ARTICLE

Organisational Rights for Minority Trade Unions: A Reflection on Ngcobo J's Judgment in *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC)

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ABSTRACT

The Constitution of the Republic of South Africa contains a Bill of Rights which enshrines the rights of all the people in the country. These include the rights of trade unions and employers or employers' organisations. This article deals with organisational rights for minority trade unions, with specific reference to the decision of the Constitutional Court in *NUMSA & Others v Bader Bop (Pty) Ltd & Another* and more particularly the judgment delivered by Ngcobo J. It argues that by recognising organisational rights to a minority trade union such as the National Union of Mineworkers of SA, outside Part A of Chapter III of the Labour Relations Act, which grants them only to majority or representative trade unions, the *Bader Bop* judgment brought about a 'revolution' in the South African labour-law jurisprudence. This judgment will remain one of the jewels of South African jurisprudence and Ngcobo J, who delivered in this case one of his few separate judgments, played an important role during this revolution facilitated by a transformative and substantive interpretative approach that went beyond the Labour Relations Act to consider the Constitution and international law.

Keywords: trade union; employee; employer; employers' organisation; organisational rights

Introduction

Until the demise of the apartheid regime in 1994, in terms of the then Labour Relations Act (LRA), trade unions were not entitled to most organisational rights because the Act[1] did not recognise them. The only organisational right that was recognised was the right

1 This Act replaced the Industrial Conciliation Act 28 of 1956 before it was also repealed by the Labour Relations Act 66 of 1995; hereinafter the 'LRA'.

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to stop-order facilities, which was not even available to all trade unions. This position changed with the adoption of the Interim Constitution of the Republic of South Africa, 1993,[2] which was later superseded by the Constitution of the Republic of South Africa, 1996 ('the Constitution'). Section 23 of the Constitution of 1996 protects workers' rights to form and join trade unions, to participate in the activities and programmes of such trade unions, and to strike. Employers' rights to form and join employers' organisation(s) and to participate in their activities are also protected. So are employers and employers' organisations entitled to engage in collective bargaining. Collective bargaining is the most common form of workers' participation in the workplace as it provides workers, through their trade unions, with greater leverage and equality of negotiating power in the bargaining process with employers. To give effect to these constitutional labour rights, a new LRA[3] was passed in 1995. In its Chapter 2, the Act recognises trade unions' organisational rights (statutory rights).[4] However, such organisational rights may be exercised only by registered trade unions that are sufficiently representative[5] and/or represent the majority of employees[6] in the workplace. Chapter 2 of the LRA does not make any reference to minority trade unions' organisational rights.

This article critically reflects on organisational rights for minority trade unions with specific reference to the decision of the Constitutional Court in *NUMSA & Others v Bader Bop (Pty) Ltd & Another*,[7] which for the first time upheld minority trade unions' organisational rights in South Africa. More particularly, it reflects on the separate but concurring judgment delivered by Ngcobo J. It argues that by recognising organisational rights for a minority trade union such as the National Union of Metalworkers of South Africa (NUMSA), outside of Part A of Chapter III of the Labour Relations Act, which grants such rights only to majority or representative trade unions, the *Bader Bop* judgment brought about a 'revolution' in the South African labour-law jurisprudence on the protection of labour rights, mainly the right to freedom of association and the right to strike. This judgment will remain one of the jewels of South African jurisprudence, and Ngcobo J, who delivered in this case one of his few separate judgments, played an important role during this 'revolution' that was facilitated by a transformative and substantive interpretative approach. This approach went beyond the LRA to consider the Constitution, the supreme law of the Republic,[8] and international law, which must also be considered when interpreting the rights enshrined in the Bill of Rights.[9]

2 Act 200 of 1993.
3 Act 66 of 1995.
4 Sections 11–16 of the LRA.
5 See ss 12, 13, and 15 of the LRA.
6 See ss 14 and 16 of the LRA.
7 *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA* (2002) 23 *ILJ* 104 (LAC) ('*Bader Bop*').
8 Sections 1(*c*) and 2 of the Constitution.
9 Section 39(1)(*b*) of the Constitution.

The article first provides the background to *Bader Bop*, which started at the Commission for Conciliation, Mediation and Arbitration (CCMA), then went to the Labour Court and the Labour Appeal Court (LAC), and was finally heard in the Constitutional Court. It then considers the majority judgment of the Constitutional Court and focuses on Ngcobo J's separate but concurring judgment.

