



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA23/2017

In the matter between:

**ASSOCIATION OF MINeworkERS
AND CONSTRUCTION UNION (AMCU)**

1st Appellant

**THE INDIVIDUAL PERSONS WHOSE
NAMES ARE LISTED IN ANNEXURE "A"**

2nd to Further Appellants

and

ROYAL BAFOKENG PLATINUM LIMITED

1st Respondent

THE NATIONAL UNION OF MINeworkERS

2nd Respondent

UASA – THE UNION

3rd Respondent

THE MINISTER OF LABOUR

4th Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

5th Respondent

THE CHAMBER OF MINES

6th Respondent

Heard: 06 March 2018

Delivered: 26 June 2018

Summary: Summary: Constitutionality of sections 189(1)(a)(c) and 23(1)(d) of the LRA – employer entering into a retrenchment agreement with representative union and agreement extended to minority union in terms of section 23(1)(d) –

retrenchment agreement excluded consultation with minority union – minority contending that sections 189(1)(a)(c) and 23(1)(d) unconstitutional as they infringe on a number of the employees' constitutional rights and International Conventions – further that the section be interpreted in such a manner that individual employees and minority trade unions may also be consulted irrespective of the existence of a collective agreement between the employer and the majority union/s and that the extension of retrenchment agreements, without involving minority unions or non-members, in terms of section 23(1)(d) is irrational and offends the rule of law.

Held that: the Legislature had made a policy choice of Majoritarianism in order to facilitate orderly collective bargaining, minimise union rivalry and to foster democratisation of the workplace by avoiding a multiplicity of consulting parties, a proliferation of unions and industrial discontent - section 189 of the LRA is also a manifestation of the policy choice that the legislature made. This policy choice in favour of majoritarianism is no doubt based on the fact that retrenchments are usually collective in nature. Section 189 recognises that the interests of the employees are best served by the most representative entity at the workplace. The entity shall have obtained its seat at the consultation table based on its statistical dominance at the workplace. Having obtained its statistical dominance and entered into a collective agreement with the employer as the exclusive representative of the employees, consultation is more practical and less cumbersome than a multiplicity of consultations with each and every employee at the workplace.

Held that the exclusion of minority unions because, they have not met the threshold agreed upon, does not mean that their members are not represented. If the representative union acts unfairly or discriminatory against an employee and such conduct leads to the unfair retrenchment of the employee, such employee has the right to challenge the fairness of his or her individual retrenchment.

Held that section 23(1)(d) does not require expressly or implicitly that a minority union should be consulted before a collective agreement is extended. The representative union would generally be in a better position to consult with the

employer because it will have all the necessary information at its disposal. To grant a minority union the right to be heard in circumstances where the representative union has by means of collective bargaining acquired the right to be the only bargaining agent would be subversive to collective bargaining and the principle of majoritarianism which underpins section 23(1)(d). The extension of a collective agreement without affording a minority union or non-union members a hearing is rationally related to the achievement of the purpose of the section 23(1)(d) process. It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it fosters peace and order in the workplace.

Procedural challenge based on section 189A(13) dismissed on account of the minority union not having *locus standi* to challenge the procedural fairness of the dismissals. – Labour Court’s judgment upheld and appeal dismissed.

Coram: Waglay JP, CJ Musi JA and Savage AJA

JUDGMENT

MUSI JA

[1] The first appellant, the Association of Mineworkers and Construction Union (AMCU), sought an order in the Labour Court declaring sections 189(1)(a) to (c) and 23(1)(d) of the Labour Relations Act (the Act)¹ unconstitutional. The delineation of the constitutional challenge will become apparent later. The Labour Court (Prinsloo J) dismissed the application. This appeal is against that order. The appeal is brought with the leave of the Labour Court.

[2] The first respondent (employer) operates a platinum mine known as the Bafokeng Rasimone Platinum Mine (Mine). The second to further appellants (employees) were all employed at the mine. The majority of the employees at the mine were members of the second respondent, the National Union of Mineworkers (NUM). The third respondent, the United Association of South

¹ Act 66 of 1995.

Africa (UASA), also had members at the mine.² During 2014, AMCU commenced recruiting members at the mine. By 31 July 2015, the employees switched allegiance and were all members of AMCU.

