



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 99/14

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA

Applicant

acting in its own name & on behalf of

HARMONY GOLD MINING COMPANY LTD

ANGLOGOLD ASHANTI LTD

SIBANYE GOLD LTD

and

ASSOCIATION OF MINEWORKERS OF SA

First Respondent

NATIONAL UNION OF MINEWORKERS

Second Respondent

SOLIDARITY

Third Respondent

UNITED ASSOCIATION OF SA

Fourth Respondent

EMPLOYEES LISTED IN ANNEXURE 'A'
TO THE NOTICE OF MOTION

Fifth and Further Respondents

ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION

First Applicant

THE PERSONS REFERRED TO IN ANNEXURE 'A'
TO THE NOTICE OF MOTION

Second to further applicants

and

CHAMBER OF MINES OF SOUTH AFRICA

First Respondent

acting in its own name & on behalf of

HARMONY GOLD MINING COMPANY LTD

ANGLOGOLD ASHANTI LTD

SIBANYE GOLD LTD

NATIONAL UNION OF MINEWORKERS

Second Respondent

SOLIDARITY

Third Respondent

UNITED ASSOCIATION OF SA

Fourth Respondent

MINISTER OF LABOUR

Fifth Respondent

MINISTER OF JUSTICE

AND CONSTITUTIONAL DEVELOPMENT

Sixth Respondent

Heard: 5 and 6 June 2014

Judgment delivered: 23 June 2014

Summary: Return day of rule *nisi* - interim interdict granted in respect of strike action where collective agreement concluded with unions making up majority extended in terms of s 23 (1) (d) of the LRA – extension of agreement to those employees not members of unions party to the agreement valid – rule confirmed. Challenge to constitutionality of s 23 (1) (d) - section not unconstitutional, constitutes justifiable limitation on right to engage in collective bargaining and to strike.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is the return day of a rule *nisi*, issued by Cele J on 30 January 2014.¹ For various reasons, the return date was extended until 5 June 2014. During this period, the first respondent (AMCU) filed a supplementary answering affidavit, to which the applicant (the Chamber) replied. The Chamber seeks to strike out the annexures attached to AMCU's supplementary affidavit and to have the rule made final. AMCU seeks to have the rule discharged. For convenience, I shall refer to this as 'the main application'.

[2] AMCU has filed a counter-application. In that application, the constitutionality of s 23 (1) (d) of the Labour Relations Act (LRA) is challenged. That subsection permits the parties to a collective agreement to extend their agreement to

¹ The judgment in which the interim order was granted is reported at (2014) 35 *ILJ* 1243 (LC).

employees who are not parties to the agreement (either because their union is not a party to the agreement or because they are not members of any union), provided that the members of the union party or parties to the agreement comprise a majority of employees in the workplace. The counter-application is opposed by the Chamber, the second respondent (NUM), the third respondent (Solidarity), the fourth respondent (UASA)² and the fifth respondent, the Minister of Labour.

The material facts

- [3] The facts are not in dispute. The Chamber is a registered employers' organisation and acts as the collective bargaining agent of its members. These include the gold mining companies on whose behalf the Chamber acts in the present proceedings, i.e. Harmony, AngloGold Ashanti and Sibanye. Collective bargaining, at least in respect of wages and other substantive conditions of employment, is conducted on a centralised basis, in a non-statutory bargaining forum. Since 2001, collective agreements concluded in this manner have been applied by the Chamber's members, party to the agreement, to those employees who are not members of the party unions, and also to non-union members.
- [4] During the latter half of 2013, the Chamber conducted negotiations with all the unions that are party to these proceedings. On 24 July 2013, NUM, Solidarity and UASA declared a dispute with the Chamber and referred the dispute to the CCMA. On 29 July 2013, the Chamber declared a dispute against AMCU, the latter not having moved from the demands that it tabled on 24 June. During August 2013, certificates of non-resolution were issued by the CCMA in respect of all of these disputes.
- [5] On 3 September 2013, after giving the required notice, NUM members embarked on a protected strike in support of their demands. On 6 September 2013 the Chamber sent a revised offer to the union parties to the negotiation, including AMCU. On 9 September 2013, AMCU rejected the offer. On 10 September 2013

² UASA filed an affidavit 'to clarify issues pertaining to the fourth respondent' but did not otherwise participate in the proceedings.

the Chamber signed an agreement (the wage agreement) with NUM, Solidarity and UASA. The wage agreement comprises a review of wages and other conditions of employment for the period 2013 to 2015.

- [6] Clause 1.2 of the wage agreement provides that in terms of s 23 (1) (d) of the LRA, the agreement binds all other employees (i.e. employees not members of the trade unions party to the agreement) employed in recognition units '*in the workplace of each respective employer*'. Clause 17 of the wage agreement records that the agreement is concluded in full and final settlement of all demands and proposals made during the negotiations and that no party bound by the agreement will call for any strike or lockout in support of demands or proposals to amend wages and other conditions of employment, for the duration of the agreement. The Chamber signed the agreement as the representative of its members recorded in annexure A to the agreement, each of whom recorded that the agreement was signed '*in respect of the workplace*' defined to mean, in each case, their respective mines and operations.
- [7] It is not disputed that while AMCU represents a majority of the employees at five mines (three managed by AngloGold Ashanti, one by Sibanye and one at Harmony), the number of employees who are covered by the wage agreement on extension constitute a majority of the total number of employees employed by each of the employer parties to the agreement.³ It is also not disputed that despite an initial averment to the contrary and in compliance with s 23 (1) (d), the majority threshold was determined by reference to the total number of employees employed by each of the employer parties, and not on the basis of those employees engaged by each of them in the agreed bargaining unit. It is also common cause that AMCU is party to a recognition agreement at Harmony's Kusasalethu Operation, and at Sibanye's Driefontein operation. At AngloGold Ashanti's Mponeng, Savuka and Tautona Mines, AMCU is in the process of negotiating a recognition agreement.

³ As at the date on which the wage agreement was concluded, AMCU represented 16% of Harmony's workers, 29.4% of AngloGold Ashanti's employees and 29.27% of Sibanye's employees.