Background to the Constitutional Court's Judgment in *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd*

As stated earlier, the dispute was first brought to the CCMA. It then went to the LAC and ended in the Constitutional Court. Bader Bop (Pty) Ltd[10] employed 1 108 employees. A registered trade union known as the General Industrial Workers Union of South Africa (GIWUSA) represented the majority of Bader Bop's employees,[11] while NUMSA,[12] also a registered trade union, represented twenty-six per cent of the total workforce and was therefore a minority trade union in the Bader Bop workplace.[13] The employer granted GIWUSA the organisational rights provided for in section 14[14] of the LRA; NUMSA was granted section 12[15] and 13[16] organisational rights. However, since it was a minority trade union, NUMSA was not granted section 14 organisational rights. Accordingly, NUMSA demanded that the employer grant it organisational rights provided for in section 14 of the LRA.

The employer refused to grant NUMSA such rights on the basis that section 14 rights were available for trade unions which represented the majority of employees in the employer's workforce and that NUMSA could not be entitled to such organisational rights because it represented only twenty-six per cent of the employees. NUMSA then referred the dispute regarding the employer's refusal to grant it organisational rights, referred to in section 14 of the LRA, to the CCMA for conciliation. After conciliation failed at the CCMA, NUMSA did not refer the dispute to arbitration as provided for in

10 Hereinafter the 'employer'.

11 Thus, GIWUSA represented more than fifty per cent of the Bader Bop workforce. It is hereinafter referred to as the 'majority' trade union.

12 NUMSA, hereinafter referred to as the 'minority' trade union.

13 On the facts of *Bader Bop* (n 7), see paras D–G.

14 Section 14 provides for trade unions' right to elect trade union representatives or shop stewards. Only a trade union which represents the majority of all employees in the employer's workforce is granted this right.

15 Section 12 relates to a registered trade union's right to access an employer's premises for trade union activities. This right is granted to trade unions that are 'sufficiently representative'. Thus, a trade union representing less than fifty per cent of employees in the workforce can acquire this right.

16 Section 13 relates to the deduction of trade union subscriptions or levies from employees who are members of a registered trade union that is 'sufficiently representative' in the workforce. As in the case of s 12 rights, a trade union representing less than fifty per cent of employees in the workforce can acquire this right.

section 21(7)[17] of the LRA but instead issued the employer a strike notice in terms of section 64(1)(*b*)[18] of the LRA. The employer then brought an urgent application to the Labour Court for an order interdicting the intended strike by NUMSA. NUMSA argued that since it had followed the necessary strike procedure set out in section 64 of the LRA,[19] its members were entitled to strike. The Labour Court dismissed the application for an interdict, in response to which the employer appealed to the Labour Appeal Court (LAC).

At the LAC, the question that the Court had to deal with was whether it was permissible in terms of the LRA for a minority trade union to resort to strike action to compel the employer to grant it the organisational rights referred to in section 14 of the LRA, particularly when there was a majority trade union,[20] or to persuade an employer to recognise its shop steward.[21] The Court, *per* Zondo JP, held that NUMSA had no right to call a strike to demand section 14 rights, since it did not meet the threshold requirement. Such action was declared unlawful and unprotected.[22]

In his judgment, Zondo JP reasoned as follows:

> [I]f a minority trade union demands the employer to grant it 'organisational rights referred to in section 14' in a workplace where there is a majority trade union that has been granted the organisational rights provided for in section 14 of the LRA, which is the case in this matter, the employer will be entitled to adopt the attitude that it cannot give what it does not have. This is so because once section 14 rights have been granted to one trade union in a workplace and, properly so granted, there would be no further section 14 rights which the employer can grant to another trade union. There might be something else akin to section 14 rights but there cannot be any section 14 rights left to be granted to another trade union.[23]

The LAC concluded that NUMSA and others were not entitled to strike to demand the organisational rights referred to in section 14 of the LRA. Therefore, Bader Bop's appeal was upheld and NUMSA was interdicted from participating in a strike in support of organisational rights. The LAC was of the view that once a trade union such as NUMSA had conceded that it was not representing the majority of employees at the employer's workplace, there was no dispute over which to strike and such strike would be prevented by section 65(1)(*c*), which prohibits strikes over disputes that either party

17 Section 21(7) provides that if the dispute referred to conciliation remains unresolved, either party to the dispute may request that it be resolved through arbitration.

