



Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 46/16

In the matter between:

**ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNIOIN
("AMCU")**

Applicant

and

MINISTER OF LABOUR

First Respondent

**CHAMBER OF MINES OF SOUTH
AFRICA**

Second Respondent

**NATIONAL UNION OF
MINEWORKERS ("NUM")**

Third Respondent

UASA

Fourth Respondent

SOLIDARITY

Fifth Respondent

Heard: 31 January 2018

Delivered: 13 March 2018

Summary: (Review – S77(2) of the BCEA and 158 (1) (g) of the LRA-review based on legality-review of ministerial determination falling under PAJA - failure to invoke alternative remedy under section 50 (9) in respect of ministerial determination issued under s 50(8)(c) fatal – review of extension of the agreement extended under section 23 (1) (d) of the LRA - review available only on narrow ground of legality – review of s 23(1)(d) extension ought not to entail interrogation of bargaining process as if it were a hearing - merits of the application and costs.)

JUDGMENT

LAGRANGE J

Background

- [1] This review was brought under section 158 (1) (g) of the Labour Relations Act, 66 of 1995 ('the LRA'). It began as a multipronged attack on the extension of wage agreements concluded between the Chamber of Mines ('COM' or 'the chamber') and the respondent unions in this application namely, NUM, UASA and Solidarity in the gold and coal mining sectors for the period 2015 to 2018, and on the Ministerial determinations under s 50(8) (c) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'). T
- [2] The scope of the application has gradually been narrowed down owing to certain grounds of review falling away, either because they have become moot or because AMCU decided not to persist with certain grounds of review. In particular the review of the extension of the agreement and the determination affecting coal mining was withdrawn. The application was opposed by the Chamber, the Minister of Labour and NUM.
- [3] AMCU seeks the following relief:
- 3.1 Reviewing and setting aside the Ministerial variation of section 12 (2) (b), section 14, section 15 (1) (a) and s 17(1) under s 50 of the BCEA, for the period 1 October 2015 to 30 September 2018 in respect of.

- 3.2 Setting aside the extension of the collective agreement of 2 October 2015 in the gold sector to employees who are not members of union parties to the agreement.

Grounds of Review

[4] Initially, the principal grounds of review relating to the determination were threefold:

- 4.1 Firstly the applicants advance the argument that the ministerial determinations were erroneously premised on Anglo Gold Ashanti and Harmony Gold mining houses being treated as single workplaces in terms of the LRA definition of a workplace. This was subsequently abandoned in the light of a Constitutional Court judgment in 2017 which is discussed below.
- 4.2 Secondly, AMCU argued that the determination published by the Minister undermines the health and safety of employees by increasing the risk of employees contracting silicosis.
- 4.3 Thirdly, the income disparity in the collective agreement between category 4-8 employees on the one hand compared with officials, miners and artisans on the other will grow at a rate which will be in breach of section 27 of the Employment Equity Act, 55 of 1998 ('the EEA'), which provides that:

"27 Income differentials and discrimination

(1) Every designated employer, when reporting in terms of section 21 (1), must submit a statement, as prescribed, to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational level of that employer's workforce.

(2) Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6 (4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such

guidance as may be given by the Minister as contemplated in subsection (4).

(3) The measures referred to in subsection (2) may include-

- (a) collective bargaining;
- (b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act;
- (c) applying the norms and benchmarks set by the Employment Conditions Commission;
- (d) relevant measures contained in skills development legislation;
- (e) other measures that are appropriate in the circumstances.

(4) The Employment Conditions Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.

(5) The Employment Conditions Commission may not disclose any information pertaining to individual employees or employers.

(6) Parties to a collective bargaining process may request the information contained in the statement contemplated in subsection (1) for collective bargaining purposes subject to section 16 (4) and (5) of the Labour Relations Act."

AMCU's complaint related to the minister's alleged failure to consider this provision and whether the determination might result in unfair discriminatory income outcomes because of a widening of pay gaps. The day before the matter was due to be argued, AMCU advised that it was not pursuing the last-mentioned ground, which is apparently the subject matter of another case under case no JS 611/16

[5] Other grounds of review were raised in respect of the extension of the agreement itself under s 23(1)(d). To some extent there is an overlap between the grounds raised under reviews of the determination and the parties' extension of the agreement, but the two reviews are considered separately because of the preliminary issues impacting on the review of the determination.

