

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Johannesburg

CASE NO:

JA50/00

In the appeal between

Bader Bop (Pty) Ltd

Appellant

And

**National Union of Metal and
Allied Workers of SA and Others
Respondents**

JUDGEMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the separate judgements prepared by my Colleagues Du Plessis AJA and Davis AJA. Like Du Plessis AJA, I have come to the conclusion that the appeal should be upheld with costs and that the order of the Court a quo should be set aside and replaced with one granting the application with costs. Accordingly I agree with the order proposed by Du Plessis AJA. I set out below my reasons for coming to this conclusion. It is not necessary to set out all the facts of this matter as that has been adequately done in Du

Plessis AJA's judgement. For that reason I shall only refer to those facts that I consider necessary to ensure a proper understanding of this judgement.

Brief facts

[2] The appellant employs about 1108 employees in the workplace that is affected by the dispute in this matter. 982 of them are semi-skilled or unskilled, and, 126 are administrative and technical staff. A registered trade union known, for short, as GIWUSA has as its members the majority of the employees of the appellant in the workplace. The first respondent, a registered trade union, is a minority union in the workplace in the sense that it has as its members less than half the total number of employees employed by the appellant; in fact its membership is said to be about 26% of the total workforce.

[3] The appellant has granted GIWUSA, as the majority union, the organisational rights provided for in sec 14 of the Labour Relations Act ("**the Act**"). The first respondent has been granted the organisational rights provided for in s12 and s13 but not those provided for in s14. The organisational rights provided for in s12 relate to access by a registered trade union that is "**sufficiently representative**" to the premisses of an employer. The organisational rights provided for in s13 relate to the deduction of union subscriptions or levies from employees who are members of a registered trade union that is "**sufficiently representative**" and the remittance of such

deductions to such trade union. The organisational rights provided for in s 14 relate to the election of trade union representatives of a majority trade union in a workplace.

[4] The first respondent is demanding that the appellant grant it the organisational rights provided for in sec 14 of the Act. The appellant refuses to grant the first respondent such rights. The reason advanced by the appellant for its refusal is that such rights can only be granted to a majority trade union and not a minority trade union. The first respondent takes the attitude that, despite it being a minority trade union, it is entitled to, and can be granted, organisational rights referred to in sec 14. The first respondent has described the issue in dispute between the parties in par 7.2 of its answering affidavit as the appellant's refusal to grant the first respondent **"the organisational rights referred to in section 14"** of the Act.

The referral and the urgent application

[5] The first respondent referred the dispute between the parties on the appellant's refusal to grant it the organisational rights referred to in sec 14 to conciliation. After conciliation had failed, the first respondent did not refer the dispute to

arbitration as provided for in sec 21(7) of the Act but issued to the appellant a strike notice in terms of sec 64(1)(c) of the Act. The appellant then brought an urgent application to the Labour Court for an order interdicting the intended strike. The Court a quo dismissed the application and later gave leave to appeal to this Court.

The appeal

[6] In presenting his argument on appeal, Mr Van der Riet, who appeared for the respondents, did so on the basis that the rights which the first respondent sought in this matter were not any rights conferred by Part A of chapter III to the Act. He said that the rights that the first respondent sought fell outside Part A. It seems to me that this line of argument was adopted in an attempt to meet, among others, the argument that sec 14(1) only contemplates the organisational rights provided for therein being granted to a registered trade union that has the majority of the employees in the workplace as its members or two or more registered trade unions that, acting jointly, have the majority of the employees in the workplace as their members. The latter argument would imply that sec 14 does not confer, or make provision for the conferment of, organisational rights on a trade union other than the majority trade union in the workplace.

[7] I am unable to accept Mr Van der Riet's submission that the rights which the first respondent sought in this matter were not the rights conferred by Part A in chapter III and that it sought rights which fell outside Part A. A reading of to the correspondence exchanged between the parties and the minutes of meetings held between the parties does not only disprove Mr Van der Riet's submission but, on the contrary, it shows that what the first respondent sought was definitely rights conferred by Part A including the rights provided for in sec 14. In this regard it needs to be pointed out that:-

(a) on the 16th August 1999 the first respondent issued a sec 21(1) notice; sec 21(1) prescribes that any

registered trade union that seeks to exercise any of the organisational rights conferred by Part A must issue a notice setting out, among others, which organisational rights such union is seeking to exercise; in this regard it is significant that sec 21 specifically provides that it applies to any registered trade union that seeks to exercise any organisational rights conferred by Part A;

(b) in par 1 of its sec 21 notice the first respondent specified the workplace where it was seeking to exercise these rights; the specification of the workplace in which the organisational rights are sought to be exercised is required by sec 14(1);

(c) in par 3 of the notice referred to in (a) above, the first respondent specifically said that it wished to discuss with the appellant **“our intention to exercise rights in terms of section 14(1) - (5) of the Act, i.e. shop stewards elections”**;