18 Section 64(1)(*c*) provides that in the case of a proposed strike, at least forty-eight hours' notice of the commencement of the strike, in writing, has been given to the employer.

19 *Bader Bop* (n 7) para F.

20 ibid para 8.

21 ibid para 1.

22 ibid paras 50 and 59.

23 ibid para 57.

may refer to arbitration. NUMSA and others made an application for leave to appeal against the decision of the LAC and to approach the Constitutional Court.[24]

At the Constitutional Court, the applicants argued that on the interpretation of the relevant provisions of the LRA[25] by the LAC, the provisions constituted an infringement of their right to strike as provided for in section 23 of the Constitution. In the alternative, the applicants contended that, if the interpretation adopted by the LAC was correct, the LRA's interpretation was unconstitutional in that it constituted an unjustified limitation of the right to strike. On the other hand, the employer argued that the applicants were not entitled to take strike action to demand the recognition of its shop stewards, since it was not a majority but a minority trade union.

Judgment of the Constitutional Court[26]

The Constitutional Court had first to answer questions whether leave to appeal should be granted, whether the Court had jurisdiction and whether it was in the interests of justice to deal with the matter. The answers to these questions were in the affirmative.[27] The Court could then deal with the merits of the case, which related to organisational rights for minority trade unions.

In terms of the LRA, sufficiently representative trade unions may seek to enforce organisational rights conferred on them through mediation and arbitration or through industrial action.[28] However, it is not clear what option, if any, is available to trade unions that are not sufficiently representative.

At the Constitutional Court, the first question that arose was whether the LRA should be interpreted to preclude non-representative trade unions from obtaining organisational rights, either through a collective agreement with the employer or through industrial action.[29] Secondly, there was the question of the procedure to be followed to attain organisational rights. Both questions are examined in turn.

Interpretation of the LRA

When determining the proper interpretation of the LRA, the Constitutional Court had to look at its primary objectives as expressly stated in section 1.[30] These objectives

24 ibid para 2.
25 Sections 14, 20, 21 and 65.
26 *Bader Bop* (n 7) paras 1–48.
27 ibid paras 14–21.
28 See s 21 of the LRA, read with s 65(2) of the LRA.
29 *Bader Bop* (n 7) para 25.
30 Section 1 provides that 'the purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objectives of this Act, which are:

are to protect rights in section 27 of the Constitution,[31] to give effect to South Africa's obligations as a member of the International Labour Organization (ILO), to provide a framework for collective bargaining between employees and employers and their respective organisations, and to promote orderly collective bargaining, employee participation in decision-making and the effective resolution of labour disputes. When applying the LRA, the Constitutional Court had also to interpret section 3[32] of the Act and section 39 of the Constitution.[33] The Court opined that, when interpreting the provisions

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(a) To give effect to and regulate fundamental rights conferred by section 27 of the Constitution;
(b) To give effect to obligations incurred by the Republic as a member of the International Labour Organisation (ILO);
(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.'

31 The corresponding provision in the 1996 Constitution dealing with labour relations rights is section 23, which reads as follows:
(1) Everyone have a right to fair labour practices.
(2) Every worker has the right –
to form and join a trade union;
to participate in the activities and programmes of a trade union; and
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 the provisions of section 36(1).

32 Section 3 of the LRA also 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 obligation of the Republic.'

33 In terms of s 39(1) of the Constitution, which provides that:

of section 23 of the Constitution, an important source of international law would be the ILO Conventions[34] and recommendations.[35] Of utmost importance is Article 2 of the ILO Convention 87 of 1948.[36] Although the two ILO Conventions do not expressly refer to the right to strike, the ILO Committee of Experts on Freedom of Association (CFA) has indicated that the right of employees to strike is an essential element of the right to freedom of association and one of the essential elements of trade union rights.[37]

Similarly, the CFA considers the right to strike as one of the essential means available to all workers and their organisations with which to promote and protect their economic and social interests.[38] The CFA therefore interpreted the two Conventions on freedom of association as implying the right to strike.[39] According to the Constitutional Court, freedom of association entrenched in section 18 of the Constitution is given specific content in the right to form and join a trade union and the right of a trade union to organise is entrenched in section 23(2)(*a*) and 23(4)(*b*) respectively.[40] The Constitutional Court maintained that workers' right to form and join a trade union and a trade union's right to organise would be impaired where workers were not permitted to have their union represent them in the workplace disciplinary and grievance matters, but were required to be represented by a rival union that they had not chosen to join.[41]

The Constitutional Court was of the view that the interpretation of the majority of the LAC failed to take into account sufficiently the considerations that arose from the ILO Conventions on Freedom of Association and in particular failed to avoid the limitation of constitutional rights.[42] Accordingly, in order to resolve the issue in this case, the Constitutional Court had to focus on whether or not the LRA was capable

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'when interpreting the Bill of Rights, a court or 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.'