- [3] The employer recognised NUM and UASA for bargaining purposes and extended organisational rights to them. AMCU was not recognised for bargaining purposes, neither was organisational rights extended to it.
- [4] On 30 September 2015, the employees attempted to report for duty at the mine, they were however issued with notices of retrenchment dated 18 September 2015. In the notices, it was stated that the employees would be retrenched with effect from 31 October 2015.
- [5] Neither the employees nor AMCU were issued with section 189(3) notices. It is common cause that AMCU was not consulted before the decision to retrench its members was made. NUM and UASA were, however, consulted.
- [6] AMCU referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation. During the consultation proceedings, the employer raised a point *in limine* to the effect that there is an extant collective agreement between the employer, NUM and UASA which entitled the employer to exclude AMCU from the consultation process. The Commissioner issued a jurisdictional ruling wherein he found that the CCMA had no jurisdiction to conciliate the matter.
- [7] AMCU and the employees approached the Labour Court with an application in terms of section 189A(13) of the Act. The employer, in its answering affidavit, averred that it had entered into a collective agreement as contemplated in section 189(1)(a) of the Act with NUM and UASA, in terms of which the parties agreed that the employer would only consult with NUM and UASA in respect of

² NUM and UASA were the representative trade union because they are members with the majority of the employees employed by the mine. See section 16 for the definition of representative trade union.

dismissals for operational requirements. The employer further averred that it had entered into a retrenchment agreement with NUM and UASA which was extended in terms of section 23(1)(d) of the Act. The consultation and retrenchment agreements were attached.

- [8] The parties agreed that AMCU would withdraw its section 189A(13) application and mount a constitutional challenge aimed at declaring sections 189(1)(a) - (c) and 23(1)(d) of the Act unconstitutional. The agreement was made an order of court.
- [9] Pursuant to the agreement, AMCU approached the Labour Court seeking relief which was aptly summarised by the Labour Court as follows:

"[1] The applicants (appellants) approached this Court for an order, inter alia, declaring sections 189(a) - (c) of the Labour Relations Act (LRA) unconstitutional in so far as they have the effect that where an employer consults with a trade union with which the employer is required to consult in terms of a collective agreement, that employer has no obligation to consult with any other trade union whose members are likely to be affected by the proposed dismissals. Construed in this manner, it violates the rights (and freedoms) set out in the Constitution namely, the rule of law (section 1), the right to equality (section 9(1)), dignity (section 10), freedom of association (section 18) fair labour practice (section 23), access to information (section 32) and access to courts (section 34).

[2] The applicants seek that sections 189(a) - (c) be excised from the LRA, alternatively be reinterpreted in a manner that is consistent with the aforesaid constitutional rights (and freedoms) and that it be declared that where an employer consults with a trade union that the employer is required to consult with in terms of a collective agreement, that employer must also consult with any other trade union whose members are likely to be affected by the proposed dismissals.

[3] In respect of section 23(1)(d) the applicants seek an order declaring the said section unconstitutional in so far as it permits a collective agreement regulating the dismissal of employees based on operational requirements, concluded with a majority trade union, to bind employees who were not members of the registered trade union. Construed in this manner, it violates the following rights (and freedoms) set out in the Constitution: rule of law (section 1), the right to equality

(section 9(1)), dignity (section 10), freedom of association (section 18), fair labour practice (section 23), just administrative action (section 33) and access to courts (section 34).

- [4] *The applicants seek that section 23(1)(d) be reinterpreted in a manner that is consistent with the aforesaid constitutional rights (and freedoms) and that it be declared that a collective agreement regulating the dismissal of employees based on operational requirements, concluded with a majority union, cannot be extended to bind employees who are not members of the trade union or a party to the agreement. Alternatively, that an exclusion be read into section 23(1)(d) precluding its application to collective agreements regulating the dismissal of employees based on operational requirements.*
- [5] *The applicants also seek the review and setting aside of the retrenchment agreement concluded between the first second and third respondents, and/or the extension thereof in terms of section 23(1)(d) of the LRA. Lastly the applicants seek that the dismissals of the second and further applicants be declared to be of no force and effect and that they be reinstated retrospectively. If the dismissals are not declared to be of no force and effect, the applicants seek to challenge the procedural fairness of their dismissals in terms of the provisions of section 189A(13)."*

[10] The Labour Court its judgment made the following findings:

'section 23(1)(d) of the Act is not unconstitutional;
there is no basis to read in an exclusion into section 23(1)(d) precluding its application to collective agreements that regulate dismissals based on operational requirements;
section 189 is not inconsistent with the Constitution because if an employer consults a party in terms of a collective agreement, there is no obligation to consult another party in terms of the remaining subsections to section 189 of the Act;
section 189 creates a hierarchy of consulting parties;
the elevation to the status of consulting party is strictly speaking not dependent on the principle of majoritarianism, but rather on such party acquiring the status of consulting party by way of a collective agreement;
there is no basis to excise or interpret sections 189(1)(a) - (c) in order to declare that where an employer consults with a trade union that the employer is required to consult, the employer must also consult with any other trade union members who are likely to be affected by the proposed dismissals;and
the impugned sections do not violate any of the constitutional rights alleged by AMCU.'