[6] What AMCU is persisting with are the following:

- 6.1 Whether the extension of the 2015 – 2018 gold mining sector wage agreement to employees of non-parties under section 23(1)(d) can be set aside on review on the basis that the employer did not have due regard to health and safety considerations in terms of section 7(b) of the BCEA when agreeing to regulate hours of work in terms of that agreement and the variation of overtime averaging provided for under s 12(2)(b) of the BCEA.
- 6.2 Whether the determination issued by the Minister of Labour ('the Minister') on 15 December 2015 under section 50 (1) of the BCEA varying certain provisions of the BCEA relating to working hours of employees in the gold mining sector falling within the scope of the collective agreement, should be reviewed and set aside because the Minister allegedly failed to have regard to health and safety considerations, or alternatively in so far as she did, irrationally agreed to the variations.

Background

- [7] On 2 October 2015, the Chamber and the respondent unions concluded a collective wage agreement for the 2015-2018 period ('the collective agreement'). Clause 17 of that agreement expressly bound all other employees employed by the employer parties to the agreement in terms of section 23(1) (d) of the LRA. Although AMCU had participated in the negotiations, it was not a signatory to the agreement and consequently its members were bound by this extension.
- [8] On 16 October 2015, and pursuant to the collective agreement, the Chamber applied to the Minister to issue a determination varying the application of certain provisions of the BCEA for the period 1 October 2015 to 30 September 2018, as follows:
 - 8.1 Section 12 (2) (b) - Variation to permit overtime of up to 10 hours per week where ordinary hours are averaged.
 - 8.2 Section 14 - Exclusion to the effect that employees in the Miners and Artisans & Officials recognition units who work underground and in processing plants dispense with a meal interval on the basis that

informal rest arrangements and opportunities to take sustenance made and existing meal arrangements with regards to employees in processing plants remain in place.

- 8.3 Section 15 (1) (a) - Variation to permit periodic daily rest periods of less than 12 hours but not less than eight hours for the purpose of rapid shift changeovers; and
- 8.4 Section 17 (1) - Variation to the effect that shifts commencing at or after 04H00 not regarded as night work.

[9] A copy of the variation application had been sent to AMCU on 15 October 2015 advising the union that any representations in regard to the application should be made to the Minister. However, AMCU did not make any representations before the Minister issued the determination on 10 December 2015. The pertinent part of the determination issued in terms of section 50 (8) (c) of the BCEA reads:

“1. The following sections of the act are replaced or excluded:

Section 12 (2) (b), 14 (1), 15 (1) (a) and 17 (1).

2. Extent of the variation:

(a) To average hours of work over the agreed period with an average of 10 hours' overtime per week;

(b) To dispense with a formal meal interval for Miners, Artisans and Officials recognition units who work underground and in processing plants;

(c) To reduce the daily rest period to not less than eight hours, for the purpose of rapid shift changeovers; and

(d) That shifts commencing at or after 04:00 not regarded as night work.”

It was only on 17 December 2015, a week after the determination was issued, that AMCU wrote to the Minister advising her that it was opposed to the application to vary the provisions in the BCEA. The letter concludes with a request that “For all of these reasons it is respectfully submitted that the sought variation of overtime is not in accordance with the purpose of

the BCEA, and should not be granted by the Minister.” (emphasis added). Subsequent to that, AMCU made no further representation to the Minister to withdraw the determination which had already been issued.

[10] It was not the first time that such a determination had been sought and granted. On 12 February 2014, an identical determination relating to the same provisions of the BCEA had been issued at the request of the negotiating parties, for the period 1 October 2013 to 30 September 2015. Accordingly, the determination issued following the 2015 collective agreement did not introduce any new deviations from the BCEA.

[11] On 18 February 2015, AMCU launched this review application.

The relevant statutory provisions

[12] The provisions of the BCEA relevant to this application are :

“7 Regulation of working time

Every employer must regulate the working time of each employee-

- (a) in accordance with the provisions of any Act governing occupational health and safety;
- (b) with due regard to the health and safety of employees;
- (c) with due regard to the Code of Good Practice on the Regulation of Working Time issued under section 87 (1) (a); and
- (d) with due regard to the family responsibilities of employees.”