(d) in its letter dated the 14th September 1999 addressed to the appellant, the first respondent stated that it

and the appellant had **“agreed the elections of trade union representatives shall be conducted taking into account the provisions of section 14(1) - (2) of the act”**; in its reply to such letter dated 28th September, the appellant insisted that the granting of sec 14 rights would be dependent on the level of representativeness of the first respondent; it is difficult to understand why the provisions of sec 14 (1) - (2) would have to be taken into account if the rights sought fell outside sec 14;

(e) in the minutes of a meeting that was held between the appellant and the first respondent on the 17th February 2000(annexure EN 9), the first respondent is reflected as

having said that it had become representative and, because of that, was **“entitled to a certain number of shopstewards as prescribed in the Labour Relations Act 66 of 1995.”**;

(f) in the 4th paragraph in the minutes referred to in (d) above the first respondent is reflected as having asked the appellant whether it would withdraw the organisational rights enjoyed by GIWUSA and confer them on it if it became the majority union; in the second paragraph on the second page

of those minutes it is recorded that, after the appellant had proved that GIWUSA had majority membership in the workplace, the first respondent **“expressed their satisfaction and indicated that they will work hard to ensure that their union becomes (sic) majority.”**; it is difficult to see why the first respondent thought it was important for it to attain majority membership in the workplace if it was not because that would qualify it for sec 14 rights;

(g) in a letter dated the 24th February 2000 (par 1.1) that the

first respondent addressed to the appellant, it said:
“NUMSA herein reiterates its position as stated at the above mentioned meeting and confirms its acceptance of the company’s principle stand point that the union that commands majority threshold will be recognised and accorded organisational rights it seeks to exercise.”

(h) in par 3 of the form used to refer the dispute to

the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) for conciliation - which is where the nature of the dispute is required to be specified - the first respondent stated that the dispute “**relates to section 21 of the Labour Relations Act, 1995**”; sec 21 provides a dispute procedure that must be followed by a registered trade union that seeks to exercise any of the organisational rights conferred by Part A to chapter 111 of the Act;

(l) in par 7 of the referral form referred to in (g) above, the first respondent was required to specify the outcome it desired out of the conciliation process; there it said it sought that:-

“1. The Company should **allow and/or grant NUMSA organisational rights it seeks to exercise.**

2. **The company to conclude a collective agreement as to the manner in which the union will exercise the rights in respect of that workplace.**”;

in this regard it is emphasised that 1 and 2 mean that the first respondent sought the

conferment of the organisational rights and the conclusion of a collective agreement as to the manner of exercise of such rights which is precisely what is provided for in sec 21(3) of the Act;

(j) the commissioner who dealt with the conciliation process in this matter certified in the certificate of outcome that the matter **“relates to organisational rights in terms of section 21”**;

(k) in par 6.3 of its answering affidavit, the first respondent stated that the appellant could avoid the harm that the intended strike would cause **“by granting [the first respondent] the organisational rights referred to in section 14 of the Act.”**;

(l) in par 7.1 of the answering affidavit, the first respondent stated: **“I admit that the organisational rights referred to in sections 12, 13 and 15 of Act are not in issue; and that the only issue in dispute is the [appellant’s] refusal to grant [the first respondent] the organisational rights referred to in section 14 of the**

Act.”;

(m) in par 7.2 of its answering affidavit, the first respondent went on to say:-

“The [first respondent’s] demand that the [appellant] grant it the organisational rights referred to in section 14 is the subject matter of the proposed strike. The [first respondent] wants the [appellant] to sign a collective agreement regulating the exercise of these organisational rights.”

(n) in par 7.4 of its answering affidavit, the first respondent stated that the issue in dispute **“is one that a party has the right to refer to arbitration in terms of the Act.”**

[8] In my view the question which this appeal raises is whether it is permissible in terms of the Act for a minority trade union to resort to a strike to compel an employer to grant it

“organisational rights referred to in sec 14” of the Act particularly where there is a trade union in the workplace that is the representative trade union as defined in sec 14(1). If the answer is in the affirmative, the appeal must fail. If it is in the negative, the appeal must succeed. In this regard it needs to be stated right at the outset that in par 7.4 of its answering affidavit, the first respondent based its members’ alleged right to strike in respect of the issue in dispute in this matter on the provision of s65(2)(a) which I deal with later in this judgement.

[9] In considering this question one must start at the beginning. The beginning is the Constitution. Sec 23 (1) of the Constitution provides that “ **(e)everyone has the right to fair labour practices**”. Sec 23 (2) (c) provides that “**every worker has the right to strike**”. Sec 23 (4) (b) provides that every trade union and every employers’ organisation has the right “**to organise**”. Sec 23 (5) then says: “**Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.**” It continues: “**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)."

