

DEMOCRACY, MINORITY UNIONS AND THE RIGHT TO STRIKE: A CRITICAL ANALYSIS

Numsa v Bader Bop (Pty) Ltd
2003 2 BCLR (CC)

1 Introduction

In *NUMSA v Bader Bop (Pty) Ltd* (2003 2 BCLR 182 (CC)) minority unions were given the right to strike for the purpose of acquiring organisational rights. The Constitutional Courts approach in coming to its conclusion is questionable. Instead of declaring sections of the Labour Relations Act 66 of 1995 (hereinafter “the LRA”) unconstitutional it sought to bastardize the language of the Act and maintain its validity. A literal interpretation of the Act clearly prohibited strikes. The Constitutional Court should have declared these sections invalid and referred them to the legislature to correct. This judgment also fails to apply International Labour Organisation (ILO) standards correctly and is a major step backwards in protecting our new constitutional democracy. The purpose of this case note is to show weakness within the approach adopted by the Constitutional Court and suggest the approach that the court should have adopted.

2 Background information: Setting the scene

2.1 *Organisational rights and the Labour Relations Act: What are its literal requirements*

Organisational rights are regulated by Part A of Chapter III of the LRA. They are found in sections 12, 13, 14, 15 and 16 of the Act. Section 12 allows trade union officials access to the workplace to recruit members, to communicate with them and to have meetings outside working hours. Section 13 permits trade union members to authorise the employer to deduct trade union dues from their wages and to pay these directly to the trade union. Section 14 gives trade unions the right to have their shop stewards recognised. Shop stewards represent members in grievances and disciplinary proceedings and monitor the employer’s compliance with labour legislation and collective agreements. Section 15 entitles employees who are also trade union office bearers reasonable time off during working hours to perform their trade union functions. Section 16 enables trade unions to have access to information for the purpose of collective bargaining and for trade union representatives to be able to perform their functions.

Rights conferred by sections 12, 13 and 15 are only granted to trade unions that are sufficiently representative of the employees employed by an employer in the workplace (s 11 of the LRA). The phrase "sufficiently representative" is not defined in the LRA. The LRA does, however, give guidance on issues that the arbitrator must consider when determining whether a trade union is sufficiently representative. The arbitrator must consider the nature of the workplace, the nature of the organisational rights that the union seeks to exercise the nature of the sector where the workplace is situated and the organisational history at the workplace (s 21(8)(b) of the LRA). The arbitrator will also seek to minimise the proliferation of trade union representation in a workplace and to encourage a system of representative trade unions. It will also seek to minimise the financial and administrative burden placed on the employer in providing these rights (s 21(8)(a) of the LRA). Therefore there is no minimum threshold. What amounts to sufficient representation will be determined on a case by case basis. It is, however, possible for a majority union to enter into a collective agreement with the employer setting out the minimum thresholds required for a union to be sufficiently representative to in order to acquire organisational rights 12, 13 and 15 (s 18 of the LRA). Organisational rights 14 and 16 are only conferred upon trade unions that have as members the majority of the employees employed in the workplace (s 14(1) of the LRA).

In order to enforce these organisational rights the unions must be representative and must follow section 21 together with section 65(2) of the LRA. In terms of section 21 the union must notify the employer of the organisational rights that it seeks. The parties must then meet and attempt to reach a collective agreement in respect of these rights. If an agreement cannot be reached then the dispute will be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA), which will attempt to resolve the dispute through conciliation. Where conciliation fails, the parties have a choice. They can either refer the matter to arbitration, in terms of section 21 of the LRA, or the employees can go on strike in terms of section 65(2) of the LRA. If the union opts for strike action it may not refer the matter to arbitration for a period of 12 months from the date on which a strike notice was given in terms of section 64(1) of the Act. Normally, employees cannot go on strike on issues that are referred to arbitration in terms of section 64(1)(c). Section 64(2), however, creates an exception to this rule, allowing one to strike when pursuing organisational rights 12, 13, 14 and 15.

To sum up, where a sufficiently representative union wants to enforce organisational rights 12, 13 and 15 and where a majority union wants to enforce organisational right 14 the Act is quite clear on what procedure they should follow. They can either go to arbitration in terms of section 21 of the LRA or strike in terms of section 65(2) of the LRA. There are no provisions in the LRA regulating non-representative unions that want to acquire these organisational rights.

2.2 *Facts of the case*

Bader Bop (Pty) Ltd manufactures leather products for the automobile industry and employs approximately 1 000 semiskilled employees in Garankuwa outside Pretoria. Since early 1999 the General Industrial Workers Union of South Africa has represented the majority of its workers. This union enjoys organisational rights at the workplace (185I). On 16 August 1999 National Metalworkers Union of South Africa (NUMSA) requested that Bader Bop (Pty) Ltd grant it organisational rights 12, 13, 14 and 15. Some 26% of Bader Bops workers were members of NUMSA. After a number of meetings Bader Bop agreed to provide NUMSA with only organisational rights 12 and 13, which required the union to be sufficiently representative. It refused to grant NUMSA organisational rights 14 and 15, which required majority representation.