In 1998 a Code of Good Practice on the Arrangement of Working Time¹ was issued by the minister under section 87 (1) (a) of the BCEA, but no specific reliance was placed on this Code by AMCU. The remaining BCEA provisions of relevance are:

“9 Ordinary hours of work

(1) Subject to this Chapter, an employer may not require or permit an employee to work more than-

- (a) 45 hours in any week; and

¹ (GenN 1440 in GG 19453 of 13 November 1998)

(b) nine hours in any day if the employee works for five days or fewer in a week; or

(c) eight hours in any day if the employee works on more than five days in a week.

....

10 Overtime

(1) Subject to this Chapter, an employer may not require or permit an employee to work-

(a) overtime except in accordance with an agreement;

(b) more than ten hours' overtime a week.

...

12 Averaging of hours of work

(1) Despite sections 9 (1) and (2) and 10 (1) (b), the ordinary hours of work and overtime of an employee may be averaged over a period of up to four months in terms of a collective agreement.

(2) An employer may not require or permit an employee who is bound by a collective agreement in terms of subsection (1) to work more than-

(a) an average of 45 ordinary hours of work in a week over the agreed period;

(b) an average of five hours' overtime in a week over the agreed period.

(3) A collective agreement in terms of subsection (1) lapses after 12 months.

(4) Subsection (3) only applies to the first two collective agreements concluded in terms of subsection (1).

...

14 Meal intervals

(1) An employer must give an employee who works continuously for more than five hours a meal interval of at least one continuous hour.

(2) During a meal interval the employee may be required or permitted to perform only duties that cannot be left unattended and cannot be performed by another employee.

(3) An employee must be remunerated-

(a) for a meal interval in which the employee is required to work or is required to be available for work; and

(b) for any portion of a meal interval that is in excess of 75 minutes, unless the employee lives on the premises at which the workplace is situated.

(4) For the purposes of subsection (1), work is continuous unless it is interrupted by an interval of at least 60 minutes.

(5) An agreement in writing may-

(a) reduce the meal interval to not less than 30 minutes;

(b) dispense with a meal interval for an employee who works fewer than six hours on a day.

15 Daily and weekly rest period

(1) An employer must allow an employee-

(a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and

(b) a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed, must include Sunday.

(2) A daily rest period in terms of subsection (1) (a) may, by written agreement, be reduced to 10 hours for an employee-

(a) who lives on the premises at which the workplace is situated; and

(b) whose meal interval lasts for at least three hours.

(3) Despite subsection (1) (b), an agreement in writing may provide for-

(a) a rest period of at least 60 consecutive hours every two weeks; or

(b) an employee's weekly rest period to be reduced by up to eight hours in any week if the rest period in the following week is extended equivalently.

...

17 Night work

(1) In this section, 'night work' means work performed after 18:00 and before 06:00 the next day.

(2)13 An employer may only require or permit an employee to perform night work, if so agreed, and if-

(a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and

(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.

(3) An employer who requires an employee to perform work on a regular basis after 23:00 and before 06:00 the next day must-

(a) inform the employee in writing, or orally if the employee is not able to understand a written communication, in a language that the employee understands-

(i) of any health and safety hazards associated with the work that the employee is required to perform; and

(ii) of the employee's right to undergo a medical examination in terms of paragraph (b);

(b) at the request of the employee, enable the employee to undergo a medical examination, for the account of the employer, concerning those hazards-

(i) before the employee starts, or within a reasonable period of the employee starting, such work; and

(ii) at appropriate intervals while the employee continues to perform such work; and

(c) transfer the employee to suitable day work within a reasonable time if-

(i) the employee suffers from a health condition associated with the performance of night work; and

(ii) it is practicable for the employer to do so.

(4) For the purposes of subsection (3), an employee works on a regular basis if the employee works for a period of longer than one hour after 23:00 and before 06:00 at least five times per month or 50 times per year.

(5) The Minister may, after consulting the Commission, make regulations relating to the conduct of medical examinations for employees who perform night work.

