CERTAINTY ESTABLISHED: MAJORITARIANISM TRUMPS MINORITY, PASSES CONSTITUTIONAL MUSTER, AND ACCORDS WITH INTERNATIONAL STANDARDS

Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited [2020] ZAAC 1

1 Introduction

South African courts have recognised majoritarianism to mean that the will of the majority is favoured over the will of the minority in serving the legislative goals of advancing labour peace, orderly collective bargaining, and the democratisation of the workplace. Yet a fundamental problem arising from majoritarianism is the possibility that the rights of the minority could be violated.

This case involves the retrenchments in South Africa when a firm elects to dismiss part of its labour force for operational reasons. This procedure frequently arises without warning. Generally, it has devastating consequences and leaves certain employees out of work through no fault of their own. That is exactly what happened in *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* [2020] ZACC 1.

Against this backdrop, this case note addresses two issues. First, it explores the constitutionality of procedural fairness during retrenchments; second, it assesses the International Labour Organisation's Committee of the Freedom of Association (ILO-CFA) Report on this matter against the decision of the Committee.

2 Synopsis of the case

A platinum mine run by Royal Bafokeng Platinum Limited (respondent) decided to retrench 103 of its employees, some of whom were Association of Mineworkers and Construction Union (AMCU) members. There was no previous consultation with AMCU, which represented approximately 11 percent of the employees, or with the employees themselves. This was because of a retrenchment agreement concluded between the employer and two other unions at the mine: the National Union of Mineworkers (NUM), the majority union with 75 percent membership, and the United Association of South Africa (UASA) another minority union. The agreement was extended to cover all employees and contained a "full and final settlement clause" in

terms of which all the parties to the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

The applicants disputed the fairness of the procedure which led to their dismissal. The challenge to the dismissals was adjudicated before the Commission for Conciliation Mediation and Arbitration (CCMA), then before the Labour Court (LC), the Labour Appeal Court (LAC), and finally the Constitutional Court (CC).

3 The legal issues

The issue at the centre of this matter is whether the right to fair labour practices in section 23(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) requires an employer to consult with an employee who faces dismissal for operational requirements, or with his or her representatives when that employee or his or her representative is not a party to a collective agreement governing consultation (par 28).

4 Ruling of the CCMA

AMCU took the matter to the CCMA. It later transpired that this was an error as the challenge ought to have been mounted by way of application to the Labour Court under section 189A(13) of the Labour Relations Act 66 of 1995 (LRA). The respondent also raised a point *in limine* that there was a collective agreement, which entitled the respondent to lawfully exclude AMCU from the consultation process. In November 2015 the CCMA issued a jurisdictional ruling that it lacked the requisite jurisdiction to conciliate the matter.

5 Judgment of the Labour Court

AMCU then challenged the fairness of their members' dismissals. At the Labour Court, AMCU approached the Constitutional Court to challenge the constitutionality of sections 189(1) (par 48) and 23(1)(*d*) of the LRA where the collective agreement was extended in terms of that section and prohibited minority union members from striking (par 56). AMCU further sought to have the retrenchment agreement (and its extension) set aside based on the principle of legality, which requires the exercise of public power to be rationally linked to the objectives for which the power was granted. The Labour Court found that sections 23(1)(*d*) and 189(1) did not violate any constitutional rights. Nonetheless, the Labour Court did not pronounce the relief sought by AMCU to have the retrenchment agreement set aside. AMCU appealed against the Labour Court's judgment and sought the same relief on appeal.

6 Judgment of the Labour Appeal Court

In the Labour Appeal Court, AMCU requested that sections 189(1) and 23(1)(*d*) of the LRA be constitutionally interpreted to provide that an employer is obliged to consult with minority trade unions (par 2) irrespective

of whether there is a valid collective agreement between an employer and a majority union which states otherwise (par 16). In short, AMCU's challenge was aimed at the application of the principle of majoritarianism to the retrenchment process.