34 Especially these Conventions: International Labour Organization (ILO), Freedom of Association and Protection of the Right to Organise Convention, C87, 9 July 1948, C87 <http://www.refworld.org/docid/425bc1914.html> accessed 17 November 2017; and ILO, Right to Organise and Collective Bargaining Convention, C98, 1 July 1949, C98 <http://www.refworld.org/docid/425bc23f4.html> accessed 17 November 2017. South Africa ratified both Conventions in 1996.

35 *Bader Bop* (n 7) para 28. See also *SANDU v Minister of Defence & Another* 1999 (6) BCLR 615 (CC) para 25.

36 Article 2 of the ILO Convention 87 of 1948, which provides that: '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.'

37 Committee on Freedom of Association, Second Report (1952), Case no 28 (Jamaica), in *Sixth Report of the International Labour Organization* to the United Nations (Geneva), Appendix 5, 181, para 27.

38 1983 Report of the Committee of Experts, para 2000.

39 ILO General Survey, 1994, para 179.

40 *Bader Bop* (n 7) para 34.

41 ibid para 35.

42 ibid para 39.

of an interpretation that did not avoid limiting constitutional rights, more particularly the right to strike. Responding to this question, O'Regan J, in the main judgment, held that the LRA was capable of an interpretation that could avoid limiting constitutional rights.[43] She held that while Part A of Chapter III of the LRA[44] expressly conferred organisational rights on unions which were either sufficiently representative or majority unions, it also provided for their enforcement mechanism, which is conciliation followed by arbitration.[45] However, unusually, in the overall scheme of the LRA, trade unions and employers are given a choice between arbitration and industrial action should conciliation fail.[46] Thus parties have a choice: either to go for arbitration or to call for industrial action (a strike or a lockout).

The Constitutional Court averred that there was nothing in Part A of Chapter III of the LRA which expressly stated that unions which admitted that they did not meet the requisite threshold membership level were prevented from using ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational rights such as access to the workplace, stop order facilities and the recognition of shop stewards.[47] According to the Constitutional Court, trade unions' organisational rights such as access to the workplace, stop order facilities and the recognition of shop stewards are clearly matters of 'mutual interest' to employers and trade unions and as such capable of forming the subject-matter of collective agreements and of being referred to the CCMA for conciliation before a protected strike action.[48] The above argument is also confirmed by section 20 of the LRA, which provides that: 'Nothing in this Part precludes the conclusion of collective agreements that regulates organisational rights.'[49]

In O'Regan J's opinion, Zondo JP's reading that section 20 did not mean that minority unions could conclude collective agreements with employers affording them organisational rights was a 'narrow one' and not the one suggested by the ordinary language of the text. She held:

> 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 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 recognized rights of minority unions to seek to gain

43 ibid para 40.
44 Sections 12–13 and 14–16 of the LRA.
45 *Bader Bop* (n 7) para 40.
46 See s 65(1) and (2).
47 *Bader Bop* (n 7) para 40.
48 ibid.
49 Section 20 of the LRA, which forms part of Chapter III, Part A.

> access to the workplace, the recognition of their shop-stewards as well as other organisational rights through the techniques of collective bargaining.[50]

According to the Constitutional Court, section 21's procedure is available in two circumstances: (1) where a sufficiently representative trade union wishes to use the procedure to determine the manner in which the rights are to be exercised and (2) where there is a dispute as to whether the union is sufficiently representative or not.[51] On its own terms, section 21 is not available to a union which admits that it is not sufficiently representative as contemplated by the Act. However, the provisions of section 21 should not be read to deny such unions the right to pursue organisational rights through the ordinary mechanisms of collective bargaining.[52]