[13] Section 50 of the BCEA empowers the Minister to vary the same basic conditions of employment. The relevant provisions read:

“50 Variation by Minister

(1) The Minister may, if it is consistent with the purpose of this Act, make a determination to replace or exclude any basic condition of employment provided for in this Act in respect of-

- (a) any category of employees or category of employers; or
- (b) any employer or employee in respect of whom an application is made by-
 - (i) the employer;
 - (ii) the registered employers' organisation;
 - (iii) the employer and the registered employers' organisation.

(2) A determination in terms of subsection (1)-

- (a) may not be made in respect of sections 7, 17 (3) and (4), 25, 43 (2), 44 or 48 or a regulation made in terms of section 13; and
- (b) may only be made in respect of section 43 (1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities.

(2A) A determination in terms of subsection (1) may only be made in respect of section 9 if-

- (a) the employees' ordinary hours of work, rest periods and annual leave are on the whole more favourable to the employees than the basic conditions of employment in terms of sections 9, 10, 14, 15 and 20; and
- (b) the determination-
 - (i) has been agreed to in a collective agreement;

(ii) is necessitated by the operational circumstances of the sector in respect of which the variation is sought and the majority of employees in the sector are not members of a registered trade union; or

(iii) applies to the agricultural sector or the private security sector.

(3) ...

(4) ...

(5) ...

(6) ...

(7) (a) A determination in terms of subsection (1) (b) may be issued if the application has the consent of every registered trade union that represents the employees in respect of whom the determination is to apply.

(b) If no consent contemplated in paragraph (a) is obtained, a determination in terms of subsection (1) (b) may be issued if-

(i) the employer or employers' organisation has served a copy of the application, together with a notice stating that representations may be made to the Minister, on any registered trade union that represents employees affected by the application; and

(ii) in the case where the majority of employees are not represented by a registered trade union, the employer or employer's organisation has taken reasonable steps to bring the application and the fact that representations may be made to the Minister, to the attention of those employees.

(8)

(9) (a) The Minister may on application by any affected party and after allowing other affected parties a reasonable opportunity to make representations, amend or withdraw a determination issued in terms of subsection (1).

(b) For the purposes of paragraph (a), an affected party is-

(i) an employer or employer's organisation that is covered by the determination;

(ii) a registered trade union representing employees covered by the determination, or an employee covered by the determination who is not a member of a registered trade union.

(10) ..."

- [14] Before considering the substantive merits of the attack on the determinations and the s 23(1) (d) extension of the agreement to non-parties, a number of preliminary objections raised by the respondents must be addressed.

Preliminary issues

Review of determination premised on wrong statute

- [15] The chamber and Minister contended that it is impermissible for AMCU to rely on section 158(1) (g) of the LRA and that the union should have relied on section 77 (2) of the BCEA. Recognising the soundness of this objection, AMCU intended to apply to amend the notice of motion accordingly. However, this was not done.
- [16] Nevertheless, AMCU argued in the alternative that the structure of the relief sought and the variations the minister approved fell squarely within the ambit of the LRA and this court's specialist jurisdiction. In support of this, the applicant cited the case of ***O'Thorpe construction and others v the Minister of Labour and others***.² In that case, it was held that the extension of the collective agreement to non-parties constituted the performance of a function expressly provided for in the LRA. As the respondents correctly point out, AMCU fails to mention that the extension in question concerned a ministerial extension of an agreement concluded in a bargaining council to non-parties falling within the scope of the Council under s 32 of the LRA. While the review of the Minister's determination in this case is not dissimilar in some respects, it is a power exercised under the BCEA and not the LRA. Strictly speaking, AMCU ought to have brought the application under s 77A(d) of the BCEA in terms of which the labour court is empowered to review the performance of any function under the act on any grounds permissible in law.
- [17] In any event, the chamber and the Minister claim that since the review of the determination is a review of administrative action, AMCU should have

² (2015) 36 ILJ 935 (WCC)

exhausted internal remedies before launching the review application. Sub-section 7(2) (a) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') provides that no court shall review administrative action ...unless any internal remedy provided for in any other law has first been exhausted", except that under section 7(2) (c), in exceptional circumstances and on application by the party affected, a court may exempt such a party from complying with the requirement to exhaust internal remedies. The chamber and Minister claim that in terms of section 50 (9) of the BCEA, AMCU could have applied to have the determination amended or withdrawn after it was issued, but failed to utilise these remedies.