[11] In this Court, Mr Boda, on behalf of the appellants, contended that the Court *quo* did not deal with the appellants' prayer that the extension of the retrenchment agreement be reviewed and set aside, despite the review not being contingent on the constitutionality challenges succeeding. The appellants further contended that the Labour Court erred in not:

- "1. *impugning the constitutionality of section 189(1)(a) - (c) of the Act;*
2. *impugning the constitutionality of section 23(1)(d) of the Act;*
3. *reinterpreting the above sections in such a manner that minority trade unions may also be consulted irrespective of the existence of a collective agreement between the employer and the majority union/s;*
4. *finding that the dismissal of the employees was procedurally unfair."*

[12] The different contentions of Mr Pretorius, for the first respondent, Mr Malindi, for the fourth respondent and Mr Myburgh, for the *amicus curiae*, in support of the Labour Court's judgment will be set out later.

[13] The Republic of South Africa is a democratic state founded on, *inter alia*, the value of the supremacy of the Constitution and the rule of law.³ The Constitution is the supreme law of the Republic of South Africa and any law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.⁴

[14] Section 23 (1), (5) and (6) of the Constitution reads as follows:

- "(1) *Everyone has the right to fair labour practices...*
- (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 our right in this chapter, the limitation must comply with section 36(1).*

³ Section 1 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁴ Section 2 of the Constitution.

- (6) *National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."*

[15] Section 36 of the Constitution reads as follows:

"36.(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 the 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; and*
- (e) less restrictive means to achieve the purpose.*

(2) 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."

[16] The Act contains an important interpretive instruction in section 3 thereof which reads:

"Any person applying this Act must interpret its provisions –

- (a) To give effect to its primary objects;*
- (b) In compliance with the Constitution; and*
- (c) In compliance with the public international law obligations of the Republic."*

[17] The purpose of the Act is stated in section 1 as follows:

"The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996...;*
- (b) To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;*
- (c) To provide a framework within which employees and their trade unions, employers and employers' organisations can-*

- (i) *Collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
- (ii) *formulate industrial policy; and*
- (d) *To promote-*
 - (i) *Orderly collective bargaining;*
 - (ii) *Collective bargaining at sectoral level;*
 - (iii) *Employee participation in decision-making in the workplace; and*
 - (iv) *The effective resolution of labour disputes.”*

[18] This Court must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.⁵ When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that would inconsistent with international law.⁶

[19] The Act is predicated upon the principle of majoritarianism. The system of majoritarianism permeates our labour relations dispensation. The system which is a conscious policy choice that the legislature made runs through the Act. This policy choice was made in order to facilitate orderly collective bargaining, minimise union rivalry and to foster democratisation of the workplace. In ***Kem-Lin Fashions v Brunton***⁷ this Court said the following:

*“The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for the collective bargaining as well as for the democratisation of the workplace and sectors...”*⁸

[20] The Constitutional Court has recently pointed out that majoritarianism is both a premise of and a recurrent theme throughout the LRA. It went on to state that:

⁵ Section 39 (2) of the Constitution.

⁶ Section 233 of the Constitution.

⁷ *Kem-Lin Fashions CC v Brunton and Another* [2001] 1 BLLR 25 (LAC).

⁸ Ibid para 19.

“it is majoritarianism that underlies the statute’s countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members), and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union). This is not to say that these provisions are invulnerable to constitutional attack. It is only to point to them as piquantly instancing the scheme of the statute as a whole.”⁹

- [21] This principle was also underscored in ***Transport and Allied Workers Union of South Africa v PUTCO***¹⁰ where the Constitutional Court said:

“In essence, the principle of majoritarianism states that the will of the majority prevails over that of the minority. This is reflected throughout the LRA.”¹¹

- [22] The appellants, faced with the uphill battle to displace the principle of majoritarianism, opted to limit their challenge to the principle in the context of retrenchments. Mr Boda submitted that the appellants have no difficulty with the principle of majoritarianism and its constitutionality *per se*, their challenge however relates to the application of majoritarianism in the context of the right to procedural fairness in the retrenchment scenario, so as to exclude constituencies of workers from the scope of consultation.

- [23] Majoritarianism is underpinned by collective bargaining which secures certain benefits for the majority union or unions. In order to enjoy the enhanced benefit which comes with being a representative union, the union or unions must enter into a collective agreement with the employer. A collective agreement is defined as:

“a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –

(a) one or more employers;

(b) one or more registered employers’ organisations; or

⁹ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC) para 43.