- [8] It warrants mention for present purposes that each of the employers represented by the Chamber filed supporting affidavits, in which they deposed to facts in support of the contention that each of their various mines or operations constitute a single workplace for the purposes of s 23 (1) (d). The picture that emerges from the affidavits is that each of the employers has various mining operations, all of which are involved in the production of gold. Mining licences are held by each company and not by the individual mines operated by them. Each company is controlled from a head office where financial and production planning, including the setting of production targets and staff levels, is done. Financial management is also dealt with centrally – this includes the management of debtors and creditors, and the receipt of income. Indeed, in the case of Harmony, individual mines do not operate their own bank accounts; all operating expenses are paid by Harmony from a central account. In each case, centralised support services are provided to the mines' operations, for example, in respect of human resources and IT systems. Procurement is managed centrally. Each mine is run by a manager who reports directly to the head office concerned, subject to an overarching set of policies and controls. Operating procedures, mining methodologies and plant processes are standardised across each company. Security systems and IT systems are standardised. All assets are owned by the company, with movable assets being transferred between mines. All gold production is sold to Rand Refinery on a total production basis (i.e. not by mine). Recruitment is managed centrally. The entity that comprises the employer in each instance is the company, not the individual mine or operation. Employees may be transferred between operations, remuneration is managed centrally, and human resource policies are standardised across each company. As I have mentioned, collective bargaining on substantive conditions takes place at a centralised level, with limited bargaining (typically over work practices) occurring at mine level.
- [9] AMCU has failed to engage with the detailed factual averments recorded in the supporting affidavits. In its answering affidavit, AMCU states only, in bald terms, that a purposive interpretation of the LRA requires each mine to be treated as a

separate workplace, and that each of the mines operates independently by reason of size, function and organisation. To the extent that AMCU's failure to interrogate the factual averments made by the Chamber might be ascribed to time constraints when these proceedings were initiated, in its supplementary answering affidavit, filed some two months after the interim order was granted, AMCU does not deal with the above facts.

- [10] The supplementary affidavit does no more than proffer two additional facts concerning the definition of a 'workplace'; first, the existence of recognition agreements concluded between certain mines and AMCU and secondly, the existence of reports, filed by individual mines, in terms of certain regulatory requirements. In particular, AMCU contends that the recognition agreements concluded in respect of Harmony's Kusasalethu operation, at Sibanye's Driefontein mine and the negotiations underway at AngloGold Ashanti's Mponeng, Savuka and Tautona mines are destructive of the allegation that each of the employer parties operates as a single workplace, as is the fact of charter compliance reports and separate social and labour plans submitted by each of the mines operated by the employer parties.
- [11] In his judgment, Cele J considered and dismissed three principal submissions made on AMCU's behalf. The first was that the wage agreement in substance constituted a collective agreement concluded at sectoral level, and that any extension of the agreement could only validly be effected by the minister acting in terms of s 32 of the LRA. The second was a submission based on s 23 of the Constitution, to the effect that even if the extension of the agreement were permissible under s 23, AMCU's members had a constitutional right to bargain collectively and to strike. Finally, AMCU contested the definition of a 'workplace'. In particular, it contended that each of the employer parties' mines and operations were separate workplaces for the purposes of s 23 and that it was entitled to strike, at least in respect of those mines where it was the majority union.

[12] Cele J held that s 32 applied only to collective agreements concluded under the auspices of a bargaining council; that s 23 of the Constitution did not present a bar to any extension of a collective agreement under s 23 (1) (d) of the LRA; and that a 'workplace' for present purposes comprised the mines and operations of each of the employer parties or, put another way, *'the wage agreement contains a series of section 23 (1) (d) extensions on a per employer basis, which in my view, is clearly permissible'*.⁴ On this basis, Cele J was satisfied that the Chamber had established a *prima facie* right to the relief that it sought, and that the other requirements for the granting of interim relief had been satisfied. The effect of the order was to interdict the strike action initiated by AMCU at the mines and operations owned by Harmony, AngloGold Ashanti, and Sibanye Gold, pending the return date.

The main application

[13] With this background, I turn first to the main application. To succeed in the main application, the Chamber must establish the requirements for the granting of a final interdict. These are well-established, and require the Chamber to demonstrate a clear right, an actual or threatened invasion of that right and the absence of any other suitable remedy.⁵

[14] In the present proceedings, the primary issues concern the interpretation and application of the definition of a 'workplace' in s 213 of the LRA, the interpretation and application of 23 (1) (d), and the connection between that subsection and s 65 (1) (a), given especially the constitutional rights to engage in collective bargaining and to strike. AMCU also pursued its argument in relation to s 32 of the LRA and in particular, the submission that the wage agreement is a sectoral agreement and ought to have been dealt with in the same or similar fashion as the extension of a collective agreement under that section.

⁴ At paragraph 42 of the judgment.

⁵ See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *NUMSA & others v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC).

[15] It is appropriate at this point to deal with the Chamber's application to strike out the annexures to the supplementary affidavit filed by AMCU. Some two months after Cele J granted the interim order sought by the Chamber, AMCU filed a supplementary affidavit in the main application. At paragraph 5 of the supplementary answering affidavit, the deponent states that the purpose of the affidavit is to provide additional facts to the court concerning the definition of the 'workplace'. In respect of Harmony, it is averred that Harmony, in response to a request for informal discovery made by AMCU, had discovered 10 separate charter compliance reports ⁶ in terms of the Minerals Petroleum Resources Development Act 28 of 2002 (the MPRDA) and nine separate social and labour plans.⁷ The affidavit does not contain a single reference to any particular portion of any annexure. There is no exposition in the affidavit as to which of the annexures or any part of them is relevant to the determination of a workplace for the purposes of these proceedings. The only averment that has any reference to the annexures is one to the effect that the content of the reports, which the deponent contends to be destructive of the allegation that Harmony operates as a single workplace, will be referred to during argument. A similar approach is adopted in respect of reports submitted in terms of the same regulatory measures by AngloGold Ashanti and Sibanye. In total, 29 reports comprising 2846 pages are attached to the supplementary affidavit.

[16] In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T). Joffe J said the following in relation to the proper use of annexures to affidavits in motion proceedings:

'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought

⁶ The full title of the charter is the 'Broad-based socio-economic empowerment charter for the South African mining and minerals industry.' It is published in terms of s 100 (2) (a) of the MPRDA.