The LAC found no merit in AMCU's contention that the principle of majoritarianism serves no purpose. It was a deliberate policy choice taken by the legislature to facilitate orderly collective bargaining, minimise the proliferation of unions, and democratise the workplace (par 55). A clear policy decision had been taken by the legislature that the will of the minority cannot trump that of the majority (par 39).

The alternative would mean that an employer must negotiate with each union member in the workplace, regardless of how small, and would result in intolerable disruptive and economic harm. The LAC found that the applicant's argument that majoritarianism has no place in the retrenchment process was baseless (par 61). It further, found that procedural fairness was not a rational requirement *per se* (par 62) and that "there was no general duty on a decision-maker to consult interested parties for a decision to be rational under the Rule of Law". Accordingly, the LAC dismissed AMCU's appeal in its entirety. AMCU then appealed to the Constitutional Court still claiming the relief sought in the LAC.

7 The Constitutional Court decision

In the Constitutional Court AMCU contended that by creating an exclusive consultation regime, section 189(1)(*a*) of the LRA infringes the rights of minority unions and non-unionised employees to fair labour practices guaranteed in section 23(1) of the Constitution in that it excludes them from the very process that determines their fate.

Royal Bafokeng relied on the primacy that collective bargaining is afforded in terms of the LRA and accordingly contended that there is no need to interfere with the principle of majoritarianism. This, they argued, is because the retrenchment process is a collective one and the rights in issue are therefore held collectively.

The Constitutional Court found that the constitutional challenge to section 23(1)(*d*) of the LRA should be dismissed because AMCU had failed to show that the section infringed on any of its members' constitutional rights (par 25–27).

Regarding the challenge and the concerns posed in section 189(1) of the LRA, Froneman J, writing for the majority of the Constitutional Court, found that there was no entitlement to individual consultations under section 189 of the LRA (par 39–43). Furthermore, section 23(1) of the Constitution, which provides that every employee has the right to fair labour practices, does not expressly or by implication guarantee a right to be individually consulted in a retrenchment process (par 204). The Constitutional Court also found (par 101) that:

- Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. This provision does not expressly or impliedly guarantee a right to be individually consulted in the retrenchment process;

- One of the objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23. That is done in relation to unfair dismissals and unfair labour practices in Chapter VIII of the LRA;
- The right not to be unfairly dismissed or subjected to unfair labour practices is given effect in section 185 of the LRA and its content and application are regulated by the further provisions in the Chapter;
- The procedure for dismissals based on operational requirements is exhaustively set out in section 189 of the LRA;
- Our jurisprudence, since the introduction of the LRA, has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy section 189(1) itself creates;
- The consultation process that section 189 prescribes is procedurally fair and accords with international standards; and
- Further, regarding compliance, section 189(1) which deals with procedural fairness does not mean that the outcome may not be challenged on the basis of substantive unfairness.

The Constitutional Court accordingly found that a majority-driven collective bargaining process passes constitutional muster in the context of retrenchment and that no right to further individual or dual consultation outside of the hierarchy prescribed by section 189(1) exists. In the circumstances, the Constitutional Court found that a retrenchment agreement could lawfully be extended across the workplace to apply to persons who were not consulted during the consultation process. The Constitutional Court found that the provisions of section 189(1) of the LRA are neither unconstitutional nor irrational, and it accordingly dismissed AMCU's application for leave to appeal.

The judgment of the Constitutional Court can be seen as another victory for the principle of majoritarianism in the South African labour relations system.

8 Analysis of the *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* [2020] ZACC 1

In terms of sections 189(1) of the LRA:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult–
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> (*a*) any person whom the employer is required to consult in terms of a collective agreement;
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> (*b*) if there is no collective agreement that requires consultation–
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> (i) a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of whichthere is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (*c*) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any

registered trade union whose members are likely to be affected by the proposed dismissals; or

(*d*) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose." (par 95)

Section 189(1) creates a cascading hierarchy of persons that an employer is effectively obliged to consult once it contemplates dismissal for operational requirements. This means that it must first comply with subsection (*a*), and if subsection (*a*) does not apply, then (*b*), and if (*b*) does not apply then (*c*) (par 30).