¹⁰ *Transport and Allied Workers Union of South Africa v PUTCO Ltd* 2016 (4) SA 39 (CC).

¹¹ *Ibid* para 61.

(c) one or more employers and one or more registered employers organisations;¹²

[24] The philosophy of the Act is in favour of voluntarism and is by and large abstentionist in its approach. The regulation of the workplace and employment contracts is left to the parties to agree upon. As part of the trade-off, collective agreements are given priority; this is so because collective bargaining is essentially geared towards concluding a collective agreement. Collective agreements are so important in the scheme of the Act that they are allowed to trump the provisions of the Act. Jordaan puts it thus:

“... The Act generally allows collective bargaining to trump its own provisions. It even goes as far as allowing for collectively agreed limitations on certain constitutionally guaranteed rights. For example, section 64(1)(a) prohibits a strike where collective agreement determines that the issue in dispute is not stable. By agreement between an employer and a majority union, such a limitation may also be extended to workers who do not belong to the union concerned, thereby also depriving them of the right to strike over that particular issue. Similarly, trade unions which do not represent the majority of employees in the workplace may be deprived of the right to organise on the shop floor if an employer and majority union agreed in terms of section 18 to grant exclusive rights to the majority union.”¹³

[25] The primacy of collective agreements is carefully interwoven with the provisions of the Act dealing with organisational rights,¹⁴ bargaining councils,¹⁵ regulating, to a limited extent, terms and conditions of employment,¹⁶ workplace forums,¹⁷ the right to strike,¹⁸ and retrenchments.¹⁹

¹² Section 213 of the Act.

¹³ Barney Jordaan: Collective bargaining under the new Labour Relations Act: The resurrection of freedom of contract. Law, Democracy and Development, Vol 1, No 1 (1997).

¹⁴ Sections 18(1) reads: “An employer and a registered trade union whose members are a majority of the employees employed by that employer in the workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in section 12, 13 and 15.” See also section 20 which states that “nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights”.

¹⁵ Section 28.

¹⁶ Section 49 of the Basic Conditions of Employment Act, 75 of 1997.

¹⁷ Section 81.

¹⁸ Section 65 (1) (a) and (b). Section 65 (3).

¹⁹ Section 189.

[26] The voluntary nature of our labour relations system is held together by collective agreements. Collective agreements are part of the package. The gains made by collective bargaining which leads to collective agreements should not be unravelled easily. The risk, of course, being that the unravelling of one thread might lead to the destruction of the entire garment.

[27] Section 189(1) of the Act is one of the sections in the Act that is predicated upon the primacy of collective agreements. Section 189(1) is as follows:

“(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

- (a) any person whom the employer is required to consult in terms of a collective agreement;*
- (b) if there is no collective agreement that requires consultation-*
 - (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and*
 - (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;*
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or*
- (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.”*

[28] It is common cause that the employer on the one hand, and NUM and UASA on the other hand signed a valid and enforceable collective agreement in terms of which the employer was required to consult exclusively with NUM and UASA. The parties further entered into a retrenchment agreement after the consultation process.

[29] It is not in dispute that the retrenchment agreement which regulated the dismissals based on the mine's operational requirements was extended in terms of section 23(1)(d) of the Act to bind employees who were not members of NUM or UASA. Section 23(1)(d) reads as follows:

“a collective agreement binds –...

(d) employees who are not members of the registered trade union or trade unions party to the agreement if –

- (i) the employees are identified in the agreement;*
- (ii) the agreement expressly binds the employees; and*
- (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.”*

[30] In ***Aunde v NUMSA***,²⁰ this Court stated that section 189 creates a hierarchy of consulting partners. It held that:

“Where an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchments, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not.”²¹

[31] The appellants took issue with this construction of section 189. They point out that they were not consulted prior to their dismissals and were precluded from contributing to the consultation process. In being disenfranchised in this manner, so the argument was advanced, the individual appellants remain oblivious to the content of the consultation process, consequently being hamstrung in determining the adequacy or otherwise of the exclusionary consultation that took place, for purposes of pursuing a fairness challenged on an informed and effective basis. The appellants contended that their exclusion from the consultation process is not in keeping with the right to fair labour practices, which includes the right not to be unfairly dismissed.

²⁰ *Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC).

²¹ *Ibid* para 32.

[32] They submitted that the effect of the mine's action was to discriminate unfairly between employees based on their chosen trade union affiliation and to disenfranchise the individual appellants who elected to be associated with AMCU, without doing so in relation to members of NUM and UASA.