The union declared a dispute over these organisational rights, in particular the question of recognition of its shop stewards and its right to bargain collectively on behalf of its members. This dispute was referred to the CCMA. After conciliation at the CCMA failed, NUMSA informed Bader Bop that it intended to institute strike action in terms of the LRA (189D). Bader Bop's view was that a minority union cannot strike over organisational rights 14 and 15 and the company therefore applied to the Labour Court for an interdict to stop the strike. The application was dismissed by the Labour Court, but upheld on appeal by the Labour Appeal Court. The matter was then referred to the Constitutional Court.

3 **The Constitutional Court judgment**

The Constitutional Court found in favour of the minority union. It indicated that while representative unions could acquire organisational rights through striking or arbitration in terms of section 21 and 65(2) of the LRA, non-representative unions also have a right to strike over organisational rights. In coming to this conclusion the court held that there is nothing in Part A of Chapter III of the Labour Relations Act that excludes these unions from using the ordinary process of collective bargaining when acquiring organisational rights (199F-H). Section 20 of the Act provides that "nothing in this part precludes the conclusion of a collective agreement that regulates organisational rights". The ordinary process in the Act enables unions and employers to enter into collective agreements on matters of mutual interest. The LRA permits unions to strike where a collective agreement on matters of mutual interest is not reached. Since organisational rights are clearly matters of mutual interest unions may strike where collective bargaining fails (200A-B).

Thus, for the Constitutional Court there are two different approaches. If a union is representative, to acquire organisational rights it must use section 21 read with section 65(1)(c) and section 65(2). These unions have a right to organisational rights. They can go to conciliation in order to enforce these rights. Where conciliation fails, the union can either refer the matter to

arbitration or go on strike. Unions that are not representative do not have a right to these organisational rights. They must bargain for these rights according to section 20 of the LRA and where bargaining fails they are allowed to strike but not to go to arbitration (210A-H).

4 Analysis of the judgment

There are three major problems with the judgment:

4.1 Criticism of the process

The Constitutional Court judgment is clearly mistaken. According to the wording of the LRA only representative unions should be granted organisational rights. The Constitutional Court ignored the clear language of the Act. The Act goes into great depth in ensuring that certain majorities are satisfied before a union acquires or loses its organisational rights. Section 21(8) imposes an obligation on the commissioner to look at specific factors when determining whether a union is sufficiently representative or not for the purpose of acquiring organisational rights 12, 13 and 15. On acquiring organisational rights 14 and 16 the Act is also clear. It requires that the union be a majority union. Section 21(11) further stresses the importance of majorities. It enables a trade union that is no longer representative to lose its organisational rights in the enterprise. It provides that an employer who believes that a union is no longer representative can apply to the CCMA to withdraw organisational rights from the union. Section 18 further stresses the importance of being representative for the purpose of acquiring organisational rights. It permits employers and unions to conclude collective agreements setting out minimum thresholds for a union to be "sufficiently representative" for the purpose of acquiring organisational rights 12, 13 and 15.

Since the Act stresses the importance of representivity, it is clear that the drafters intended these rights to be denied to minority unions and hence they cannot be allowed to strike in order to acquire rights that they are not entitled to in the first place. Section 20 of the LRA should be interpreted to apply only to representative unions. To apply it to non-representative unions would render the sections on representivity meaningless. Instead of bastardizing the clear language of the LRA, the Constitutional Court should have declared sections 21 and 65(2) unconstitutional since these clearly deny non-representative unions a constitutional right to strike.

Not only is the court's interpretation of the Act incorrect, it also creates uncertainty on subsequent interpretations of the LRA, in particular sections of the LRA that have clear majority requirements necessary to acquire rights. For example, according to sections 25(2) and 26(2) of the LRA, agency and closed shop agreements can only be entered into by majority unions and the employer. The effect of the Bader Bop judgment could imply that minority unions are entitled to strike to enter into such agreements despite the clear wording of the Act. By avoiding declaring sections 21 and 65(2)

unconstitutional, the Constitutional Court in fact created more difficulties that would eventually require further clarification by the Constitutional Court.

4.2 *The case denies democracy within the workplace*

It has been argued by a number of authors that strikes are essential for democracy within the workplace. According to McIlroy: "As long as our society is divided between those who own and control the means of production and those who only have the ability to work, strikes will be inevitable because they are the ultimate means workers have of protecting themselves" (see McIlroy *Strike! How to fight. How to win.* (1984) 15).

According to Weintraub it is an investment in employee bargaining power since it helps them play a role in the decision making process on matters affecting them (see Weintraub "Why Teachers Strike: The Economic and Legal Determinants" 1976 5 *Journal of Collective Negotiations* 195). Novitz states that strikes can be justified not only to improve working conditions but also influence the way that an enterprise is run (see Novitz *International Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization and the Council of Europe* thesis available from the British Library document supply centre in West Yorkshire United Kingdom April 1998 111).