[10] Sec 36(1) of the Constitution provides as follows:

"36. Limitation of rights. - (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of right;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the relation between the limitation and its purpose;**
- (e) less restrictive means to achieve the purpose."**

[11] Subsection (2) of sec 36 of the Constitution provides:

"Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."In this regard it is

appropriate to state that the right to strike is regarded as an integral part of the process of collective bargaining. It is often said that, without the right to strike, collective bargaining would become collective begging.

[12] The purpose of the Act is given in sec 1 as being **“to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act.”** The primary objects of the Act are given as:

“(a) to give effect to and regulate the fundamental rights conferred by section [23] 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-

- ii) orderly collective bargaining;**
- iii) collective bargaining at sectoral level;**
- iv) employee participation in decision-making in the workplace; and**
- v) the effective resolution of labour disputes.”**

[13] It is therefore important to bear in mind, in the context of this matter, that part of the purpose of the Act is to give effect to the constitutional right to strike and the constitutional right of, on the one hand, employers and their organisations and, on the other, of employees and their trade unions, to bargain collectively. The

constitutional right to organise must also be borne in mind. However, it is equally important to bear in mind that the Act also seeks, among other things, to promote **“orderly collective bargaining.”** There can, therefore, be no doubt that the Act is the type of legislation that is contemplated by sec 23 (5) of the Constitution that is meant to regulate the right to collective bargaining. To this extent the Act may, in terms of sec 23(5) of the Constitution, limit the constitutional right to strike or to bargain collectively or to organise entrenched in the Bill of Rights provided such limitation complies with sec 36(1) of the Constitution.

[14] The Act deals with collective bargaining in Chapter III. Collective bargaining is dealt with under six parts in the chapter, namely, Parts A -F. Those parts relate, respectively, to organisational rights, collective agreements, bargaining councils, bargaining councils in the public service, statutory councils and general provisions concerning councils.

[15] The Act deals with strikes and lock-outs in chapter IV. Sec 213 of the Act defines a strike as **“the partial or complete concerted refusal to work, or the**

retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes over-time work whether it is voluntary or compulsory”. It is convenient to also at this stage refer to the phrase **“issue in dispute”** which features prominently in chapter IV. The phrase **“issue in dispute”** is defined in sec 213 as meaning, in relation to a strike or lock-out, **“the dispute that forms the subject matter of the strike or lock-out.”**

- [16] Section 64 (1) provides that **“(e)very employee has the right to strike ... if”** certain conditions there set out are met. It is not necessary for purposes of this judgement to set those out here. Ss (2) is irrelevant for present purposes. Ss (3) provides exemptions from compliance with the requirements of ss (1) in certain

specified circumstances. Ss 4 and ss 5 are also of no relevance to the present matter.

[17] Sec 65 is headed: **“limitations on right to strike or recourse to lock-out.”** Sec 65 (1) provides that **“(n)o person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out”** in certain circumstances. Those are 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.”

[18] Sec 65(2)(a) seeks to provide an exception to s 65(1)(c).

It reads thus:

“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.”

This is the provision that is relied upon by the first respondent to contend that it is entitled to call a strike in this matter in order to put pressure on the appellant to grant it **“the organisational rights referred to in sec 14.”** Sec 65 (2) (b) provides: **“ If a registered trade union has given notice of a proposed strike in terms of s 64 (1) in respect of an issue in dispute which is about a matter dealt with in sections 12 to 15, such union may not exercise the right to refer the dispute to arbitration in terms of sec 21 for a period of 12 months from the date of the notice.”** Ss (3) sets out further limitations to the right to strike but these are subject to provisions of a collective agreement.

[19] The Act deals with organisational rights in sections 11 to

22 all of which fall within Part A of Chapter III of the Act. Sec 11 defines a representative trade union in relation to organisational rights provided for in Part A as meaning, unless otherwise stated, **“a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by the employer in a workplace.”** As already stated above, the Act sets out in sections 12, 13, 14, 15, 16, 17, 18, and 19, specific organisational rights and the circumstances under which they may be acquired by trade unions.

[20] Provision is made in sec 21 for the exercise of organisational rights conferred by Part A. In terms of s21(1) a trade union that seeks to exercise any organisational rights conferred by Part A is required to notify the employer in writing that it seeks to exercise one or more of the rights conferred by Part A. In terms of ss(2) it is required to specify in the notice the rights it seeks to exercise, the workplace in which it seeks to exercise them, the manner in which it seeks to exercise them, its representativeness in the workplace concerned and the facts on

which it relies to demonstrate that it is a representative trade union.