The Court ruled that where employers and unions had 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 and, therefore, there is nothing in section 64 and section 65 to suggest that there is a limitation on the right to strike in this regard.[53] The Court held that the provisions of section 65(1)(*c*) and 65(2) had no application in this dispute[54] before it. The Court concluded that the LAC had erred in concluding that minority trade unions could not strike in support of a dispute for organisational rights provided in section 14 of the LRA. According to the Court, if such an interpretation were to be followed, the right of minority trade union members to be represented by their own shop stewards would be unnecessarily limited. O'Regan J held, further, that the interpretation of the relevant provisions of the LRA adopted by the majority of the LAC was not constitutionally appropriate. However, the interpretation adopted by the Constitutional Court did not mean that minority trade unions would be entitled to have their shop stewards recognised. It meant only that recognition of their shop stewards was a legitimate subject for collective bargaining and industrial action.[55]

The Procedure for Attaining Organisational Rights

In dealing with the question whether or not a minority trade union is entitled to strike in order to force the employer to recognise its shop steward, the Constitutional Court first looked at the provisions of section 14 of the LRA, which grants a 'representative' trade union the right to elect trade union representatives. A 'representative trade union' refers to a registered trade union or two or more registered trade unions acting jointly that have as members the majority of the employees employed in a workplace.[56]

50 *Bader Bop* (n 7) para 41.
51 ibid para 42.
52 ibid.
53 *Bader Bop* (n 7) para 43.
54 ibid.
55 ibid para 45.
56 Section 14(1) of the LRA.

Secondly, the Court considered section 21 of the LRA, which provides for the mechanism for the enforcement of organisational rights conferred by Chapter III, Part A of the Act. According to section 21(1) of the LRA, any registered trade union that seeks to exercise one or more rights conferred by Part A of the Act must notify the employer of the rights it seeks to exercise and must then meet with the employer to conclude a collective agreement in respect of those rights.[57] If a collective agreement cannot be reached, either the union or the employer can refer the dispute to the CCMA for conciliation. If conciliation fails, either party has a right to refer the matter to arbitration.[58]

In terms of section 65 of the LRA, where a dispute may be referred to arbitration, it is not a matter that can constitute the basis of a strike action.[59] Section 65(1)(*c*) provides that

> [n]o person may take part in a strike or lock-out or any conduct in contemplation or furtherance of a strike action or lock-out if … the issue in dispute is one that the party has the right to refer to arbitration or to the Labour Court in terms of the Act.

However, section 65(2)(*a*) provides for an exception to the general principle by providing that

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

Section 65(2)(*b*) went further by providing that

> 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 section 21 conciliation proceedings may elect either to comply with the provisions of section 64(1) and call for an industrial action or to refer the dispute for arbitration. However, if it elects to strike, it may not then refer the matter to arbitration for a period of twelve months from the date on which it gave notice to strike.[60] In view of the above, trade unions which are sufficiently representative may seek to enforce the organisational rights conferred by the Act upon them by adjudication or by industrial action.[61]

57 Section 21(1) and (2).
58 Section 21(4)–(7).
59 Section 65(1)(*c*).
60 Section 65(2) of the LRA.
61 *Bader Bop* (n 7) para 25.

Ngcobo J's Separate but Concurring Judgment

Ngcobo J is the only judge who wrote a separate but concurring judgment. He concurred with the order proposed by O'Regan J, but differed with the approach followed to get to the conclusion. According to Ngcobo J, the main question that the Court had to deal with was whether NUMSA was seeking the statutory rights within or outside the ambit of section 14 of Part A of Chapter III of the LRA.[62] In Ngcobo J's judgment, if NUMSA was seeking the statutory organisational rights[63] provided for in section 14 of the LRA, the application could not succeed because NUMSA was admittedly not a majority trade union as required by the Act and therefore not entitled to section 14 rights.[64] This would therefore be the end of the enquiry on the basis that NUMSA had failed to comply with the statutory requirements.

However, if NUMSA was seeking organisational rights outside Part A of Chapter III, then three issues arose for consideration:

- whether an unrepresentative trade union such as NUMSA can assert organisational rights outside of Part A Chapter III of the LRA;
- if they do have the right, whether they have the right to strike in pursuit of such organisational rights and whether such strike is limited by section 65(1)(*c*) of the LRA; and, lastly,
- whether section 21 provides for an exclusive mechanism for the enforcement of organisational rights, including those that fall outside Part A.[65]

In Ngcobo J's opinion, in order to be able to answer the above three questions, it was important first to ascertain the true nature of the dispute between the parties.[66] Ngcobo J's answers to these questions will therefore follow his consideration of the nature of the dispute.