- [18] AMCU firstly argues that this provision is not applicable where the review is not premised on PAJA but on the general principle of legality (which includes consideration of irrationality as a ground of review) to which PAJA does not apply. In the alternative, if s 7(2) (a) does apply, AMCU denies that the remedy provided in s 50(9) is an internal one that can address the complaints. In the further alternative it also contends that it made representations to the Minister within a week of the determinations being made on 10 December 2015 setting out its opposition to the CRM's application to vary BCEA provisions in particular those relating to overtime work and averaging hours of work. It argues that these representations effectively constituted an application as envisaged by section 50(9) calling on the Minister to withdraw the determination.
- [19] The first obvious point raised by the respondents in response is that the common law power of review of *administrative action* on grounds of legality does not exist in some distinct parallel universe of law separate from the right to fair administrative established in s 33 of the constitution and given effect to by PAJA. It is now trite law that the common law right to fair administrative action is subsumed in the constitutional right which finds its detailed expression in PAJA. In ***Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign***

and Innovative Medicines SA as Amici Curiae),³the Constitutional Court expressed it unequivocally :

"[95] PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights.⁸⁰ It was required to cover the field and purports to do so.

[96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.

[97] Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:

"The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in section 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act."⁸¹ (Footnotes and emphasis omitted.)

I agree."

[20] I accept that there is scope for arguing when dealing with action which is not administrative and therefore not capable of review under PAJA, a review based on legality and the rule of law can still be entertained, as exemplified in the discussion of this remedy in **Public Servants Association of South Africa and another v Minister of Labour and**

³ 2006 (1) BCLR 1 (CC) at 37-38. In the labour context this principle was affirmed in **Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA** [2011] 4 BLLR 330 (LC) at 337, para [16].

another.⁴ That matter concerned the Minister's withdrawal of an employee's designation as the Registrar of Labour. In that case the minister had raised a defence that her decision did not amount to administrative action and therefore could not be reviewed. Although the court found that her action did constitute administrative action, it nonetheless found that even if it was wrong about the administrative nature of the action, the decision was still reviewable on the less stringent standard of legality, which requires that the action must satisfy the requirements of being *intra vires*, rationally related to the purpose for which the power was given, exercised for the purpose the power was granted and not for some extraneous reason, and that it must be procedurally fair. A further requirement is that the functionary must give reasons for their decision.⁵

- [21] However, in this instance, AMCU did not make any serious attempt to explain why the Minister's action in making the determinations did not constitute administrative action and why a review relying purely on the principle of legality founded on the rule of law, without invoking PAJA, was available to it as a remedy. For the sake of clarity, I will nonetheless consider if the Minister's decision amounted to administrative action susceptible to review under PAJA or if it was simply the exercise of public power subject only to review under the principles of legality. In ***Minister of Defence and Military Veterans v Motau and others***⁶, the Constitutional Court summarised the defining characteristics of administrative action based on existing jurisprudence :

"[33] The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that

⁴ [2016] 1 BLLR 68 (LC)

⁵ At 85-6, paras [54] to [56].

⁶ 2014 (8) BCLR 930 (CC) at 941

adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.”

[22] Clearly, the decision of the Minister to make the determination satisfied all of the characteristics in paragraphs (b) to (f) above and none of the listed exclusions in the definition of ‘administrative action’ in section 1 of PAJA apply. In relation to whether the decision was administrative in nature, the SCA in ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others***⁷ set out typical identifying characteristics of administrative action:

“[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of “an administrative nature”) that have emerged from the construction that has been placed on section 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.”

[25] The law reports are replete with examples of conduct of that kind. But the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that:

“[d]ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33”.

In making that determination:

⁷ 2005 (10) BCLR 931 (SCA)

“[a] series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33.”