[21] Subsection (3) requires the employer to meet with such trade union within 30 days of receiving the notice and to endeavour to conclude a collective agreement **“as to the manner in which the trade union will exercise the rights in respect of that workplace.”** In ss(4) there appears, for the first time in sec 21, a reference to a **“dispute”**. Ss(4) reads: **“If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.”** In subsections (5), (6) and (7) there are references to **“the dispute”**. Those subsections are, collectively, to the effect that, if no collective agreement is concluded, either the union or the employer may refer **“the dispute”** to the CCMA for conciliation and that, if conciliation does not succeed in having **“the dispute”** resolved, either party to **“the dispute”** **“may request that the dispute be resolved through arbitration.”**

[22] The question which arises is what the nature of the dispute is that is contemplated by ss(4),(5),(6) and (7). What is clear

from ss(3) is that the collective agreement that the employer is required to endeavour to conclude with the trade union is a collective agreement **“as to the manner in which the trade union will exercise the rights in respect of that workplace.”** This gives rise to the impression that the only dispute contemplated in subsections(3),(4),(5),(6) and (7) is one about the manner of the exercise of the organisational rights.

[23] Subsection (8) provides that **“(I)f the unresolved dispute is about whether or not the registered trade union is a representative trade union”**, the commissioner must, in arbitrating the dispute, seek to minimise the proliferation of trade union representation in a single work place and, where possible, seek to encourage a system of a representative trade union in a workplace and must seek to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union.

[24] Subsection (8)(c) also empowers the commissioner who is arbitrating a dispute about whether a trade union is a

representative trade union to withdraw any organisational rights conferred by Part A which are exercised by any registered trade union in respect of that workplace if that other trade union has ceased to be a representative trade union in the particular workplace. In my view, the fact that in ss(8) provision is made that, if a dispute is about whether the union is a representative trade union, such dispute must be dealt with in the manner there set out shows that a dispute about the manner in which a union will exercise the rights it seeks is not the only dispute contemplated by sec 21. The reference in ss(8) to **“the unresolved dispute”**, is a reference to the dispute referred to in ss(7) which provides that **“if the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.”**

[25] Subsection 11 gives an employer who alleges that a trade union is no longer a representative trade union the right to apply to the CCMA for the withdrawal of any of the organisational rights conferred by Part A. The process to be followed in that regard is the referral of that matter to conciliation and thereafter to

arbitration.

[26] Sec 22 deals with disputes about the interpretation or application of any provision of Part A. This excludes a dispute contemplated in sec 21 of the Act. A dispute about the interpretation or application of any provision of Part A must be referred to conciliation and thereafter to arbitration if conciliation fails. Under sec 21 the body responsible for conciliation and arbitration is specified as being the CCMA. No specification of any kind is made in respect of the body that is responsible for conciliation and arbitration for disputes falling within the ambit of sec 22. This must mean that it can be the CCMA if there is no bargaining council with jurisdiction or a bargaining council if there is one with jurisdiction.

[27] In the light of all the above it seems to me that the Act prescribes representativeness as the decisive factor on whether a registered trade union acquires organisational rights provided for in Part A. For some organisational rights, sufficient representativeness is required but for others majority membership is required. This must be so because of the wording employed in the relevant sections of the Act. This means that, all things being equal, if a trade union meets the level of representativeness required in respect of a particular organisational right in a particular workplace, and the employer does not dispute such representativeness, then, by operation of law, such union is entitled to such organisational right. In such a case there can only be a dispute about the manner in which the union will exercise such right or the conditions subject to which the union may exercise such right. In this regard sec 21(3) to (7) lays down the procedure to be followed to resolve such dispute. If it is arbitrated, the dispute is resolved.

[28] However, if there is a dispute between the union and the employer about whether the union is a representative trade union for purposes of such a right in terms of the Act, that dispute must be referred to conciliation and thereafter to arbitration in terms of ss (4), (5), (6), (7) and (8) of sec 21. If the dispute is arbitrated, the arbitration award will end the dispute. If the arbitration award is that the union does not meet the required level of representativeness, its claim will be

dismissed. If the arbitration award is to the effect that the union meets the required level of representativeness, the union will be entitled to an award in its favour on the organisational right in issue.

[29] What then if the union admits or it is common cause that it does not have the level of representativeness required for a particular organisational right that it seeks to exercise? That is a worse scenario for a union than one where it is only the employer who alleges that the union does not have the requisite level of representativeness. In respect of the latter case, sec 21(11) is to the effect that the employer may apply to the CCMA for the withdrawal of any organisational rights that such a union may have been granted and sec 21(8) gives a commissioner of the CCMA dealing with such application the power to withdraw such rights from such union.

[30] It seems me that, in such a case, if a trade union insisted on its demand for an organisational right whose requisite level of representativeness it does not meet and the dispute about whether or not it is entitled or it should be granted, the particular organisational right were referred to arbitration, the outcome of the arbitration would be a foregone conclusion. Such a union's claim to such a right would definitely be dismissed in an arbitration.