The Nature of the Dispute

Ngcobo J emphasised that when a court is looking at a matter before it, it is its duty to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute, the court must look at the substance of the dispute and not the form in which it

62 See *Bader Bop* (n 7) para 50.

63 Organisational statutory rights are those organisational rights that are provided for in the LRA.

64 In order for a trade union to exercise s 14 rights, it should represent majority of all employees employed by the employer in his or her workplace. In this case, NUMSA had admitted that its members did not constitute the majority of all the employees employed by Bader Bop (Pty) Ltd. Accordingly, NUMSA did not comply with the requirement of s 14 and could therefore not claim the rights outlined in this section.

65 *Bader Bop* (n 7) para 58.

66 ibid para 51.

is presented.[67] He referred to the *Coin Security* case, where the Court pointed out that the label a party gives to a dispute is not necessarily conclusive.[68] He further referred to the LAC's comments in *Fidelity Guards Holdings (Pty) Ltd*,[69] where the LAC held that the true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties before and after the referral of such dispute.[70]

Ngcobo J acknowledged that the parties to a dispute may modify their demands in the course of the discussion or during the conciliation process, and this should also be taken into consideration in ascertaining the true nature of the dispute.[71] For Ngcobo J, in the present case NUMSA modified[72] not only the basis of its claim but also its claim, as it was no longer claiming majority support at Bader Bop but its claim was based on combined membership at Bader Bop and Sewing.[73] In addition, NUMSA added section 4 of the LRA as the basis of claiming organisational rights.

According to Ngcobo J, in the present case, initially the dispute between the parties was therefore whether NUMSA could assert majority status on the basis of combined membership at Bader Bop and Bader Bop Sewing and, if not, whether NUMSA was nevertheless entitled to obtain organisational rights outside the ambit of Part A of Chapter III.[74] Ngcobo J stressed that by the time the dispute reached the Labour Court, NUMSA was only asserting organisational rights outside Part A of Chapter III. This was evinced by its answering affidavit in which it argued that section 14(1) did not preclude a minority trade union from exercising the organisational rights referred to in section 14.[75] In support of its argument, NUMSA referred to section 20 of the LRA, which provides that 'nothing in Part A precludes the conclusion of a collective agreement that regulates organisational rights.'

67 ibid para 52. See also the LAC's comments in cases such as *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & Others* (1998) 19 *ILJ* 260 (LAC); *Coin Security Group (Pty) Ltd v Adams & Others* (2002) 21 *ILJ* 925 (LAC) ('*Coin Security*') at 269G–H of para 16.

68 *Coin Security* (n 67) para 16.

69 ibid 265B–E and 269H–I.

70 *Bader Bop* (n 7) para 52.

71 ibid. For instance, in this case, initially, at the CCMA, NUMSA claimed that it represented the majority of all employees at Bader Bop and it was on this basis that it sought s 14 organisational rights. When Bader Bop proved that NUMSA had only 26.6% representation, NUMSA reluctantly accepted it. However, it persisted in seeking those organisational rights. This clearly indicates that NUMSA modified not only the basis of its claim but also its claim as it was no longer claiming majority support at Bader Bop; its claim was on combined membership at Bader Bop and Sewer.

72 NUMSA has therefore modified its original claim: see (n 71).

73 *Bader Bop* (n 7) para 54.

74 ibid.

75 ibid para 55.

According to Ngcobo J, this argument, coupled with NUMSA's reliance on section 20 of the LRA, was evidence of an intention to seek organisational rights outside of Part A.[76] Ngcobo J asserted:

> This must be viewed against the acceptance by NUMSA that it does not enjoy majority representation at [the Bader Bop] 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.[77]

According to Ngcobo J, to describe the dispute between NUMSA and Bader Bop in this case as relating to the statutory organisational rights conferred in Part A of the LRA was to lose sight of the true nature of the dispute, because NUMSA was no longer denying that it did not reach the threshold. As he reasoned, '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'.[78]

Ngcobo J's Answers to Legal Issues Raised by the Case

Ngcobo J provided answers to four legal questions raised in the case in relation to minority trade union's organisational rights:

- Is an unrepresentative or minority trade union entitled to obtain organisational rights outside of Part A of Chapter III of the LRA?
- Does an unrepresentative union have a right to strike in pursuit of its organisational rights?
- Does section 65(1)(*c*) of the LRA limit such right to strike?
- Does Part A provide an exclusive platform for the attainment of organisational rights?