- [23] In making the determination in this matter, the Minister was exercising a specific power allocated to her under s 50 of the BCEA, and it obviously had direct consequences for AMCU members employed by the employer parties to the collective agreements, to which AMCU was not a party. The power exercised by the Minister is incidental to giving effect to the legislation and the policies it embodies and does not entail creating new policy. Consequently, I am satisfied that the Minister’s conduct in issuing the determination is quintessentially administrative in nature. Therefore it follows that AMCU had first to exhaust any available internal remedies before bringing this application, unless it can be excused its failure to do so because of exceptional circumstances as provided for under section 7(2)(c) of PAJA, which states:

“A court or tribunal may, in that exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

- [24] To warrant exceptional treatment, AMCU needed first to apply to court to be exempt from any internal remedies it had not used and secondly to justify why the requirements of exhausting internal remedies should be waived for it. Firstly, it made no such application. Secondly, it did not expressly advance reasons why it should be exempted, except perhaps in the most oblique way by suggesting that the submissions it had made after the determination should have been construed as an attempt to request the withdrawal of the determination. I will deal below with whether the submissions could conceivably be construed in that way. The question of

whether exceptional circumstances existed is also closely tied up with the type of internal remedies that were available to AMCU. In ***Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)***⁸ the Constitutional Court had the following to say about the considerations which might make a failure to exhaust internal remedies exceptional:

“[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”

[25] In relation to AMCU's argument that no internal remedy was available to it to address the complaints it had, this is difficult to understand. Firstly, It had every opportunity under s 50(7)(b)(i) to intervene before the determination was made by making any of the representations on the issues it now claims the Minister failed to consider. Secondly, even after the determination was made it had another opportunity to make representations requesting the withdrawal or amendment of the determination under s 50(9). It failed to use these readily available and simple mechanisms at its peril, instead choosing the more indirect and difficult path that it has. Moreover, there is no substantial reason advanced why those remedies in principle could not have yielded relief equivalent to the remedy it seeks now.

[26] AMCU's last fall back position is that its representations should have been construed as a request to withdraw the determination. Firstly, this submission suffers from the logical difficulty that the submissions were plainly made on the assumption that the decision was still pending. There is no reason why the Minister should have understood them to be anything other than a late submission. Once AMCU realised that the proverbial horse had bolted, nothing prevented it from invoking the remedy provided by s 50(9). In short, quite apart from failing to specifically apply to be

⁸ 2009 (12) BCLR 1192 (CC) at 1204.

exempt from the requirement of invoking internal remedies, I am satisfied that AMCU has failed to demonstrate exceptional circumstances which might excuse it from not doing so before it embarked on this application. As such, its non-compliance with s 7(2) is fatal to the review application of the Minister's determination, irrespective of any substantive merits it might have.

The review of the extension of the agreements under s 23(1) (d) of the LRA.

[27] AMCU had originally also contended that the extension of the agreement under s 23(1) (d) of the LRA was susceptible to review as administrative action and that the agreements could not be extended because for the purposes of satisfying the majoritarian requirement of s 23(1)(d)(iii) the parties could not treat whole companies as workplaces instead of individual mines. However, subsequent to launching the review the Constitutional Court decision in **Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others**⁹, clarified that while the extension of a collective agreement to a non-party union's members in a workplace under s 23 (1) (d) is an exercise of public power it was not an exercise of administrative power and therefore not susceptible to the full gamut of administrative review remedies.¹⁰ An extension of an agreement is capable of review only on the much narrower test of legality measured by the "minimum standards of lawfulness and non-arbitrariness" which the Constitutional Court described by reference to its own judgment in **Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) as follows:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. 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

⁹ (2017) 38 ILJ 831 (CC)

¹⁰ At paragraphs [83] to [87].

power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”¹¹

[28] The review grounds originally advanced by AMCU in respect of the extension of the agreement under s 23(1)(d) were that :

28.1 The agreement did not address AMCU's demand for a basic salary of R 12 500, per month.

28.2 The agreement did not address severe income disparities between employees and this breached s 27 of the EEA.

28.3 The variation of overtime worked was not fully detailed or explained in terms of BCEA guidelines.

28.4 The overtime hours would impact adversely on underground employees' health by placing them underground for longer periods of time in conditions contributing to silicosis.

[29] One objection raised by the respondents to these grounds was that these issues were not raised by AMCU during the negotiations and accordingly the parties in concluding the agreement could not be said to have failed to take factors brought to their attention into account, nor could they be held to have acted irrationally in not considering them. This led to a dispute of fact and an application by AMCU to request an opportunity to lead oral evidence on AMCU's presentation during the course of the negotiations to resolve the dispute of fact.