⁷ Social and labour plans must be submitted in term of regulation 42 of the regulations published in terms of the MPRDA.

to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. The party would not know what case must be met.’⁸

- [17] In *Minister of Land Affairs in Agriculture v D& F Wevell Trust* 2008 (2) SA 184 (SCA) 184 (SCA), Cloete JA said:

‘It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts... A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.’⁹

- [18] In this court, in *Wood v Potane NO & others* [2004] 7 BLLR 722 (LC) Tokota AJ held:

‘It would have saved a lot of time and money if parties had refrained from attaching unnecessary documents, which neither advanced the case nor were they of any assistance to the court in any way. It is not enough to simply attach annexures without drawing the court attention to the portions on which reliance is placed on those annexures.’¹⁰

- [19] While the prospect of a trial by ambush and the potential prejudice that it may have caused was to some extent attenuated by the assurance given by Mr. Kennedy SC, who appeared for AMCU, that he did not intend to trawl through each of the annexures and that they had been filed simply to provide support for AMCU’s submissions regarding the relevance of the reports for the determination of a ‘workplace’ for the purposes of s 23 (1) (d), the fact remains that the record has been unnecessarily burdened by thousands of pages of documents which

⁸ See also *Nature’s Choice Products (Pty) Ltd v Food and Allied Workers Union & others* (unreported, Labour Appeal Court, JA 12/12, 5 February 2014) at paragraph 22.

⁹ At paragraph 43 of the judgment.

¹⁰ At paragraph 13 of the judgment.

might have been made available (should that have been necessary) by means other than annexing them to the supplementary affidavit. AMCU has used the supplementary affidavit merely to annex a document, and then request the court to have regard to it. The annexures serve no purpose, other than to assert that the reports that they comprise were submitted on a mine-by-mine basis. This much is the subject of a series of (uncontested) averments in the supplementary answering affidavit. As matters transpired, not a single one of the annexures was referred to during the course of argument. The annexures are irrelevant and serve only to further burden an already substantial record. For these reasons, I intend to grant an order striking out the annexures.

- [20] I turn next to the merits of the main application and deal first with the submission that the wage agreement constituted a sectoral agreement and that s 23 (1) (d) is thus not applicable. As I understood the submission, the extension of the wage agreement falls to be regulated by s 32 of the LRA. Section 32 provides for the extension of collective agreements concluded in a bargaining council. Bargaining councils are registered for defined sectors and areas, and the conditions applicable to extension to non-party employers and employees are limited, amongst other things, by representativity thresholds that must be met both in relation to the conclusion of the agreement and upon its extension.
- [21] The application of s 32 is not dependent on the nature of the agreement sought to be extended; rather, it is concerned with the nature of the institution in which the agreement is concluded. In the present instance, the wage agreement was not concluded in a bargaining council. Collective bargaining took place, as it has for many years, in a non- statutory forum. Although negotiations were conducted at what might be described as a centralised level, there is no bargaining council registered for the gold mining industry. There is no reason to depart from the plain meaning of s 32 and specifically, the clear provision in s 32 (1) that any extension may be applied only to collective agreements concluded in bargaining councils, and then only by the minister at the request of the council. In short, s 32 does not apply to the extension of a collective agreement concluded outside

of a bargaining council, even if that agreement *de facto* serves to regulate matters of mutual interest in a particular sector.

[22] I turn next to the application and interpretation of s 23 (1) (d). The three sections of the LRA relevant to these proceedings are s 23 (1) (d), s 65 (1) (a) and the definition of 'workplace' in s 213. Section 23 regulates the legal effect of collective agreements. Subsection (1) (d) reads:

'(1) 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'.

Section 213 defines a 'workplace' (other than in relation to the public service) to mean:

'(c) ... the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation..

Section 65 (1) (a) provides that

'No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if –

- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.'

[23] It is common cause that the wage agreement meets the requirements established by s 23 (1) (d) (i) and (ii). In other words, the agreement identifies the

employees to whom it is extended, and it states that those employees are expressly bound by its terms. The central controversy before Cele J (and in these proceedings) is whether Harmony, AngloGold Ashanti and Sibanye each constitute a single workplace, or whether each of their mines constitutes independent workplaces. The significance of this, of course, is that if Harmony, AngloGold Ashanti and Sibanye each constitute a single workplace, then the extension of the wage agreement in terms of s 23 (1) (d) was valid and the strike called by AMCU unprotected by virtue of s 65 (1) (a). But if, on the other hand, each mine constitutes an independent workplace, then the extension was not validly effected (at least not in respect of those mines where AMCU has majority representation) and a strike by AMCU members would be protected.

[24] Mr. Kennedy made two primary submissions on AMCU's behalf regarding the application and interpretation of s 23 (1) (d). First, he submitted that the statutory definition of 'workplace' had no application in the context of s 23 (1) (d). Here, he relied primarily on the preamble to s 213 and the words "Unless the context indicates otherwise...." to submit that the interpretation of 'workplace' must be considered in the context of the LRA and in particular, with s 65 (1) (a). The second (related) submission was to the effect that when there are two possible interpretations of 'workplace' under s 23 (1) (d), which he submitted there clearly were, the court is enjoined to prefer the interpretation that avoids limiting the constitutional rights of AMCU and its members.

[25] The principle to be applied in relation to the definition of 'workplace' is that the statutory definition should prevail unless it appears that the legislature intended otherwise. That question is itself to be determined by asking whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the legislature could never have intended the statutory definition to apply.¹¹

¹¹ *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TkSC).

- [26] In the present instance, there is no incongruity or absurdity that results from the application of the statutory definition, nor is there any injustice. The language of the definition of 'workplace' is plain. It is clear and unambiguous, and does not allow the determination of a workplace to depend (as AMCU implies, by suggesting that every mine is a separate workplace because it has higher levels of representation at certain mines than it does at company level) on whether a particular trade union has a majority, or any particular level of representativity, at a particular place at a particular time. The definition requires a court to focus exclusively on whether those operations carried on by the employer in different places are 'independent' of one another. Independence is to be determined only by reference to the size, function or organisation of the operations concerned. Again, there is no basis for any interpretation that introduces extraneous considerations such as whether a trade union enjoys a particular level of representativity at a particular place. That is a matter that is relevant only at the second stage of the enquiry (for the purposes of determining whether the majority threshold has been met), once the workplace has been determined.
- [27] In short, there is no genuine question of interpretation in the present instance. The real complaint by AMCU would appear to be that the application of an unambiguous definition to the undisputed facts creates legal consequence which it does not like. That is not a basis to discharge the rule *nisi*. What is required is an application of the definition of 'workplace' to the facts and a determination of the place or places where the employers' employees work and whether the employers' mines, to the extent that they comprise different operations carried on by each employer, can be said to be independent of one another by reason of their size, function or organisation.
- [28] Perhaps the initial enquiry in any determination of the workplace for the purposes of s 23 (1) (d) is to identify the entity that comprises the employer, since it is the 'employees of an employer' who work in a workplace. In the present instance, it is not disputed that each of the Chamber's members represented in these
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proceedings, Harmony, AngloGold Ashanti and Sibanyane, are the respective employers of those employees whom they contend are bound by the wage agreement, either on account of membership of the union parties or extension of the agreement. In other words, the 'employees of an employer' for the purposes of the definition of 'workplace' are all the employees of Harmony, AngloGold Ashanti and Sibanyane respectively.