[31] Only a registered trade union that has the prescribed level of representativeness for a particular organisational right is contemplated by the Act as eligible to acquire that organisational right. That is why:-

(a) in each one of the sections providing for the various organisational rights in the Act, reference is made to a representative trade union;

(b) the reference to a representative trade union is a reference to either a majority trade union or to two or more registered trade unions that, acting jointly, have the majority of employees in the workplace as their members or to a registered trade union that is sufficiently representative of the employees in the workplace even though it does not have majority

membership or to two or more registered trade unions that, acting jointly, are sufficiently representative of the employees in the work place;

(c) in sec 21(2)(b) of the Act a trade union that seeks to exercise one or more of the organisational rights provided for in the Act is required to specify its representativeness in its sec 21 notice;

(d) in terms of sec 21(8)(c) a commissioner who arbitrates a dispute about whether or not a trade union is a representative trade union is given power to withdraw any organisational rights conferred by Part A from a trade union that has ceased to be a representative trade union;

(e) in terms of sec 21(11) an employer who alleges that a trade union is no longer a representative trade union is given a right to apply to the CCMA for the withdrawal of any organisational rights conferred by Part A on such a trade union and, sec 21(8) (c) becomes applicable to such an application which gives the commissioner dealing with such application power to withdraw any organisational rights from such a union if it is no longer a representative trade union.

[32] The problem that is presented by this matter arises from the fact that the legislature saw fit to enact the provision of sec 65(2)(a). Without sec 65(2)(a) of the Act, there could have been no doubt that a trade union that is not the representative trade union as defined in sec 14(1) has no right to call a strike in order to compel an employer to grant it the organisational rights referred to in sec 14 particularly where there is a registered trade union in the workplace which meets the level of representativeness required by sec 14(1). This is so because a strike in such circumstances would have been precluded by

the limitation of the right to strike contained in sec 65(1)(c) which is to the effect that no person may take part in a strike if **“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.”**

[33] The first respondent demands to be given **“organisational rights referred to in section 14”**. If the appellant is refusing to grant the first respondent such rights in circumstances where the first respondent believes it is entitled to or in circumstances where it believes the appellant should grant it such rights, the dispute resolution process that the first respondent would be confined to would be to refer such dispute to arbitration and, because it has a right to refer it to arbitration in terms of the Act, it would have no right, in the light of sec 65(1)(c), to call a strike about it. I have already said above that the first respondent relies on the provision of sec 65(2)(a) to found its alleged right to call a strike about the issue in dispute in this matter. The question which all of the above raises is whether the provision in sec 65(2)(a) does give the first respondent the right to call a strike, and, its members the right to go on strike,

in a case such as this one.

[34] As already stated above, the section of the Act that confers the general right to strike is sec 64(1). That right to strike may only be exercised if certain conditions there set out are met. Further, the exercise of such right is subject to the limitations set out in sec 65 of the Act. The limitation in sec 65(1)(c) is to the effect that no person may take part in a strike if **“the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of this Act.”**

As the first respondent has described the issue in dispute as the appellant’s refusal to grant it **“the organisational rights referred to in sec 14”** of the Act, there can be no doubt that there is a right to refer a dispute about such rights to arbitration in terms of sec 21(7) of the Act. In the light of this it can be accepted that, subject to what the effect of sec 64(2)(a) is, the right to strike about a dispute relating to organisational rights referred to in sec 14 is limited by the provisions of sec 65(1)(c) of the Act.

[35] What then is the effect of sec 65(2)(a) of the Act on the right to

strike about such a dispute and on the limitation to that right provided for in sec 64(1)(c)? Sec 65(2)(a), as already stated, provides that, despite section 65(1)(c), a person may take part in a strike **“if the issue in dispute is about any matter dealt with in sections 12 to 15.”** The acquisition by a trade union of the organisational rights referred to in sec 14 - which is what this matter is about- is a matter that, in my view, falls within the ambit of the phrase **“any matter dealt with in sections 12 to 15”** appearing in sec 65 (2)(a). It is therefore clear that sec 65(2)(a) seeks to confer a right to strike about a matter such as this one in circumstances where there otherwise would be no such right in the light of the limitation to the right to strike provided for in sec 65(1)(c). The question which arises is whether sec 65(2)(a) does succeed in providing for an effective right to strike in a case such as the one before us and, therefore, makes the limitation in sec 65(1)(c) inapplicable.

[36] I think the legislature was aware that, without a specific provision granting a special right to strike for matters dealt with in sections 12 to 15, there would be no such right because of the limitation in sec 65(1)(c). It was also aware that enacting a provision granting such special right to strike in respect of such matters would place unions in a position where they would have both the right to call a strike and the right to refer such matters to arbitration with the result that they could start with a strike

but change after some time to arbitration if the strike did not produce the desired results and this would be unfair to employers.