The concept of "majoritarianism", which is a consistent theme under the LRA (par 115), is entrenched through section 23(1) of the LRA and provides that an employer and a majority union can extend the binding nature of a collective agreement (e.g., a retrenchment agreement) to cover all employees within a bargaining unit, including members of another minority union.

AMCU challenged whether this arrangement complied with the right to fair labour practice under section 23(1) of the Constitution. This case went from the Labour Court to the Labour Appeal Court and then to the Constitutional Court.

It is worth noting that the Constitutional Court's full judgment included four judgments: the majority judgment backed by five judges; a minority opposing judgment supported by four judges; and two separate minority judgments by individual judges wishing to express further reasons for their views. One of the latter judgments supported the conclusion reached by the five judges in the majority judgment, and the other supported the conclusion of the four judges in the main minority judgment. The final count was, therefore, six opposed to five judges – a close outcome. Further, the minority judgment would have found section 189(1) of the LRA to be unconstitutional and invalid for failing to impose a legal duty on an employer to consult with all those affected by retrenchment.

This suggests the interesting possibility that concluding a collective agreement on retrenchment with a majority union, which may be extended to cover non-parties, and prior consultation with a minority union, are not necessarily mutually exclusive. Consultation and collective bargaining serve different purposes and vindicate different rights, and the outcomes of the consultation (even with different groups) can then be considered by parties in concluding a subsequent collective agreement.

Despite the views expressed above, the Constitutional Court's majority judgment did not agree that section 189(1) of the LRA is constitutionally invalid and dismissed the challenge to section 23(1)(*d*) of the LRA, which provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit. The majority judgment found that the consultation process prescribed under section 189 is procedurally fair and accords with international standards (par 126).

The Constitutional Court noted further that since the introduction of the LRA, our jurisprudence has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment

process outside the confines of the hierarchy created in section 189(1). The majority judgment commented that dismissal for operational reasons involves complex procedural processes requiring consultation, objective selection criteria, and the payment of severance benefits (par 126). The process involves a shared attempt to arrive at an agreed outcome that considers the interests of both the employer and employees. Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the type of process where union assistance to employees is invaluable, and it would be futile to provide individual consultation.

The Constitutional Court accordingly found that the priority given to collective bargaining in section 189 is not only rational but sound and fair. Recalling that the outcome, in this case, was so close (a six to five majority), it is worth noting what seems to be a growing trend, both in various amendments to the LRA and in court decisions – an attempt to accommodate minority union representation as well as entrenched principles of majoritarianism. This trend acknowledges the interconnectedness between the right to freedom of association, the right to form and join a union, and the rights of unions to organise and engage in collective bargaining, which may be threatened if workers are not permitted to be represented by the union of their choice and are forced to be represented by a union they have chosen not to join.

As commented in the Constitutional Court's minority judgment, this is exactly what happened here as AMCU members were not permitted to be represented by their union in the consultation process. Instead, they were compelled to accept representation by NUM and UASA after the collective agreement had been extended to cover workers who were not members of those two unions. The Constitutional Court's minority judgment endeavours to show that majoritarianism is, or should be, compatible with the existence of minority unions and allow those unions to organise and represent their members in competition with the majority union.

Although the Constitutional Court's majority judgment confirms that it may not be necessary to consult minority unions under section 189(1), it also states there is nothing to prevent employers from electing to do so. If minority unions have a strong presence, employers may be wise to consider doing so in the interests of workplace stability, even when a collective agreement is subsequently concluded with a majority union and extended to cover all employees.