- [29] Next, it is necessary to determine the 'place or places' where the employees work. This will determine, by way of general rule, the single 'workplace' for the purposes of the LRA. The second part of the definition is in the nature of the proviso – it creates an exception to the primary element of the definition. Brassey comments:

'In the private sector the nature of a 'workplace' is a question of fact. If the employees all work in one place, it is the workplace: if they are divided into separate branches or depots, the separate locations can each be a workplace. Deciding whether two locations are separate workplaces entails an examination of the extent to which operate independently of each other, which in turn entails a consideration of the size, function and organisation of each. Geographical separation will be important, but will not always be decisive.'¹²

- [30] In the present instance, as I have indicated, there is consensus on the relevant factual matrix. What remains is to apply the definition to the facts. Here, as I have indicated, Harmony, Anglo Gold Ashanti and Sibanyane Gold are the respective employers of the affected employees. The starting point must therefore be that the places where the employees work, even though they are geographically disparate, constitute the workplace for the purposes of s 23 (1) (d). It is not seriously disputed that the places where the employees work are the mines and operations of each of the employer parties to the wage agreement.

- [31] In support of its contention that each mine is a discrete workplace, AMCU relies on the proviso in the definition to contend that the mines fall to be treated as an

¹² Brassey *Commentary on the Labour Relations Act* at A9-35 to A9-36).

independent unit. In my view, all of the evidence points to a contrary conclusion, to an integrated operation, certainly by reference to function and organisation. To the extent that AMCU's supplementary affidavit makes mention of the additional facts of the existence of recognition agreements and statutory reports, there are obviously relevant to the determination of independence, by reference particularly to the factors of function and organisation. These are that AMCU enjoys majority support at three of Anglo Gold Ashanti's mines (Mponeng, Savuka and Tautona), and that two charter compliance reports and two social and plans (one each for the mines in the West Wits and Vaal River areas). AMCU contends that the latter are destructive of the allegation that Anglo Gold Ashanti operates as a single workplace. Indeed, AMCU appears to submit that these factors are decisive of the fact that each mine operates independently.

- [32] In relation to the first factor, the fact that AMCU enjoys majority support at three of Anglo Gold Ashanti's mines is of little if any consequence. A 'workplace' for the purposes of the LRA is not a bargaining unit as defined by the parties to a collective bargaining relationship. The definition, by stipulating the place or places where the employees work as the primary criterion with three further subcategories that may be relevant where two or more independent operations are conducted, clearly did not intend that any agreed bargaining unit would be a directly relevant criterion. In any event, the agreements on which AMCU relies makes it abundantly clear that collective bargaining on wages and substantive conditions of employment will be dealt with at central level.
- [33] The fact that reports have been submitted in the discharge of obligations under the charter or in terms of other regulations promulgated under mining legislation does not, in my view, tip the scales in favour of a narrower definition. In the replying supplementary affidavit, the reasons for separate reporting are explained. In short, the submission of the reports in question is regulated by statute, or because the reports on a permanent basis of into a specific mining rights granted in respect of a particular farm of farms, which accounts for the fact that multiple reports have been submitted. In addition, reports are submitted on a

provincial basis as required by the DMR. In any event, it is not disputed that there is a high degree of supervision at a centralised level over the content and submission of both the plans and reports.

- [34] To the extent that AMCU places determinative weight on geographic proximity, this is not irrelevant factor, but must be weighed with other factors relevant to a determination of independence by virtue of size, function and organization. In this regard, Clive Thompson has contrasted the definition and the LRA with that applicable in Australia:

‘A ‘workplace’ encompasses all the different places of work of an employer (unless some of them are independent in the same specified in the definition). On the other hand, one worksite may be fragmented into several ‘workplaces’ if independent operations are identified there. Compare the Australian approach, which focuses on the individual geographical site: a workplace is ‘a single physical area occupied by the establishment from which it engages in productive activity on the relatively permanent basis.’¹³

- [35] The only conclusion to be drawn from the above facts is that the places where the employees of Harmony, Sibanye and AngloGold Ashanti work are the mines and operations respectively managed by those entities, and that none of mines and operations is independent of the other by reason of size, function or organisation. There is no factual basis in the papers before me to conclude that each of the employer’s mines operate as independent units. On the contrary, as Cele J found, Harmony, AngloGold Ashanti and Sibanye each constitute a ‘workplace’ for the purposes of s 23 (1) (d). It follows that the wage agreement was validly extended in terms of that subsection and that any strike by members of AMCU would be in breach of s 65 (1) (a).

- [36] I am satisfied that the Chamber has established a clear right to the relief it seeks and that all of the other requirements relevant to final relief having been satisfied, the rule *nisi* issued on 30 January 2014 stands to be confirmed.

¹³ Thompson in Cheadle, et al *Current Labour Law* 1997 at p 3.

[37] AMCU has also raised an interpretational issue in relation to s 23 (1) (d). In particular, Mr. Kennedy submitted that the word ‘workplace’, taken in context, can be reasonably interpreted to mean that each individual mine is a workplace. He contended that the court is accordingly enjoined to adopt that interpretation, since it is the interpretation that best promotes the fundamental rights to engage in collective bargaining and to strike. If the definition is found not to be reasonably capable of the interpretation contended for, then AMCU submits that s 23 (1) (d), read with s 65 (1) (a) and the definition of workplace, is unconstitutional. This is the relief sought in the counter application. The main and the counter-application are therefore interrelated. None of the respondents in that application disputes that s 23 (1) (d), read with s 65 (1) (a) and the definition of ‘workplace’ in s 213, constitutes a limitation on the right to strike; they contend that s 23 (1) (d) constitutes a justifiable limitation on those rights. The enquiry into the justification cuts across both applications. I intend therefore to revisit the interpretational issue raised in the main application at the conclusion of the justification enquiry.

The constitutional challenge to s 23 (1) (d)

The nature and extent of the challenge

[38] Section 23 of the Constitution, headed “Labour relations” and which is part of the Bill of Rights, reads as follows:

- ‘(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right -
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike’.
- (3) Every employer has the right -
 - (a) to form and join employers’ organisation; and

- (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right –
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter the limitation must comply with section 36 (1).