[37] It must then have been decided that a trade union must be given a choice between a strike and arbitration to resolve such dispute. That is why the provision in sec 65(2)(a) and the provision in sec 65(2)(b) were enacted. Through secs 21(7) and 65(2)(a) the Act makes both arbitration and a strike or lock-out available in order to resolve an issue in dispute about a matter dealt with in sections 12 to 15. Sec 65(2)(b) provides that if **“a registered trade union has given a notice of the proposed strike in terms of sec 64(1) in respect of an issue in dispute referred to in par (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.”** Through this provision the Act ensures that, once a trade union has elected to follow the strike route by issuing a strike notice in order to resolve such a dispute it cannot thereafter change its mind and refer the dispute to arbitration within 12 months of the notice.

[38] There are two serious deficiencies in sec 65(2)(b). The one is that the preclusion to use the route of arbitration in respect of

the dispute is directed only against the trade union and there is no preclusion directed against the employer so that, if the employer resorts to a lock-out in terms of sec 65(2)(a) to resolve such a dispute, it may not refer such a dispute to arbitration within a period of 12 months from the date of the lock-out notice issued in terms of sec 64(1).

[39] This means that, if the employer instituted a lock-out in terms of sec 65(2)(a) in order to compel the union and the employees to agree to his demands on the dispute and he realised after some time that the lock-out was ineffective, he would not be precluded to at that stage refer the dispute to arbitration whereas a trade union would be so precluded once it has issued a strike notice. No justification for this inconsistency is apparent.

[40] The other serious deficiency is that no provision has been made to the effect that, when a trade union elects to call a strike as opposed to referring the dispute to arbitration and gets precluded from referring it to arbitration after the issuing of a strike notice, the employer is also precluded from exercising the right to refer the dispute to arbitration or that once the union has issued a strike notice, the dispute is disqualified from arbitration or adjudication. No justification for this omission is apparent. As a result of this deficiency in the Act, an employer is able in a case such as this one to frustrate a trade union's attempts to resolve such a dispute through strike action. I demonstrate this below.

[41] The provision of s21(7) has particular significance. It is

that, when conciliation fails in respect of a dispute contemplated in sec 21, the employer may frustrate any attempts on the part of the trade union to resort to a strike in terms of sec 65(2)(a) to put pressure on the employer to agree to its demands. The employer can do this by invoking the provisions of sec 21(7) which are to the effect that, if such a dispute remains unresolved after conciliation, either the employer or the trade union may request that the dispute be resolved through arbitration. Soon after the issuing of the certificate of outcome, the employer would be able to send to the CCMA a request for an urgent arbitration of the dispute. This could be just before, or, simultaneously with, the issuing of the 48 hours strike notice by the union. There is no reason why the CCMA would not be able to arbitrate such a dispute on an urgent basis if there is a strike looming.

[42] If, as in this matter, it is common cause that the union did not have the level of representativeness required for the organisational right it seeks, the evidence that the employer would need in order to obtain an award denying the union such rights would be minimal. It would hardly take 30 minutes. All a witness from the employer would need to say is what the total number of employees in the workplace is, how many employees in the workplace are members of the union, and, if there is another trade union that has members in the same workplace, to also mention that and, may be, also the number of the latter union's members. By the time the 48 hours required for the strike notice expires, the arbitration award could be out. The issuing of an arbitration award would bring the dispute to an end with the result that the intended strike would become unprotected if it was pursued because there would no longer be an issue in dispute between the parties as contemplated by sec 64(1) of the Act.

[43] Subsequent to the hearing of argument, the parties were afforded an opportunity to deal with the question of how it could be said that sec 65 (2)(a) provides for an effective right to strike in respect of an issue in dispute such as the one in this matter when the employer can easily frustrate such a right by invoking arbitration and securing an arbitration award in its favour before, or soon after, the commencement of the strike. Mr Van der Riet submitted that the employer would not have the right to invoke arbitration in a case such as this one

because the rights that the first respondent seeks are not rights conferred by Part A to chapter III but rights that fall outside Part A.

[44] I have already rejected this contention earlier in this judgement and have given full reasons for rejecting that submission. It is not necessary to repeat the reasons. It is sufficient to say that in making this submission, Mr Van der Riet must have overlooked par 7.4 of the respondents' answering affidavit. There the respondents accepted that **"a party has the right to refer the issue in dispute in this matter to arbitration in terms of the Act."** That could only be a reference to arbitration in terms of Part A to Chapter III of the Act. It stands to reason that Mr Van der Riet's contention that the appellant would have no right to refer the issue in dispute in this matter to arbitration and thereby frustrate the first respondent's members' alleged right to strike based on sec 65 (2)(a) falls to be rejected.