Although these authors are correct in that strikes are essential for democracy, they are usually a more significant weapon for majority unions who have greater leverage during collective bargaining and can often be a hindrance to minority unions whose strikes are ineffective hence denying them any real say in the workplace. By providing only minority unions with a right to strike without any recourse to arbitration, one may in fact be hampering democracy. Democracy does not only imply majoritarian control but also minority protection. In *S v Makwanyane* (1995 3 SA 395) the Constitutional Court, in prohibiting the death penalty, indicated that it will not give in to public opinion and the will of the majority but instead uphold standards of a civilized democratic society (see *S v Makwanyane supra* par 199). According to Chaskalson: "The very reason for establishing the new legal order was to protect the rights of minorities and others who cannot protect their rights adequately ... Those who are entitled to claim this protection include the social outcast and marginalized people in society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected" (see *S v Makwanyane supra* par 98).

According to Dworkin there are two concepts of democracy: statistical democracy where one counts heads and provides a statistical readout of what people want, and integrated democracy which places weight on the importance of the individual (see Guest *Dworkin* (1992) 98). Dworkin believes that we need more than a statistical government in a genuine democracy. We need to consider individual interest as well. For Dworkin a true democracy would protect three principles, which are essential for all individuals: those of participation, stake and independence (see Guest 98).

The principle of participation ensures that all individuals have a role to play within their community, not only the majority, that is, it provides all citizens with the right to vote and freedom of speech, *etcetera*. The principle of stake ensures that all people have a claim to the community and can call it their own. It ensures that certain groups are not isolated by the majority. For example, it prevents discrimination. The principle of independence indicates that a democratic government must not dictate to its citizens what they should think. It protects rights such as freedom of speech religion and privacy.

By providing minority unions with the right to strike, the Constitutional Court does not give effect to these three principles. Strikes by minority unions would not always enable them to participate in the running of the enterprise. Threats by a majority union would usually be much more effective than those by a minority union. Strikes by a minority would not ensure that they have a stake in their employment community. It could also merely subject them to the whims of the majority or the employer without having any means of redress. These values of democracy would be more accessible to minority unions if they were given a right to these organisational rights, enforceable through arbitration. Being too weak to challenge employer control, arbitration would give minority unions a greater voice within the workplace, providing them with some stake and independence in the community within which they work.

Thus, by protecting only a minority union's right to strike for the purpose of acquiring organisational rights, without any recourse to arbitration the Constitutional Court does not give effect the values of an integrated civilized democracy, which would prohibit exploitation by the majority and by an employer.

4 3 The judgment does not give effect to ILO standards

The court reinforced the significance of international law, in particular ILO standards when determining whether minority unions should be entitled to strike in order to acquire organisational rights. It failed, however, to ensure that these international law standards are complied with. To determine whether minority unions had a right to organise the Constitutional Court considered at Article 2 of the Freedom of Association and Protection of the Right to Organization Convention 87 of 1948, which provides that "all workers and employers without distinction shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". The two major ILO committees, namely the ILO Committee of Experts and the Freedom of Association Committee, have held that this provision protects a worker's right to join a union of his or her choice, including a minority union. The two committees have held that a majoritarian system is not incompatible with freedom of association as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions.

After determining that these ILO standards require that minority unions be provided with organisational rights, the Constitutional Court failed to recognise that the LRA does not provide minority unions with such rights. According to the Constitutional Courts interpretation of the LRA, all that the LRA does is enable minority unions to strike in order to acquire these organisational rights, without any recourse to arbitration. Without much leverage, strikes by minority unions do not create significant pressure on the employer (see discussion in par 4 2 above). The Constitutional Court should have recognised that by providing minority unions with a right to strike without any recourse to arbitration, it fails to give effect to its ILO obligations, with, which it is compelled to comply in terms of both the Constitution and the LRA. Thus, although the Constitutional Court stressed the importance of ILO standards, it failed to recognise that its remedy of enforcement through strike action is ineffective. Even though NUMSA, as a minority union, was claiming the right to strike to acquire organisational rights 14 and 15, the South African Constitution provides the Constitutional Court with jurisdiction to award remedies outside claims made by the parties if they are in conflict with the Constitution. According to section 172(1)(b) of the Constitution, the Constitutional Court has the power to make any order that is just and equitable.

5 Conclusion

In Bader Bop the Constitutional Court failed to follow the correct approach. Instead of declaring sections 21 and 65(2) of the LRA unconstitutional, it expanded the literal interpretation of the Act and ignored the significance of representation that the Act so amply advocates. It also failed to apply ILO standards correctly. According to the ILO, minority unions are entitled to organisational rights. Instead of declaring sections 65(2) and section 21 unconstitutional for failing to recognise that a minority union has a right to organise the Constitutional Court instead found that minority unions can strike in order to acquire organisational rights. In so doing, the Constitutional Court merely provided minority unions with a right to strike, without any recourse to arbitration, which would have provided minority unions with greater protection and would have ensured that South Africa's ILO obligations are complied with. By denying minorities significant protection the Bader Bop judgment is infect a severe setback in our constitutional democracy. It fails to recognise the principle advocated by Judge O Regan in *S v Makwanyane* (*supra*) that "The new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect" (see *S v Makwanyane supra* par 344).

MA Chicktay
University of the Witwatersrand