[39] In its counter-application, AMCU seeks a declaratory order to the effect that the interpretation placed by Cele J on the provisions of section 23 (1) (d) read with s 65 (1) (a) and the definition of 'workplace' in s 213 of the LRA, conflicts with the constitution because the interpretation violates the rule of law and the applicants fundamental rights terms of section 10 (human dignity) 18 (freedom of Association) 22 (freedom of trade occupation and proficient) 23 (1)(2) (a),(b), (c) (4) (a) and (b) and (5) (labour relations) and s 34 (administrative justice) of the Constitution of the Republic of South Africa, 1996. In the alternative, to the extent that the court finds that interpretation placed on the provisions of section 23 (1) (d) read with s 65 (1) (a) and the definition of 'workplace' in s 213 by Cele J is correct (because the sections cannot reasonably be interpreted otherwise) AMCU seeks a declaratory that the provisions of s 23 (1) (d) read with s 65 and the definition of 'workplace' in s 213 , conflict with the Constitution of the Republic of South Africa, in relation to the particular sections referred to above, to the extent that these provisions grant private employers and trade unions the power to secure by means of an extended collective agreement the imposition of binding obligations on employees and trade unions not party to the agreement, and to grant private employers and trade unions power by means of an extended collective agreement to prevent non-party unions and their members from

exercising the fundamental rights concerned, including but not limited to the right to bargain collectively and to strike over matters of mutual interest. On this basis, AMCU seeks to have extension of the wage agreements declared unconstitutional and invalid and the strike called by AMCU declared protected.

[40] At the hearing of the counter-application, AMCU abandoned that part of the relief sought relating to the interpretation placed on s 23 (1) (d) by Cele J, leaving only the direct constitutional attack on s 23 (1) (d) for determination.¹⁴ The counter-application strikes at central features of the system of collective bargaining established by the LRA. The fundamental rights on which AMCU relies are the rights to fair labour practices, the right to dignity and the right to freedom of trade, occupation and profession.

[41] Mr. Boda, who presented argument in the counter-application, submitted first that the impugned sections offend the principle of legality. In particular, he submitted that the provisions of s 23 (1) (d) permit private actors the right to impose terms and conditions of employment on unwilling parties without intervention from any independent authority that is bound to uphold the exercise of a discretion which is lawful, reasonable and procedurally fair. Secondly, he submitted that the legislation places no duty on the parties who extend an agreement in terms of s 23 (1) (d) to act in the public interest or in the interests of those parties sought to be bound. In this regard, the parties who seek extension of the collective agreement are not constrained, as are those who exercise public power, and may even act arbitrarily or capriciously. Thirdly, it is not possible to review the actions of private actors as it is to review a decision made by a public authority. Fourthly, he submitted that the provisions of s 23 (1) (d), read with s 65 (1) (a), deny non-parties to the collective agreement, for the duration of the agreement,

¹⁴ Prayer 3 in the notice of motion contemplates a declaratory order to the effect that the interpretation placed by Cele J on s 23 (1) (d) was unconstitutional. Of course, only a 'law' or conduct' can be declared unconstitutional – see s 172 (1) (a) of the Constitution. To the extent that AMCU's real complaint was its disagreement with an interpretation of the LRA by this court, that disagreement cannot be elevated to one of constitutional principle.

the right to exercise fundamental rights under the Constitution, in this instance, the right to engage in collective bargaining and participate in strike action.

[42] In regard specifically to the constitutional right to engage in collective bargaining and the rights to freedom of association and to bargain collectively, AMCU submits that underpinning these rights is the right to dignity and in particular, the right to dignity of workers who, in our constitutional order, may not be treated as coerced employees. Secondly, AMCU asserts that the right to strike is a critical component of the system of collective bargaining, and without the right to strike, the right to bargain collectively is rendered illusory. Apart from the rights to engage in collective bargaining and to strike, AMCU invoked the rights to dignity, freedom of association, freedom of trade, occupation and profession and the right to just administrative action.

[42] This attack is diffuse and far-reaching. In *Phillips and others v National Director of Public Prosecutions*¹⁵ the Constitutional Court emphasised the need to plead constitutional challenges to legislation explicitly:

‘The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that the correct order is made; that all interested parties have an opportunity to make representations; that the relevant evidence can, if necessary, be laid and that the requirements of the separation of powers are restricted.’

[44] In *South African Transport and Allied Workers Union v Garvas*¹⁶ Jafta J explained the need for accuracy in pleadings in this context:

‘Accuracy in the pleadings is important not only for purposes of defining issues for parties involved in a particular litigation. Orders of constitutional invalidity have a reach that extends beyond parties to a case where a claim for a declaration of invalidity is made. But more importantly these orders intrude, albeit in a constitutionally permissible manner, into the domain of the legislature. The

¹⁵ 2006 (1) SA 505 (CC) at paragraph 43.

¹⁶ 2013 (1) SA 83 (CC).

granting of these orders is a serious matter and they should be issued only where the requirements of the Constitution for a review of the exercise of legislative powers have been met. In s 2, the constitution proclaims its supremacy and declares that law or conduct inconsistent with it is invalid. But the power to determine whether a particular law is indeed inconsistent with the Constitution is conferred on superior courts. Section 72 (1) (a) obliges courts to declare law or conduct inconsistent with the Constitution to be invalid. The declaration must, however, be restricted to the extent of the inconsistency. The inconsistency delineates the scope of the judicial review and the consequent declaration of invalidity in respect of a particular challenge...

Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.’¹⁷

- [45] The constitutional challenge foreshadowed by prayer 4 of the notice of motion is directed at s 23 (1) (d) read with s 65 (1) (a) and the definition of ‘workplace’ set out in s 213. In other words, the order sought appears to be directed at the combined effect of the sections concerned as opposed to the validity of any one or more of them. But it would appear from the papers that notwithstanding AMCU’s ambivalence and the diffuse and vague manner in which the relief sought in the notice of motion has been cast, the real constitutional complaint is against s 23 (1) (d) because it allows for the extension of agreements to non-party employees, and thereby denies them the right to strike. Although it says that s 23 (1) (d) must be read with s 65 (1) (a) and the definition of ‘workplace’, I do not understand AMCU to seek an order to the effect that the latter two provisions are also unconstitutional. The case made out in the founding affidavit, which primarily concerns s 23 (1) (d) and why it should be struck down, is to the effect that the section lacks the checks and balances applicable to the extension

¹⁷ At paragraphs 113 and 114, footnotes omitted.

of collective agreements in terms of s 32 of the LRA, that it is in conflict with the rule of law, and that a system of administrative approval system should replace it.¹⁸

- [46] All of the respondents accept that the right to strike is limited by s 65 (1) (a), and indirectly, by s 23 (1) (d). Given these concessions, in my view, it is not necessary for the court to determine whether any of the other rights invoked by AMCU is implicated – the most directly implicated right is the right to strike. What is primarily at issue in the present matter is the limitation on the right to strike posed by s 23 (1) (d). If that limitation is justifiable, then any incidental limitation of other rights will also be justifiable.