[33] The appellants rely on article 1 of ILO Convention 98 (Right to Organise and Collective Bargaining Convention, 1949)²² for their discrimination argument. The article reads as follows:

"Article 1

- 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.*
- 2. Such protection shall apply more particularly in respect of acts calculated to –
(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."*

[34] The appellants' reliance on this Convention is misplaced. The facts and the law with regard to this matter do not sustain an argument that the mine engaged in anti-union discrimination. The argument self-destructs, because, for it to be sustainable the appellants will have to show that NUM and UASA committed, in collusion with the employer, anti-minority union discriminatory conduct. There is no evidence that any of the workers' employment was made subject to them joining or relinquishing trade union membership. They were allowed to be members of AMCU. They were not requested to relinquish their AMCU membership. In fact, some of them were members of AMCU as well as NUM. They were allowed to engage and participate in union activities, without reprisal. This is at best an abstract challenge without a factual basis to support it.

²² This Convention was ratified by South Africa on 19 February 1996.

- [35] The appellants contended that employees who face possible dismissal for alleged misconduct (individual or collective) or incapacity have a right to be included in the pre-dismissal stage irrespective of their trade union affiliation. Whereas employees who face possible dismissal based on the employer's operational requirements do not have the same right because of their union affiliation. This they contend is unfair discrimination.
- [36] Dismissals for misconduct or incapacity are not the same as dismissals based on the employer's operational requirements. The former has to do with the conduct or attribute of the employee while the latter occurs through no-fault on the part of the employee. Dismissal based on misconduct can be individual or collective. In both instances, the employees, as a general rule, enjoy the right to be heard.²³ Dismissals based on the employer's operational requirement can also be collective or individual. In both cases the employee or employees have a right to be consulted before the employment is terminated.
- [37] The appellants point out that in the case of dismissals for misconduct, the entitlement to be heard is not linked with union affiliation whereas in the case of dismissals based on the employer's operational requirements union affiliation is important.
- [38] Retrenchments normally apply across the enterprise. It is usually, but not necessarily, a collective process with essentially collective outcomes. The issues about which the parties may consult on apply across the board. The consultation process is a joint consensus-seeking process in order to minimise or avoid dismissals. It is not a fault seeking exercise, as in dismissals for misconduct or poor performance.
- [39] Section 189 of the Act is also a manifestation of the policy choice that the legislature has made. This policy choice in favour of majoritarianism is no doubt

²³ *Modise and Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC).

based on the fact that retrenchments are usually collective in nature. Section 189 recognises that the interests of the employees are best served by the most representative entity at the workplace. The entity obtains its seat at the consultation table based on its statistical dominance at the workplace. Having obtained its statistical dominance and entered into a collective agreement with the employer as the exclusive representative of the employees, consultation is more practical and less cumbersome than a multiplicity of consultations with each and every employee at the workplace.

[40] To require an employer to consult with each and every employee, when an employer has entered into a collective agreement with the representative union, is impractical. It would also run against the scheme of the Act. Mr Pretorius correctly pointed out that the consultation process contended for by the appellants is unworkable because the employer would be obliged to implement the outcome of a collective bargaining process (the collective agreement) concluded with the representative union. Where the parties have agreed that the representative union would be the exclusive bargaining agent for all the employees the employer would not be able to consult with minority unions because it would be bound by the collective agreement. It would also not be able to consult with each individual employee without breaching the terms of the collective agreement.

[41] Although the consultation process is not negotiations or collective bargaining, it may lead to the signing of a collective agreement. The employee representatives generally, and where there is a collective agreement the representative union, are better resourced and experienced to deal effectively with the issues about which the parties have to consult. To require the employer to consult with a multiplicity of individual parties rather than the representative union at the workplace has the potential to result in a wide and irreconcilable range of outcomes depending on the consulting party's preferences.

[42] I agree with Mr Pretorius that to allow consultation with a minority union where there is a recognised representative union would be to enable the minority union to frustrate a mass retrenchment, which in turn might lead to industrial strife instead of industrial peace. I agree. This would cause bedlam and chaos at the workplace. In order to avoid such bedlam, it is best that the representative union that has won exclusive bargaining rights represent all the employees in the bargaining unit, for retrenchment consultation purposes. If there is no representative union with exclusive bargaining rights, there can be no objection if the employer consults with all the recognised unions at the workplace.

[43] Section 189A, in keeping with the scheme of the Act, gives employees the right to strike after mass dismissals. If a trade union gives notice of a strike in terms of section 189A, no member of the trade union and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employer's operational requirement has been extended in terms of section 23(1)(d) may refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court.²⁴ I agree with Mr Malindi that the power-play typically encountered in collective bargaining is not envisaged in any other form of dismissals except mass retrenchments.