The learned Judge answered the first question as follows: Chapter III Part A of the LRA grants representative trade unions organisational rights. The main question here is whether a trade union that is not sufficiently representative or is not a majority trade union at the employer's workplace can obtain organisational rights outside Part A of Chapter III. When dealing with this question, Ngcobo J first considered section 4 of Chapter II of the LRA, which grants employees the right to freedom of association such as the right to form and join trade unions of their choice; the right to elect trade

76 ibid.
77 ibid para 56.
78 See *Bader Bop* (n 7) para 57.

union representatives; the right to be represented by such representatives at disciplinary inquiries; and the right to organise and to bargain collectively to obtain these rights.

Ngcobo J also looked at the interpretation of the LRA, particularly Part A Chapter III of the LRA which expressly provides representative trade unions with organisational rights. He established whether by conferring organisational rights on representative trade unions the LRA intended to deny them to unrepresentative unions.[79] He emphasised that when construing Part A of the LRA, it is essential to have regard, first, to the provisions of the Constitution; second, to the primary objects of the LRA; and,finally, to the relevant provisions of the ILO Conventions.[80]

Like O'Regan J in the main judgment, after looking at the provisions of section 23 of the Constitution, section 4 of the LRA and the two ILO Conventions on Freedom of Association and Collective Bargaining which South Africa has ratified, Ngcobo J concluded that, if properly construed in the light of section 23 of the Constitution, section 4 of the LRA and the ILO Conventions, Part A did not preclude an unrepresentative trade union from obtaining organisational rights outside the ambit of Part A of Chapter III.[81] He maintained that Part A, and more particularly section 20, of the LRA supported the conclusion that by expressly conferring organisational rights on representative trade unions, the LRA did not intend to deny such rights to unrepresentative trade unions.[82] According to Ngcobo J, if section 20 were construed as referring to a collective bargaining agreement contemplated in section 21, it would be 'superfluous'. However, the section is meaningful if it is construed as referring to agreements conducted outside the ambit of Part A's statutory rights.[83]

Ngcobo J pointed out, further, that section 20 permitted representative unions to regulate organisational rights outside the ambit of Part A.[84] Based on the above interpretation, Ngcobo J observed and concluded that since section 20 is silent on collective agreements with unrepresentative unions, the LRA does not prohibit those agreements either. He concluded that nothing in section 20 precluded an agreement with an unrepresentative trade union that confers an organisational right on it, provided that such agreement does not prevent a representative trade union from exercising statutory organisational rights.[85]

However, unlike representative trade unions, which have these rights conferred on them by Part A and therefore need not bargain for them, an unrepresentative union must bargain for these rights.[86] Simply put, this means that section 20 allows both

79 ibid para 60.
80 ILO Conventions 87 of 1948 and 98 of 1949.
81 *Bader Bop* (n 7) para 62.
82 ibid.
83 ibid para 63.
84 ibid para 64.
85 ibid.
86 ibid para 66.

representative and unrepresentative trade unions to conclude collective agreements to regulate organisational rights outside of Part A. The only difference between trade unions is that representative trade unions are expressly entitled to those organisational rights by Part A of the Act whereas unrepresentative trade unions have to bargain for them.

In answer to his second question, 'Does an unrepresentative union have a right to strike in pursuit of its organisational rights?', Ngcobo J began by emphasising the significance of the right to strike in employment relations. According to him, 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.'[87] Since in South Africa workers have the constitutional right to strike,[88] Ngcobo J argued that once it is accepted that an unrepresented trade union has the right to bargain to obtain organisational rights, it follows automatically that such a union has the right to strike in pursuit of those rights provided that the strike complies with the procedural requirements laid down in section 64 of the LRA.[89]

But does section 65(1)(*c*) limit such right to strike? After looking at the provisions of section 65, Ngcobo J found that no limitation applied to a strike by an unrepresentative trade union. He argued that since the LRA did not provide an unrepresentative union with the right to obtain organisational rights, it therefore also does not prohibit such right.[90] Accordingly, the section 65(1)(*c*) limitation does not apply at all.