The rule of law attack

- [47] Central to AMCU's rule of law attack is the assertion that the parties to a collective agreement that is extended in terms of s 23 (1) (d) are effectively exercising public power. It is clear from the terms of s 23 and the regulation of the binding effect of collective agreements generally that in circumstances such as the present, correctly understood, this is an instance of legislation (adopted by parliament in the exercise of its public power) that creates legal rights obligations flowing from the conduct of private parties. It does not follow that simply because an organ of state exercising public power is constrained by the principle of legality to exercise no power beyond that conferred on it by law, that the conduct of private parties may not have legal consequences for third parties. Section 23 (1) (d) is not concerned with the exercise of public power. It is simply an instance of national legislation creating legal consequences that flow from specific facts. The extension of an agreement in terms of section 23 (1) (d) take operation of a legislative provision - if the agreement meets the conditions set out in subparagraphs (d) (i) to (iii), the agreement binds all employees in the workplace by operation of law. There is nothing inimical to the rule of law for legislation to

¹⁸ In any event, notwithstanding AMCU but having made out a case for the striking down of s 65 (1) (a) and the definition of 'workplace' as unconstitutional, it would amount to an impermissible collateral attack for it to do so simply on the basis of its 'read with' contention. See

provide for legal consequences to flow from the conduct of private parties. Legislation does so frequently, in a range of contexts, and without requiring the consent of all affected parties.

- [48] To the extent that AMCU persisted with its reliance on additional constitutional rights, the extension of a collective agreement to a person does not implement the right to dignity. To the extent that the right is implicated all, this is only indirectly as a consequence of the limitations of the right to strike and to bargain collectively. A separate enquiry into the right to dignity will not lead to a different outcome. Similarly, in regard to the right to freedom of trade occupation and professional under s 22 of the Constitution, s23 (1) (d) does not make it impossible for a minority union to secure organisational rights in terms of the LRA, or potentially to secure majority representativity. To the extent that any extension in terms of s 23 (1) (d) serves to limit the right to freedom of association, that limitation is both indirect and limited.

Section 23 and the limitation of the right to strike

- [49] All of the parties to the present enquiry accept that the right to strike is a fundamental constitutional right, predicated as it is on the need to redress inequality in social and economic power in the relationship between employer and employee. It also has associational elements which serve to enhance and reinforce other social and political rights in the Constitution, particularly freedom of association.¹⁹ In the first certification case, *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of South Africa*,²⁰ the Constitutional Court observed:

‘Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain

¹⁹ *South African Transport and Allied Workers Union v Moloto* [2012] 12 BLLR 1193 (CC).

²⁰ (1996) 17 ILJ 821 (CC) at paragraph 66

effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.'

Later, in *NUMSA & others v Bader Bop & another*,²¹ the same court observed:

'That right [the right to strike] is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as closed employees. Secondly it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage work bargain and the context within which it takes place.'

[50] However, in the scheme of the LRA and s 23 of the Constitution, the right to strike is by its nature not absolute and which may justifiably be limited in certain situations. This must be so because a strike is not an end in itself. Rather, a strike is primarily a means to the end of an effective collective bargaining system in which workers are able ultimately to exercise power in order to influence the terms and conditions of employment. All of the parties to the present proceedings accept this proposition. The issue is whether the limitation on the right to strike established by s 23 (1) (d) read with s 65 (1) (a) and the definition of 'workplace' is reasonable and justifiable.

[51] Section 36 of the Constitution provides:

'1. The rights in the Bill of Rights may be limited only in terms of the 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;

²¹ [2003] 2 BLLR 103 (CC) at paragraph 13.

- (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 for in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights.

[52] In *Bader Bop* the court said:

‘The first question that arises is whether the Act is capable of being interpreted in the manner contended for by the applicants, or whether it is only capable of being read as the respondents and the majority judgment in the LAC suggest. If it is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. *This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation should not be preferred in order to give effect to the clear intention of the democratic will of Parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by section 36 of the Constitution* (own emphasis).²²

[53] In practical application, s 36 requires, without adopting a mechanical ‘checklist’ approach, a consideration first of the purpose of the provision that limits a right in the Bill of Rights and secondly, a consideration of the impact of the law on the affected right. The first consideration is one that requires the court to determine whether the law which limits a right serves a legitimate government purpose; the second is sometimes referred to as a ‘proportionality’ analysis. In *S v Bulwana* the Constitutional Court summed up the approach as follows:

‘In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the

²² At paragraph 37.

inroad into fundamental rights, the more persuasive the grounds of justification must be.²³

- [54] The limitations imposed by s 65 (1) (a) on the exercise of a right to strike arise in circumstances where a trade union, on behalf of its members, contracts out of the right to strike by entering into a collective agreement that prohibits a strike in respect of the issue in dispute. Similarly, s 65 (3) (a) (i) has its roots in contracting out, in the sense that it prohibits strikes in circumstances where a binding collective agreement regulates the issue in dispute. The justification for the right to strike in these circumstances is obvious and patently justifiable.
- [55] However, the present matter primarily concerns a collective agreement extended in terms of s 23 (1) (d) to non-members of the party unions; therefore, this justification does not necessarily apply. Instead, the justification contended for by the respondents is one which lies in the legislative policy choice of majoritarianism, and they submit to be the consequent benefit of orderly and stable collective bargaining.
- [56] The principle of majoritarianism serves to underpin a number of other provisions of the LRA, some of which have been the subject of constitutional challenge.²⁴ The purpose of the limitation is rooted in a policy choice made by the legislature to adopt a specific model of collective bargaining at the level of the workplace, a choice that is consistent with a scheme of the LRA as a whole.