[44] The ILO Convention on Termination of Employment No 158 of 1982 also makes a distinction between termination for reasons related to the worker's conduct or performance and termination based on the operational requirements of the employer. Article 7 of Convention 158 provides as follows:

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

²⁴ Section 189A(10).

[45] Article 13.1 of Convention 158 provides as follows:

“1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature the employer shall:
provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

[46] Article 3 of the ILO Workers’ Representatives Convention No 135 of 1971 defines workers’ representatives as follows:

“For the purpose of this Convention the term workers’ representatives means persons who are recognised as such under national law or practice, whether they are –
 (a) *trade union representatives, namely, representatives designated or elected by trade unions or by members of such trade unions; or*
 (b) *elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.”*

[47] The appellants contended that Convention 158 envisages an inclusive process, with affected workers enjoying representation in the pre-retrenchment process. They contend that this imperative is undermined where certain workers’ representatives are not given an opportunity to consult, with those workers not being represented in the process but being subjected to the outcome of the process.

[48] The appellants further argued that section 189(1) is unconstitutional because there is no rational relationship between the section and a legitimate

governmental purpose. The appellants bear the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the section and that purpose.²⁵ In any event, this argument is flawed. The representative trade union becomes the workers' representative at the workplace after a proper collective agreement has been entered into by the representative trade union and the employer and the agreement lawfully extended to cover employees who are not members of the representative trade union.²⁶ The representative trade union then becomes the representative of all the employees, regardless of union affiliation. All the workers who fall within the purview of the collective agreement will therefore be represented at the consultation table. In this case, the collective agreement expressly stated that NUM and UASA would be the exclusive consulting parties for purposes of retrenchments.

[49] In ***Sikhosana v Sasol Synthetics Fuels***,²⁷ the underlying purpose of section 189(1) was described as follows:

*"Section 189(1) quite deliberately renounces dual consultation in favour of the single level of consultation which it provides. The change evinces, I take it, more than just a concern to make the process of consultation simple and speedy: it embodies a desire, evident elsewhere in the Act too, that bargaining and consultation should be collective rather than individual and that the legitimacy of the representative with the best claim to be consulted should not be undermined by the claims to consult made by lesser interests. The effect of this section, thus, is to vest the appropriate collective representative with sole power of representation..."*²⁸

[50] Although the Act does not expressly contain a provision relating to fair representation it is, in my view, implied in the right to be the exclusive bargaining agent in the workplace or for a particular bargaining unit, especially in retrenchments. When a representative union attains the right to be the

²⁵ *New National Party of South Africa v Government of the RSA and Others* 1999 (5) BCLR 489 (CC) para 19.

²⁶ *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto and Another NNO* 2012 (6) SA 249 (CC) para 49 to 51.

²⁷ *Sikhosana & Others v Sasol Synthetics Fuels* (2000) 21 ILJ 649 (LC).

²⁸ *Ibid* at 656G-I.

exclusive consulting partner for retrenchment purposes, it has a corresponding duty to represent all employees, members and non-members fairly and without discrimination. The representative trade union must serve the interests of all employees in the workplace honestly, with discretion and it should not act arbitrarily. It should also not collude with the employer in order to retrench more, or exclusively, members of the minority union. In my view, there is also a duty on the employer to ensure that the terms of the collective agreement that it enters into with the representative union do not unfairly discriminate against minority unions or non-members. In cases where there is no compliance with this duty and it is clear that the employee has been unfairly retrenched such employee would be able to challenge the dismissal, with or without the assistance of the union of his or her choice.

[51] There is no suggestion that the representative union in this case did not act fairly towards all the employees which it represented.

[52] As I have already indicated, the purpose of excluding minority unions where there is a collective agreement with the representative trade union is to avoid multiplicity of consultations that would invariably be impractical and might foment industrial strife. The exclusion of minority unions because they have not met the threshold agreed upon does not mean that their members are not represented. If the representative union acts unfairly or discriminatory against an employee and such conduct leads to the unfair retrenchment of the employee, such employee has the right to challenge the fairness of his or her individual dismissal. Majoritarianism in this context serves the purpose of avoiding a multiplicity of consulting parties, a proliferation of unions and industrial discontent. In relation to the extension of the agreement, it is now settled that it constitutes public power and is therefore reviewable.²⁹ Disgruntled employees therefore have recourse to the law.

²⁹ *AMCU and Others v Chamber of Mines of South Africa and Others* (AMCU v COM (CC)) 2017 (3) SA 242 (CC) para 84.