[45] What does all of this mean with regard to the question whether a minority trade union such as the first respondent has a right to call a strike in order to put pressure on an employer to grant it **"the organisational rights referred to in sec 14"** particularly when there is a majority union in the work place? As I have already said, if such a union has a right to call a strike, it

can only be because of the provisions of sec 65(2)(a). The question that arises is whether sec 65(2)(a) has conferred an effective right to strike in a situation such as this one. A trade union in the position of the first respondent cannot exercise the right to call a strike in such a situation because the employer can very easily block it through arbitration. Further, through arbitration the employer would be able to not only block a strike but also to secure an award in his favour on the issue in dispute which would also have the effect that there could be no resort to a strike.

[46] In such a case the minority union cannot do anything either to prevent the employer from requesting the CCMA to arbitrate the dispute or to prevent him from getting an arbitration award in his favour. The only thing I can think of that the union can do in order to be able to pursue a strike in such a case is to beg the employer not to invoke arbitration. If the strike is likely to be effective, there is no way that the employer would agree to that. If he were to agree, it would only be because he knew that the strike would not hurt his business. Of course, the workers' need to exercise the right to strike arises when a strike will hurt the employer. Unions and workers have no need for a strike when a strike will not hurt the employer. When a strike will not hurt the employer, unions and workers need arbitration. This

means that such right to strike as sec 65(2)(a) may be said to confer is one that workers cannot exercise when they need it most but is one that would be available to them when they least need it.

[47] If the employer agrees not to invoke arbitration, which in reality would be unlikely, that is not the end of the matter because, if, as in this matter, there is another trade union that has as its members the majority of the employees in the workplace, such a trade union may seek and obtain an interdict restraining the employer from concluding any agreement with the minority union purporting to grant it organisational rights provided for in s 14. This would be on the basis that the majority union is the only trade union that is entitled to such rights for as long as it maintains the level of representativeness required for such rights.

[48] Mr Van der Riet submitted that the majority union would not be able to obtain such interdict because it would not be able to show that any of its rights is threatened. He submitted that this was so because sec 14 did not **“confer any rights on the majority trade union not to have shop stewards’ rights granted to other employees belonging to other trade unions.”** I do not agree. Quite clearly throughout sec 14 the rights that are conferred on, and the functions that are attached to, employees and trade union representatives, are conferred on, or attached to, employees and trade union representatives who are members of that registered trade

union that constitutes, or those two or more registered trade unions that, acting jointly, constitute the representative trade union as defined in s 14(1) of the Act. There cannot be two or more trade unions in one workplace that, acting separately, can both have the majority of the employees employed in the workplace as their respective members. A registered trade union that is a minority trade union simply falls outside the contemplation of sec 14.

[49] This therefore means that, if the minority union wishes to pursue a strike, it may need to beg not only the employer not to refer the dispute to arbitration but it may also need to beg the majority trade union not to seek an interdict restraining the employer from granting it such rights. What type of a right to call a strike can such a minority trade union be said to have if such right can only be exercised at the pleasure or convenience of the employer or of a rival union? In my view no proper right to strike can be said to exist if workers need the employer's blessing or the blessing of their rival union before they can exercise it.

[50] It seems to me that, after sec 65(1)(c) had been enacted as a limitation to the right to strike, an attempt was made through sec 65(2)(a) to make that limitation inapplicable in respect of disputes involving matters dealt with in sections 12 to 15 by providing for an exception to the limitation. I think that attempt failed. The result is that in a case such as this the limitation in sec 65(1)(c) is fully applicable and enforceable and the exception that was attempted is not effective because it provides for a right to strike that can only be exercised at the employer's convenience and pleasure as well as at the convenience and pleasure of a rival union. Accordingly the first respondent has no right to call a strike in this matter.

[51] Mr Van der Riet submitted that, if the Act was interpreted to mean that sec 65(2)(a) was ineffective in a case such as this one, such interpretation would be understood to limit the constitutional right to strike without such limitation being expressly stated in the statute. In this regard he referred to **S v Zuma 1995(2) SA 642 (CC) at 6511 and CWIU v Plascon Decorative (Inland) (Pty)Ltd [1998] 12 BLLR 1191(LAC) at 1197B**. I do not agree. On this interpretation sec 65(2)(a) is not a limitation. The limitation is s65(1)(c). The right to strike is provided for in sec 23 of the Constitution and sec 64(1) of the Act. Sec 65(1) then expressly provides for limitations to that right. Sec 65(2)(a) seeks to create an exception to the limitation contained in sec 65(1)(c) and, in my judgement, ineffectively so in a case such as this one. Accordingly the limitation is expressly stated in the statute. There can be no doubt that the limitation of the right to strike that is provided for in sec 65(1)(c) is one that meets the requirements of sec 36(1) of the Constitution.