²³ 1996 (1) SA 388 (CC), at paragraph 18. See also *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 104 where the court stated ‘... there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right to that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation as to be necessary, whether the desired ends could reasonably have been achieved through other means less damaging to the right in question.’

²⁴ Fourie judgment

[57] The promotion of orderly collective bargaining is one of the explicitly recognised purposes of the LRA. Once a collective agreement is reached it is crucial that these follows – this is the *quid pro quo* to be employer for its consent to a collective agreement conferring improved benefits on employees. Section 23 (1) (d), by providing that a collective agreement may be extended to employees who are not members of the union parties to the agreement where those parties have as the members the majority of employees employed by the employer in the workplace, both serves to apply the principle of majoritarianism in the sense that the will of the majority should prevail, but also to protect the interests of the minority by imposing constraints on the extent to which a collective agreement might be extended. Here, it is worth noting that the definition of ‘workplace’ clearly extends beyond any agreed bargaining unit - all employees in the workplace must be brought into account, including those who are engaged outside the defined unit in respect of which bargaining takes place.

[58] The legitimacy of the policy choice made by the lawgiver has been expressly approved by the Labour Appeal Court in *Kem-Lin Fashions CC v Brunton & another* where the court said the following:

‘The legislature has also made certain policy choices in the Act of 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 orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged.’²⁵

[59] The courts have confirmed that in a justification enquiry, foreign and international law, embodying the law and other open and democratic societies, should inform that enquiry. The justifiability of the impugned provisions is apparent from the

²⁵ [2001] 1 BLLR 25 (LAC). at paragraph 19

views of the supervisory bodies responsible for monitoring compliance with international labour standards.

[60] In *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) the Constitutional Court specifically affirmed the value of Conventions and Recommendations adopted by the International Labour Organization as an important resource for the interpretation of s 23 of the Constitution. In that matter, the court referred specifically to the supervisory bodies established by the ILO's constitution and emphasised the importance of the body of decisions by them. These bodies have developed a jurisprudence in the course of their respective obligations to monitor compliance with ratified conventions and to conduct general surveys on national law and practice in respect of particular conventions, and to receive and consider complaints regarding alleged breaches of rights of freedom of association. The jurisprudence developed by the ILO's Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) and the Freedom of Association Committee of the Governing Body (CFA) is to be found, amongst other sources, in the General Surveys conducted by the Committee of Experts and the CFA's Digest ²⁶ of its decisions.

[61] Both bodies have interpreted Conventions 87 and 98 so as to include a right to strike. This is not been uncontroversial but for present purposes it is significant in that both the Committee of Experts and the CFA accept as a starting point that the right to strike is not absolute and that it may be restricted or, in exceptional circumstances, even prohibited. Paragraph 142 of the General Survey on the fundamental Conventions concerning rights at work in the light of the ILO Declaration on Social Justice for a Fair Globalisation tabled at the 2012 International Labour Conference reads as follows:

‘Restrictions on strikes during the term of a collective agreement

142. The legislation in certain countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice

²⁶ References are to the 5th (revised) edition of the Digest.

established by the law or by collective agreement must be observed. In other systems, collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited. The Committee considers that both these options are compatible with the Convention. In both types of systems, however, worker organizations should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements. If legislation prohibits strikes during the term of collective agreements, this restriction must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the application and interpretation of collective agreements.'

- [62] It is self-evident that s 65 (1) (a) of the LRA complies with each element identified by the Committee of Experts. A strike is only prohibited during the currency of a collective agreement if it contains a peace clause; protest action is not prohibited during the currency of a collective agreement (see s 77); and collective agreements are required by s 24 to provide for the conciliation and arbitration of disputes about its application and interpretation.
- [63] Article 4 of Convention 98 requires member states to take measures appropriate to national conditions *'to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employer organisation and workers organisations.'* The Committee of Experts has emphasised that the two essential elements to this obligation. The first is action by public authorities to promote collective bargaining; the second is the voluntary nature of collective bargaining, which implies the autonomy of the bargaining parties.
- [64] With regard particularly to the extension of collective agreements, the Collective Agreements Recommendation, 1951 (No 91) provides in Article 4 of that *'the stipulations of a collective agreement should apply to all workers concerned employed in the undertakings covered by the agreement unless the agreement specifically provides to the contrary.* In a gloss on Recommendation 91, the

Committee of Experts states at paragraph 245 of the General Survey that *'extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of convention 98. The Committee of Experts that such measures envisaged in several countries.*

[65] Similarly, the CFA has noted at paragraph 1052 of the Digest:

'When the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, the situation in principle does not contradict the principles of freedom of association, insofar as under law it is the most representative organisation that negotiates on behalf of all workers, and the enterprises are not composed of several establishments (a situation in which the decision respecting extension should be left the parties).

[66] Consistent with these provisions, many other jurisdictions, especially those in continental Europe, provide for the extension of multi-employer agreements to all enterprises in a particular industry or geographic area, either through law or other administrative means.²⁷ Although these systems typically involve the extension of sectoral level agreements, the principle of the extension of collective agreements to non-parties and their binding effect is one that is recognised and applied. International labour standards and practice therefore recognise and permit systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by number of trade unions within a company. They also recognise the legitimacy of the extension of collective agreements concluded between an employer and a majority union to non-parties.

[67] The importance and functionality of the extension of collective agreements to bind non-parties was recognised under the dispensation that applied under the 1956 LRA. In 1989, Clive Thompson wrote an article in which he was critical of a number of judgments by the industrial court in which the court appeared to recognise the right of individual employees to negotiate with their employer

²⁷ See S Hayter ed., *The role of collective bargaining in the global economy*, International Labour Office, Geneva, (2011) at 148.

regardless of any agreement concluded between the employer and a majority union. Thompson's comment ²⁸ holds true in the current legislative dispensation:

'And if the non-unionised employees (or perhaps even the disgruntled members?) may assert that right, they must be at liberty also to reject any employer attempt to make it a condition of employment that they accepted the wage deals negotiated by representative trade unions. And so the concept of the binding, uniform peace obligation is forfeited as well.

There can of course be little incentive for unemployed to enter into the collective bargaining process within such a dispensation. The employer will seldom be able to finalise a wage package, serial negotiations characterised by opportunism will be the order of the day. The formation of stable relationships will seem unlikely.