9 The ILO Committee on Freedom of Association (CFA) Report on this matter and the decision of the Committee

The Association of Mineworkers and Construction Union (AMCU) lodged a complaint against the Government of South Africa. The complainant alleged mass dismissals of its members by a metal-producing company in the context of restructuring. It alleged that sections 23(1) and 189(1) of the LRA, on which the dismissals were based, are contrary to ILO Conventions on freedom of association in that they exclude minority unions from retrenchment consultations and do not allow them to make observations in

the event of an extension of collective bargaining agreements. The complaint is contained in an AMCU communication dated 14 April 2020.

It should be noted that South Africa has ratified the Freedom of Association and Protection of the Right to Organise and the Right to Organise and Collective Bargaining Convention. In its communication dated 14 April 2020, the complainant alleged the illegal dismissal of 103 of its members by the Royal Bafokeng Platinum Limited ("the metal-producing company" or "the company") in 2015 and denounced the lack of consultation with the complainant – a minority union – both during the retrenchment consultations and before the extension of the retrenchment agreement to its members in the application of sections 23(1) and 189(1) of the LRA.

The complainant alleged that, in practice, employees facing mass retrenchments have no right to be represented by minority unions of their choice in circumstances where other unions have concluded a collective agreement with the employer; that any retrenchment agreement reached between the employer and a majority union can be extended to minority union members without any participation from the workers' union of choice; and that the national laws governing the subject are thus not in line with the principles of freedom of association.

The complainant for its part alleged that in practice the application of sections 23(1) and 189(1) of the LRA is contrary to the principles of freedom of association and collective bargaining. It argued that it effectively bans minority unions from representing their members in case of mass retrenchments where other unions have entered into a collective agreement with the employer. Further, compelling workers to be represented by a rival union is also incompatible with freedom of association, particularly in the context of the country where the rivalry between the NUM and the complainant is extreme and has on several occasions led to bloodshed. The complainant, therefore, suggested that the right of all minority unions to participate in retrenchment consultations is fundamental to ensuring a fair and equitable result.

The Committee nevertheless noted that the government argued that section 189 of the LRA was drafted to provide the fairest procedure for dismissals for operational reasons in compliance with international standards; that the hierarchy governing the consultation process realises the purposes of the LRA – i.e., the promotion of orderly collective bargaining – and that the recommendations made by the complainant to allow a multiplicity of minority unions to participate in retrenchment consultations would create disorder in the workplace by undermining the principle of majoritarianism and the requirement to conclude consultations expeditiously (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72).

The Committee noted that, according to the Government, the safeguards provided in the above sections of the LRA sufficiently protect individuals and minority union members in the event of retrenchment even if they are excluded from consultations in that retrenchment is an objective process affecting workers in each group notwithstanding their union affiliation. In this specific case, all employees were equally represented by the recognised

unions (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72).

The Committee further noted that from the information submitted by both the complainant and the government, the substance of the case had been subjected to judicial scrutiny by the Labour Court, the Labour Court of Appeal, and the Constitutional Court, all of which found that sections 23(1) and 189(1) of the LRA were in line with the ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and its Right to Organise and Collective Bargaining Convention 98 of 1949 as they advance majoritarianism, but also provide for safeguards of the rights of minority unions (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 72). The courts held that the legislator had chosen a system where a majority trade union, after concluding a collective agreement with an employer, enjoyed the exclusive right to be consulted during a retrenchment process and that the exclusion of minority unions from retrenchment consultations did not mean that their members were not represented.