[53] In **Cusa v Tao Ying**³⁰ it was said that:

*“Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreement. The right to engage in collective bargaining and to enforce the provisions of the collective agreement is an especially important right for the workers who are powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.”*³¹

[54] There is no reason why collective agreements entered into, in the context of retrenchments should not be adhered to. The distinction between dismissals for misconduct and incapacity on the one hand and dismissals for operational reasons is mere differentiation and not discrimination.³² The differentiation is rational and not arbitrary. This is so because different considerations apply in respect of the different forms of dismissals. Retrenchments are no-fault and generally collective dismissals. In mass retrenchments employees may strike after dismissal. Dismissals for misconduct or incapacity are linked to the conduct or attributes of the employee.

[55] Majoritarianism in the context of retrenchments is a rational system that is well-integrated in order to achieve the legitimate governmental purpose of orderly collective bargaining and giving representative unions primacy in order to promote workplace peace and avoid a proliferation of unions and a multiplicity of consulting partners. Tugging the thread of majoritarianism with regard to consulting partners might unravel the entire sweater woven by the Legislature in the Act. It is not a task that this Court should undertake. It is a task best left for the Legislature to consider, if it is so inclined. The constitutional challenge to section 189(1) should fail.

³⁰ *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC).

³¹ *Ibid* para 56.

³² *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 43 to 45.

[56] In **AMCU v COM (CC)**³³ the appellants challenged the constitutionality of section 23(1)(d) where the collective agreement was extended in terms of that section and prohibited minority union members from striking. According to the appellants, what was denied in this case was much more because the retrenchment agreement was extended to bind and dismiss employees who were not members of the trade union parties. They contend that their challenge is narrowly framed, because they do not challenge the constitutionality of the section *per se*, but instead, the challenge is directed at its application to collective agreements which regulate retrenchments and dismissal claims, which are extended to bind employees who are not members of the trade union parties.

[57] They sought an order that it was impermissible to extend the retrenchment agreement to bind employees who were not members of trade union parties that; that the retrenchment agreement be set aside and that the retrenchment of the individual appellants be declared to be of no force and effect and that the mine be directed to reinstate them with back pay to the date of dismissal.

[58] I have already pointed out that in **AMCU v COM (CC)** it was said that majoritarianism is a recurrent theme throughout the LRA,³⁴ and that it may be posited that for orderly and productive collective bargaining some form of majority rule in the workplace has to apply. It was further stated that what section 23(1)(d) does is to give enhanced power within a workplace, as defined, to a majority union: and it does so for powerful reasons that are functional to enhancing employees' bargaining power to a single representative bargaining agent.³⁵ The appellants accepted that the legislature exercised a policy choice in favour of majoritarianism.

[59] They, however, contended that the extension of retrenchment agreements, without involving minority unions or non-members, in terms of section 23(1)(d)

³³ See footnote 29

³⁴ Ibid para 42.

³⁵ Ibid para 44.

is irrational because it does not serve a legitimate governmental purpose and therefore offends the rule of law. In **AMCU v COM (CC)**, it was said that:

*"The rule of law is enshrined as a foundational value in the Constitution. From this it flows as "axiomatic" that the exercise of public power must comply with the doctrine of legality, which stems from the rule of law. This foundational principle binds Parliament. Its legislation must show "a rational relationship between the scheme which [Parliament] adopts and the achievement of a legitimate government purpose", since "Parliament cannot act capriciously or arbitrarily".*³⁶

[60] In **Minister of Home Affairs v Scalabrini Centre**³⁷ the following was said about the test for rationality:

*"But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable... rationality entails that the decision is founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality would be rare."*³⁸

[61] In **AMCU v COM (LAC)**³⁹ this Court said the following about the extension of collective agreements:

"It would be impractical if minority workers were not bound to collective agreements concluded at workplace level between the employer(s) and trade unions who represented the majority of the employees, simply because they were not parties to that collective agreement. Furthermore, to require unanimity amongst all employees, despite different trade union membership or affiliation would be unrealistic. To prohibit extension of the collective agreement to the minority employees, who were not parties to the collective agreement, so that they are not bound by it, would not only undermine the enforcement and therefore the effectiveness of the collective agreement, but also be destructive of collective bargaining per se, to peace in the workplace and to the

³⁶ Ibid para 65

³⁷ *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA).

³⁸ Ibid para 65.

³⁹ *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2016] 9 BLLR 872 (LAC) (**AMCU v COM (LAC)**).