- [68] Cheadle points out in relation to the limitations imposed by s 64 (1) (a) and the limitation of the right to strike that it presents:

'Applying the constitutional jig of section 36 (1) to this limitation its purpose is central to the collective bargaining process – a peace clause is the employer's side of the bargain. This clause is the consideration for higher wages, lower hours, job security or whatever else forms the subject matter of the agreement.²⁹

- [69] Functional collective bargaining therefore requires that a peace obligation conceded in a collective agreement should be enforceable. Functional collective bargaining further requires that, when such a peace obligation is agreed to by unions representing a majority of affected employees, the obligation should be capable of being extended to the minority of employees not belonging to any of the party unions. It follows from the above that the extension of collective agreements to all workers is not only compatible with the principles of freedom of association, it is recommended. This negates the core of AMCU's complaint. At the heart of the present dispute is AMCU's objection to the fact that its members

²⁸ Clive Thompson 'A Bargaining hydra emerges from the unfair labour practice swamp' (1989) 10 ILJ 808, at 811. See also Brenda Grant 'In defence of Majoritarianism: Part 2 – Majoritarianism and Freedom of Association' (1993) 14 ILJ 1145.

²⁹ Cheadle in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2ed) at 18-35 to 18-38

are bound without their consent to a collective agreement concluded by unions that enjoy the support of the majority of employees in the relevant workplaces. The majoritarian principle that underlies s 23 (1) (d) promotes orderly collective bargaining, a legitimate purpose of the LRA and serves the legislative purpose of advancing labour peace and the democratisation of the workplace and the creation of a framework within which parties can bargain collectively to determine wages and other terms and conditions of employment. If an employer and unions party to a collective agreement were denied the right to the extent their agreement to non-party employees, collective bargaining would be characterised by opportunism and the attendant threat to the formation of stable relationships. To the extent that this involves some limitation of the right to strike (or any of the other constitutional rights on which AMCU relies), this is entirely justifiable.

- [70] The limitations of the rights about which AMCU complains serves legitimate government purposes – principally, to promote orderly and effective collective bargaining at workplace level. The limitation that flows from s 23 (1) (d) read with s 65 (1) (a) is circumscribed in that strikes are prohibited only on other specific issues in respect of which a collective agreement prohibits them, and applies only for the duration of that agreement. In respect of section 23 (1) (d) specifically, the limitation is narrowly tailored to apply only to those workplaces where there is a more trade unions that represent the majority of employees and then only when the parties agree that the agreement should be extended to all employees.
- [71] The limitation arising from s 21 (1) (d) read with s 65 (1) (a) flows directly from its purpose. The very purpose of s 23 is to bind non-parties in the workplace in respect of collective agreements concluded by majority trade unions. Binding non-parties is not an inadvertent effect of s 21 (1) (d) – on the contrary, that is its central purpose. Similarly, the purpose of s 65 (1) is *inter alia* to prohibit strikes and lockouts over issues in respect of which a collective agreement prohibits industrial action. There are no less restrictive means of achieving the applicable purposes. If the parties were precluded from extending collective agreements in

terms of section 23 (1) (d), the specific purpose of the provision could not be achieved. What would remain is the ordinary common law principle that contracting parties are bound by their own agreements. This would, as I have indicated, fundamentally undermine the broader purpose of the provision, which is to ensure functional, orderly and stable collective bargaining.

[72] In so far as AMCU submits that the less restrictive means of adopting the requirement of administrative approval for any extension of a collective agreement in terms of s 23 (1) (d) is concerned, this does not constitute a 'less restrictive means' to achieve the stated legislative purpose. First, it is not a less restrictive means at all, since the end result would be the same. In other words, incorporating the additional procedural step of securing administrative approval would make no difference to AMCU's complaints about the impugned provisions. Further, and more fundamentally, the insertion of a requirement that administrative approval be obtained before collective agreement can be extended would constitute an interference with the autonomy of the bargaining parties. Further, it is not clear that administrative approval would constitute an appropriate alternative in practice. The extension of collective agreements in the circumstances contemplated by s 23 (1) (d) can function only if it applies in all cases. This achieves the necessary certainty to enable collective bargaining to take place. In other words, the legislative purpose of orderly collective bargaining would be defeated if there was even a prospect that non-parties would not be bound by the agreement.

[73] In conclusion, in the present instance, the limitation on the right to strike by AMCU's members extends only in respect of those issues regulated by the wage agreement and only for so long as the agreement remains binding. This limitation is consistent with the overall legislative scheme applicable to collective bargaining and the LRA, which in turn, is supported by foreign and international law. The limitation of the constitutional rights concerned is proportional and meets the test prescribed by s 36 of the Constitution. It follows from my finding that s 23 (1) (d) read with the other relevant sections of the LRA does not violate

the principle of legality and that it constitutes a reasonable and justifiable limitation of the right to strike and other associated rights, that the counter-application stands to be dismissed.

- [74] In the main application, and to the extent that AMCU contends that s 23 (1) (d) must necessarily be interpreted to mean that each of the employers' mines constitute a workplace, it follows that even if there were a reasonably plausible interpretation to this effect, given the justification for the limitation of the right to strike contained in that section, it is not an interpretation that should be upheld.

Costs

- [75] Finally, in relation to costs, there is no reason why, in the main application, costs should not follow the result. I did not understand any of the parties to that application to contend any differently. In regard to the counter application, there was consensus that the cross-application constituted an attempt to vindicate constitutional rights that was neither frivolous nor vexatious and that the respondents' opposition to that application was similarly motivated. For that reason, I intend to make no order as to costs in respect of the counter-application.

I make the following order:

1. The rule *nisi* issued on 30 January 2014 is confirmed, with costs, such costs to include the engagement of two counsel.
2. The counter-application is dismissed, with no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

In the main application

For the Applicant: Adv. A Myburgh SC, with him Adv. G Fourie and Adv. T Ngcukaitobi instructed by ENS

For the First Respondent: Adv. P Kennedy SC, with him Adv. F Boda and Adv. U September, instructed by Larry Dave Inc. Attorneys

In the counter-application

For the applicant: Adv. P Kennedy SC, with him Adv. F Boda and Adv. U September instructed by Larry Dave Inc., Attorneys

For the First Respondent: Adv. A Myburgh SC, with him Adv. G Fourie and Adv. T Ngcukaitobi instructed by ENS

For the Second Respondent: Adv. A Freund SC, with him Adv. J Brickhill instructed by Cheadle Thompson & Haysom

For the Third Respondent: Adv. I Posthumus instructed by Serfontein Viljoen and Swart

For the Fifth Respondent: Adv. TJB Bokaba SC, with him Adv. B Lecoge and Adv. B Morris instructed by The State Attorney Pretoria