The question that should be looked at in order to address the learned Judge's final enquiry—does Part A provide an exclusive platform for the attainment of organisational rights?—is whether the use of the term 'any registered trade union' in section 21(1)[91] of the LRA also referred to unrepresentative trade unions, whether or not an unrepresentative trade union can claim organisational rights in terms of section 21(1) of the LRA.

In responding to this question, Ngcobo J remarked:

> 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. This section is only available to enforce rights conferred by Part A and those rights are conferred on representative unions – they are not conferred on unrepresentative unions and they cannot therefore be enforced by such unions through section 21.[92]

87 ibid para 67.
88 Section 23(2)(*c*) of the Constitution.
89 *Bader Bop* (n 7) para 67.
90 ibid para 69.
91 Section 21(1) provides that '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.'
92 *Bader Bop* (n 7) para 72.

According to Ngcobo J, since Part A does not provide unrepresentative unions with organisational rights, it at the same time does not provide for their enforcement. Therefore, only representative trade unions will be able to use section 21 procedures, because they are statutorily entitled to those rights; unrepresentative trade unions are not allowed to follow such a procedure because they are not entitled to the rights to which the procedure applies.

The Importance of Ngcobo J's Separate Judgment

In his judgment, Ngcobo J addressed some questions that were not addressed in the main judgment and which are important not only for this case but for any case brought before any court of law.

One of those issues was ascertaining 'the true nature of the dispute'. On this, he concluded that parties to a dispute could not only modify the basis of their claim but also the claim itself.[93] Ngcobo J followed a broader interpretation of the relevant provisions of the LRA, taking into account a worker's right to freedom of association, which is the most fundamental worker's right previously denied some groups of workers in South Africa.[94] Ngcobo J's judgment took into account the impact that denying minority trade unions the right to seek organisational rights—more particularly the right to elect shop stewards—would have on employees in South Africa.

Ngcobo J's decision and reasoning presented a limitation on the system of majoritarianism introduced by the LRA. His argument was that although majoritarianism is not opposed to the right to freedom of association, minority trade unions' representatives should be recognised in order to be able to represent their members' interests freely. Ngcobo J's judgment took into account the South African socio-economic and political landscape. Prior to this judgment, organisational rights would simply be denied to minority trade unions merely because they did not reach a set threshold without taking into account the impact that such failure to grant such rights would have on the members of a minority union.

Conclusion

The Constitutional Court's judgment in *Bader Bop* was a landmark decision relating to workers' organisational rights. Its effect is that labour rights should no longer be interpreted restrictively so as to deny trade unions their fundamental rights as entrenched in section 23 of the Constitution, whether the trade unions represent the majority of workers or not. Both O'Regan J's main judgment and Ngcobo J's separate but

93 *Bader Bop* (n 7) paras 54–55.

94 Before the entrenchment of the interim worker, workers—more particularly black workers—were not entitled to the right to freedom of association and to strike.

concurring judgment referred to the two ILO Conventions on Freedom of Association and Collective Bargaining.

The judgment in *Bader Bop* set the tone for South African labour-law jurisprudence, especially with regard to the organisational rights of minority unions. In reaching its decision, the Constitutional Court had to consider the Constitution, which is the supreme law of the land and whose Bill of Rights enshrines the rights of all people in the country, including workers. The Court also had to consider the relevant legislation, the LRA. Finally, as recommended by section 39 of the Constitution, it had to consider, and did consider, international law, especially the ILO Conventions on Freedom of Association and Collective Bargaining.

By recognising organisational rights to minority unions, *Bader Pop* introduced a *revolution* in South African jurisprudence: as it challenged the majoritarian model on which labour legislation was based and which had so far granted those rights to majority unions only. With *Bader Bop*, minority unions can now finally enjoy organisational rights outside Part A of Chapter III of the LRA. The labour cases decided later by the Labour Court—*Transnet SOC Ltd v National Transport Movement & Others*[95] and *Police and Prisons Civil Rights Union (POPCRU) v Ledwaba*[96]—had to take cognisance of the *Bader Bop* judgment. To use a vocabulary well known in post-apartheid South Africa, this landmark judgment signalled a 'revolution' in the South African labour-law jurisprudence and 'Comrade' Ngcobo J, who in this case delivered one of his few separate judgments, will long be remembered for his role in bringing about this revolution.

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