*achievement of fair labour practices Such consequences are clearly not in conformity with the LRA and the Constitution.*⁴⁰

[62] According to the appellants, an employer would have to consult with all employees, represented and unrepresented. The appellants further contend that the decision to extend the retrenchment agreement to them is irrational because they, as members of the minority union, were not consulted. Mr Myburgh submitted that the right to be heard is a procedural requirement. He however contended that procedural fairness is not *per se* a requirement for rationality. He pointed out that the duty to a hearing when exercising public power would be a requirement when it is necessary to achieve the legitimate governmental purpose.

[63] In ***Pharmaceutical Manufacturers***⁴¹ it was stated that:

*“decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.”*⁴²

[64] In ***ARMSA***⁴³ the Constitutional Court found that

*“Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute.”*⁴⁴

⁴⁰ Ibid para 116.

⁴¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

⁴² Ibid para 85.

⁴³ *Association of Regional Magistrates of South Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC).

⁴⁴ Ibid para 59.

[65] In **Albutt**⁴⁵ the Constitutional Court found that the President had to afford victims of apartheid era offences the right to be heard before pardoning the alleged offenders. It further stated that:

*"In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context – specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims might be given the opportunity to be heard in order to determine the facts on which pardons are based."*⁴⁶

[66] In **Minister of Home Affairs v Scalabrini**⁴⁷ the court was at pains to emphasise that its conclusion does not mean that there is a general duty on decision-makers to consult organisations or individuals having an interest in their decisions and that such a duty would only arise in circumstances where it would be irrational to take the decision without such consultation.

[67] I agree with Mr Myburgh that the appellants' argument that the decision to extend the collective agreement was irrational because they were not consulted before the agreement was entered into is without merit. There is no general duty on decision-makers exercising public power to consult interested parties in order for a decision to be rational under the rule of law.

[68] Section 23(1)(d) does not require expressly or implicitly that a minority union should be consulted before a collective agreement is extended. The representative union would generally be in a better position to consult with the employer, because it will have all the necessary information at its disposal and it represents all the employees at the workplace. To grant a minority union the right to be heard in circumstances where the representative union has by means of collective bargaining acquired the right to be the only bargaining

⁴⁵ *Albutt v Centre for the study of violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

⁴⁶ *Ibid* para 72.

⁴⁷ *Ibid* para 72.

agent would be subversive to collective bargaining and the principle of majoritarianism which underpins section 23(1)(d).

[69] The extension of a collective agreement without affording a minority union or non-union members a hearing is rationally related to the achievement of the purpose of the section 23(1)(d) process. It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it fosters peace and order in the workplace. As stated above, the signing of a collective agreement between the employer and the representative union on the basis that the agreement will also bind the minority union members or non-members does not mean that they were not represented.

[70] The appellants alleged that the consultation process occurred surreptitiously without them knowing. This is simply not true because the uncontested evidence is that the employer informed all the workers about the consultation process. In my judgment the challenge is without merit.

[71] The appellants also alleged that their right to freedom of association has been infringed by the extension of the collective agreement. In **Bader Bop**⁴⁸ the Constitutional Court pointed out with reference to ILO Conventions and section 18 of our Constitution that:

*“These rights will be impaired where workers are not permitted to have their union represent them in the workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join”.*⁴⁹

The appellants’ complaint is not that AMCU is not allowed to exist or to organise or to represent its members.

[72] The appellants contended that the Labour Court did not consider their application that the extension of the collective agreement should be reviewed

⁴⁸*National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and another* (2003) 24 ILJ 305 (CC).

⁴⁹ *Ibid* para 34.

and set aside. The appellants, however, did not make out a case for a rationality review of the extension. There is no indication that any of the retrenched workers were treated differently because they were AMCU members or because they were not members of the representative union.

[73] AMCU also sought to challenge the procedural fairness of the process by way of an application in terms of section 189A(13) of the Act. This section reads as follows:

“if an employer does not comply with a fair procedure, a consulting party may approach to label court by way of an application for an order –

- (a) compelling the employer to comply with a fair procedure;*
- (b) interdicting order restraining the employer from dismissing an employee prior to complying with a fair procedure;*
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;*
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.”*

[74] The application in terms of section 189A(13) must be brought not later than 30 days after the employer has given notice to terminate the employees' services or if the notice is not given, the date on which the employees are dismissed. AMCU was out of time and it sought condonation for the late prosecution of the application. It is not necessary to consider the condonation application for the simple reason that AMCU does not have *locus standi* to challenge the procedural fairness of the dismissals. This is so because it was not a consulting party and it therefore has no *locus standi* to bring an application in terms of section 189A(13).

[75] The appeal ought to be dismissed.

[76] I accordingly make the following order:
The appeal is dismissed.

C.J. Musi, JA

Waglay JP and Savage AJA concur with CJ Musi JA.

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