[30] Assuming, without deciding, that AMCU had made representations on these issues during the collective bargaining process would that mean a failure by the other bargaining parties to take them on board and include them in the agreement, or to provide reasons for rejecting them would make the extension of the agreement reviewable under the principle of legality ? It is important in considering this question not to lose sight of the fact that the exercise of public power at issue here relates to decision to extend the agreement to all employees, not the conclusion of the agreement itself.

¹¹ At paragraph [84] footnote 90.

- [31] The agreement is the result of a bargaining process of give and take in which concessions are made to arrive at a deal the parties can jointly live with. AMCU was part of that process but because it was not the majority union its consent was not necessary for concluding the deal. The collective bargaining process, is self-evidently not an adjudicative process in which the respective demands of the parties are weighed and evaluated by a third party for their soundness, quality and weight to arrive at a considered outcome, which the third party can be called upon to justify. The outcome of collective bargaining is a settlement of conflicting bargaining positions not a ruling. It is reasonable to assume that most unions or employers would struggle to motivate their reasons for arriving at a particular collective agreement on substantive issues other than in terms of why they had decided to make certain concessions and not others in order to achieve the settlement. An interrogation of the substantive outcome of the negotiations against a yardstick used to evaluate decisions which are not the result of negotiation but deliberation is very difficult to conceive of. A legality based review which treats what transpired in the preceding bargaining process as if it were the evidence before an enquiry on the basis of which a decision was made to extend the agreement, risks artificially judicialising the bargaining process.
- [32] The issue on review of the extension of the agreement is only about whether the power exercised in extending the outcome of collective bargaining was related to the purpose for which it was granted or exercised for some ulterior motive. On this question, AMCU advanced no direct arguments and there is nothing to suggest that the agreement was extended for any other reason than to ensure uniformity of conditions for all employees for the duration of the agreement and that was premised on the agreement having been concluded with the most representative union in the workplace. That appears to be consonant with the purpose of granting such a power. No conditions were imposed on AMCU members by the agreement which were more unfavourable than those imposed on NUM members. AMCU does not claim the decision to extend the agreement was *mala fide*, capricious or arbitrary. AMCU's main complaint was about the effect of the outcome of the bargain itself.

- [33] However, a residual argument remains, which I understand to be the following: the extension of an agreement which included the variations of working hours could not be rationally related to the purpose of that power if it effectively permits, subject to confirmation by a determination, a deterioration in the health and safety standards of employees, which is a factor an employer is required to consider when determining working hours under s 7(b) of the BCEA. That argument presupposes that such a deterioration ought to have been plainly evident from the terms of the variation provisions or that the bargaining parties should have deliberated and assessed the inherent merits of the motivation for respective bargaining positions in an adjudicative fashion and bear those assessments in mind when extending the agreement as well.
- [34] The principle contention of AMCU on this issue is that, by allowing the deviations on working time, employees will suffer more prolonged exposure to mine dust and therefore will be exposed to a proportionately greater risk of contracting silicosis, which is contrary to the requirement that employers must regulate working hours with due regard to health and safety and it could never be a rational exercise of the power to extend an agreement to allow that. For the reasons mentioned about the nature of the collective bargaining process, I do not think there is an obligation on parties deciding to extend an agreement to review the merits of points made during the process. For that reason, I also do not think it would be appropriate to admit oral evidence to clear up disputes of fact about what was said in the bargaining process. This challenge is far more appropriate to apply to the distinct evaluative and deliberative process of making the determination, without which the agreement on the variation of BCEA terms contained in the collective agreement cannot be implemented anyway.
- [35] The remaining issue is whether it should have been nonetheless inescapably evident that if the agreement was extended it would in all probability have had an unacceptable impact on employee's health. *Prima facie*, it seems a plausible contention that longer hours spent underground and thereby longer hours exposed to mine dust will increase the risk of silicosis. I accept there was a quibble about the fact that the period of

averaging working hours was not expressed in the agreement on variation, but it is not in dispute that the applicable averaging period is a fortnight on the affected mines.

