 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 strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)."
- 55 [S 23\(2\)\(c\)](#) provides:  
"Every worker has the right –
- . . .
- (c) to strike."
- 56 [S 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."