[52] Much reliance was placed by the first respondent on the provisions of s20 to support the contention that the first

respondent could call a strike in a matter such as this one. Sec 20 reads: **“Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.”** This provision has no legal significance. It is clarificatory in nature. It does not give anyone any right that such person does not otherwise already have. A collective agreement is an agreement like any other agreement. As in the case of any agreement, a collective agreement can be concluded in any circumstances in which the law does not preclude its conclusion.

[53] A reading of a few sections in Part A reveals clear indications that the conclusion of collective agreements was contemplated rather than that it was not. I list some of those sections:

(a) s 14(4)(d) which contemplates the performance by a trade union representative of **“any other function agreed to between the representative trade union and the employer”**.

(b) s 15(2) which contemplates that a 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.”**

(c) s 16(3) which contemplates consultation and collective bargaining between a representative trade

union and the employer.

(d) S 16(8) which contemplates the process of conciliation to resolve a dispute and, obviously, conciliation may lead to the conclusion of an agreement that could constitute a collective agreement.

(e) s 16 [11] which contemplates the effective engagement of a representative trade union in consultation or collective bargaining.

(f) s 18(1) which contemplates the conclusion of 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.

(g) s21(3) which contemplates the conclusion of a collective agreement about the manner in which the union will exercise the organisational rights it seeks to exercise.

[54] My conclusion that there is nothing in Part A that precludes the conclusion of a collective agreement may give rise to the following question: But does that not mean that there is a right to strike if a union demands that the employer conclude a collective agreement with it on organisational rights and the employer refuses because, if there is no right to strike in such a situation, it must mean that there is no right to bargain collectively? I think the answer to this question is the following. Sec 20 does not say : **“Nothing in this Part precludes the exercise of a right to strike about organisational rights.”**

Accordingly it does not, without more, affect the right to strike. Furthermore, the limitation to the right to strike that I am of the view precludes the first respondent from calling its members out on strike about the organisational rights it seeks is not to be found in Part A. It is to be found in sec 65(c).

[55] Sec 20 contemplates nothing more than that a trade union and an employer are not precluded from concluding an agreement that meets the requirements of a collective agreement as defined in sec 213 in regard to organisational rights if they are both happy to do so. This must obviously refer to a situation where to do so will not adversely affect another union's rights or other employees' rights. The mere fact that they are not precluded from concluding such an agreement does not necessarily mean that, if the employer refuses to enter into such an agreement, there is, without more, a right to resort to a strike. Such agreements may be concluded even when a strike has not been called. However, a strike may not be resorted to in a case where the right to strike has been limited by the Act and such limitation meets the requirements of sec 36(1) of the Constitution. In any event the Constitution recognises the right to strike separately from, and, independently of, the right to bargain collectively.(see sec 23(2) (c) and 23(5) of the constitution).

[56] Although it is trite that a court will not lightly conclude that a provision in a statute is superfluous, it will equally not hesitate to say a provision is superfluous when, after careful consideration, it is satisfied that the provision is, indeed, superfluous. In my judgement s20 is definitely a superfluous provision in the Act. In the absence of anything in Part A that

suggests in any way that the conclusion of a collective agreement is or may be prohibited, there was no need for a provision that does nothing more than to simply state the obvious.

[57] Lastly it seems to me that, if a minority trade union demands the employer to grant it **“organisational rights referred to in sec 14”** in a workplace where there is a majority trade union that has been granted the organisational rights provided for in sec 14, which is the case in this matter, the employer would be entitled to adopt the attitude that it cannot give what it does not have. This is so because, once sec 14 rights have been granted to one trade union in a workplace and, properly so granted, there would be no further sec 14 rights which the employer can grant to another trade union. There might, and I would put it no higher than that, be something else akin to sec 14 rights but there cannot be any sec 14 rights left to be granted to another trade union. In this case the first respondent has repeatedly stated both in correspondence with the appellant and in the answering affidavit that what it seeks is that the appellant must grant it **“organisational rights**

referred to in s14".

[58] The first respondent has also said that it wants the appellant to conclude with it a collective agreement on the manner in which it will exercise such rights. There can only be one such collective agreement relating to sec 14 rights in one workplace. That is because there can only be one majority trade union in one workplace in the scenario contemplated by s14 or if there are two or more trade unions that are party to such a collective agreement, it can only be so if they are acting jointly for purposes of being the representative trade union as defined in s14(1). For the second trade union to demand the employer to grant it such rights at a time when the majority trade union still has such rights on the strength of meeting the requisite level of representativeness is to demand the impossible.

[59] I am satisfied that the first respondent has no right to call a strike, and its members have no right to strike, for the purpose for which the strike was sought to be called in this matter.

RMM Zondo
Judge President

Date of Judgement : 29 November 2001

Appearances

For the appellant : Adv. J Grogan

Instructed by : RC Futter Attorneys

For the Respondent : Adv. J.G. Van der Riet SC

Instructed by : Cheadle Thompson & Hayson