- [36] In terms of sections 9 and 10 of the BCEA, ordinary hours of work are limited to 45 hours per week and weekly overtime hours cannot exceed 10 hours per week. This means that ordinarily, total working time could amount to 60 hours per week in the absence of an averaging arrangement. Without a variation of s 12(2) (b) overtime hours are limited to an average of 5 hours per week if an averaging system is in place. Therefore it is true that by raising that to 10 hours the time underground could be 5 hours longer than it could be if s 12(2)(b) was not varied. Even so, on average and therefore accumulatively, the total hours worked during any cycle of averaging would still not exceed the total normal working hours and overtime hours that can be worked in the same period if an employer simply complied with the 45 hours per week and 10 hours overtime limits respectively determined by sections 9(1) (a) and 10(1)(b). Consequently, for any period of averaged working hours, in accordance with the variation of 12(2) (b) allowing up to 10 hours overtime per week on average, the total hours underground could never exceed the total hours an employee could work underground under the ordinary maxima permitted by the BCEA.
- [37] If the total hours that can be worked under the relaxation of s 12(2)(b) are still restricted to what the BCEA ordinarily permits where working hours are not averaged, it is difficult to see how the variation sought cannot pass the restricted standard of rationality, bearing in mind that the nature of AMCU's objection on health grounds is to the total time exposed to mine dust over time and not the length of individual shifts. To put it differently, in order to hold the decision to extend the agreement irrational, in particular those terms permitting an averaging of working hours to include an average of 10 hours overtime a week, the court would have to find that permitting a work regime under which the total ordinary and overtime hours over a two week averaging period cannot exceed the total hours that can ordinarily be worked anyway under the BCEA would imply an irrational disregard of employee health in the regulation of working

hours. In my view, the effect of the agreement to vary s 12(2) (b) is insufficient to warrant such an inference being drawn and therefore does not render the extension reviewable as an unlawful or irrational exercise of public power.

- [38] In any event, this probably overstates what AMCU can legitimately raise under the rubric of a legality review. There is nothing that suggests that the decision to extend the agreement to all employees was not a rational exercise of the power afforded parties under s 12(2)(b) of the LRA. It was not unrelated to the purpose for which it was granted. The fact that the variation regime agreed to was one that had in place for several years and was the product of a collective bargaining process with a majority union in the workplace, and that it was still subject to the checks and balances of the s 50 BCEA process because the variations could not be implemented unless that process was followed and concluded, are ample reasons to recognise the extension as a lawful one and one that was lacking in arbitrariness.

Costs

- [39] AMCU's case has been progressively reduced in scope with the passage of time, in part due to the effect of the 2017 *AMCU v COM* judgment of the Constitutional Court and in part because it abandoned other grounds of review. The respondents raised fundamental objections to AMCU's ability to proceed with a review of the determination which should have been obvious by the time it had considered the opposing affidavits of the respondents. Further, what could be salvaged of the case in respect of the s 12(2)(b) extension was extremely tenuous after the judgment in *AMCU v COM* removed the strongest ground of review based on the definition of a workplace and confined that review to one based on legality alone. In the circumstances, at the very least AMCU ought not to have pursued the case after receiving the opposing papers and I believe in law and fairness, it is appropriate that it pay the respondents costs after that point.

Order

- [1] The review application of the extension the collective agreement for the gold mining sector concluded on 2 October 2015 between the Chamber, NUM , UASA and Solidarity under s 23(1) (d) of the LRA to all employees employed in the workplaces of the employers listed in Annexure A to the agreement is dismissed.
- [2] The review application of the Ministerial Determination issued on 10 December 2015 under s 50(8) (c) of the BCEA attached as Annexure “JM3” to the founding affidavit is dismissed.
- [3] The applicant must pay the first, second and third respondents costs of opposing the application incurred from the date the applicant received the last answering affidavit, including the costs of senior and junior counsel.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

FA Boda SC and Z Navsa
instructed by Larry Dave
Attorneys Inc.

FIRST RESPONDENT:

PG Seleka SC and E Tolmay

instructed by the State
Attorney

SECOND RESPONDENT:

A Myburgh SC instructed by
Edward Nathan Sonnenberg
Inc.

THIRD RESPONDENT:

J G Van der Riet SC
instructed by Cheadle,
Thompson & Haysom
Attorneys

LABOUR COURT