In addition, the Committee recognised that the main issue in the case was the extent to which minority unions can engage in negotiations with the employer on retrenchments affecting their members in the context of enterprise restructuring under section 189(1) of the LRA and whether, in the complainant's case, its exclusion from the retrenchment consultations was in line with the principles of freedom of association and collective bargaining (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

The Committee also noted that the legislation in the country prescribed a system in which the most representative organisation enjoys privileges as regards collective bargaining rights to facilitate orderly collective bargaining. It noted further that section 189(1) of the LRA creates a hierarchy in the consultation process in the case of mass dismissals, where the employer is first obliged to consult any persons required to be consulted in a valid collective agreement. Only in the absence of a collective agreement should the consultations involve a workplace forum. Further, any registered trade union whose members are likely to be affected by the proposed dismissal of the employees, or with their representatives nominated for that purpose (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

Furthermore, the Committee cited in this regard that both systems of collective bargaining with exclusive rights for the most representative trade union, and those where several collective agreements can be concluded by several trade unions within a company, are compatible with the principles of freedom of association (*Compilation of Decisions of the Committee on Freedom of Association* 6ed (2018) par 1351).

The Committee consequently concluded that, as drafted, section 189(1) of the LRA is not *per se* incompatible with freedom of association in that, while giving priority in retrenchment negotiations to trade unions that have concluded a collective agreement with the employer, (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73) it also provides for consultations with other unions or directly with the concerned

workers where no collective agreement providing for consultations has been concluded. However, the Committee took due note of the complainant's concerns that forcing workers to be represented by a rival union is incompatible with freedom of association, particularly in case of retrenchment discussions and given the context of strong union rivalry in the country.

The Committee recalled that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim.

The Committee further noted that the complainant also denounced the extension of the retrenchment agreement to its members in that it held the members bound to a collective agreement concluded by the employer with another trade union extinguished their right to challenge the fairness of their retrenchment, and alleged that the complainant was not allowed to submit observations on the subject (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

In more general terms, the complainant alleged that the extension of collective agreements permitted by section 23(1) of the LRA does not involve an independent agency; that the extensions permitted between employers and majority unions in a secret process lack transparency and exclude minority unions; and that objective, precise, and pre-established criteria must be set to ensure proper protection of the right to freedom of association.

The Committee noted that section 23(1) of the LRA allows for the extension of collective agreements to employees who are not members of the trade union or trade unions party to the agreement if the employees are identified in the agreement; the agreement expressly binds the employees, and the trade union or those trade unions (party to the agreement) have as their members the majority of employees employed by the employer in the workplace. (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

The Committee expressed its understanding that these conditions had been fulfilled in the present case and pointed out that when the extension of an agreement applies to workers who are not members of the signatory unions, is not contrary to the principles of freedom of association in so far as it is the most representative organisation that negotiates on behalf of all workers (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 73).

Finally, the Committee noted that the arguments advanced by the complainant ignored the very basis of majority representation in collective bargaining to cover all workers, to avoid differing treatment at a single workplace, and to ensure orderly industrial relations. This aside, the conditions for an extension are set out under Collective Agreements Recommendation 91 of 1951, referred to by the complainant, and apply to extension across an entire sector or territory which is quite different from a determination that a collective agreement concluded with a majority representation in each workplace would cover the entire workforce (396th

"Report of the Committee on Freedom of Association" 343rd Session (2021) par 75).

In line with the above, the Committee considered this case closed and declined to examine it further. The Committee's recommendation was that, in light of its conclusions above, it invited the governing body to consider that this case does not call for further examination (396th "Report of the Committee on Freedom of Association" 343rd Session (2021) par 77).

10 Concluding remarks

South African jurisprudence since the adoption of the LRA has consistently interpreted section 189 of the Act to exclude any requirement of individual parallel consultation in a retrenchment process beyond the limits set by the hierarchy in section 189(1). Consequently, the consultation process in section 189 of the LRA is procedurally fair, accords with international standards, and is not unconstitutional. Further, section 23(1)(*d*) of the LRA which provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit, is also not unconstitutional. The principle of majoritarianism has been considered by South African courts – including in cases of retrenchment – and has undergone a complete "metamorphosis" in its passage from the Labour Court to the Constitutional Court before being confirmed by the ILO Committee on Freedom of Association Report. Legal certainty has been established.

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