IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 15/16

In the matter between:

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA (NUMSA) obo MEMBERS **Appellant**

and

SOUTH AFRICAN AIRWAYS SOC LIMITED **First Respondent**

SAA TECHNICAL SOC LIMITED **Second Respondent**

Heard: **13 September 2016**

Delivered: **31 May 2017**

Summary: Extension of a collective agreement signed by majority unions to non-parties in terms of s23(1)(d) of the LRA- principle of majoritarianism – whether a settlement agreement a collective agreement capable of extension to non-parties –

Held a matter of "mutual" interest is one in which the trade union and the employer parties have a material and simultaneous interest which relates to the employment relationship and can be reduced to, or regulated by a collective agreement - issues covered in s189(2) are manifestly mutual interest issues - a retrenchment agreement between an employer and a trade union settling a retrenchment dispute is therefore a collective agreement capable of extension in terms of s 23(1)(d) by virtue of the principle of majoritarianism which finds expression in s23(1)(d) as well as in section 189(1) and 189(A) -

s23 is a deliberate choice by the legislature to limit the rights enshrined in s23 of the Constitution in order to attain orderly collective bargaining and fair and expeditious resolution of disputes in appropriate instances - The application of s 23(1)(d) to the s 189 process is necessary and justifiable to ensure orderly and peaceful consultation process aimed at minimising dismissals and contributing to economic viability.

Coram: Tlaletsi DJP, Molemela JA and Savage AJA

JUDGMENT

TLALETSI DJP

Introduction

[1] This is an appeal against the order of the Labour Court (per Myburgh AJ), dismissing the appellant's application brought in terms of s 189A (13) of the Labour Relations Act[1] (the LRA). In the application, the appellant sought to interdict South African Airways (SAA) and South African Technical (SOC) Ltd (SAAT), both the first and second respondents respectively, from proceeding with a large-scale retrenchment exercise pending compliance with a fair procedure.[2]

[2] The essential question that the Labour Court had to determine was whether a retrenchment agreement concluded with unions representing the majority of employees in the workplace, and extended in terms of s 23(1)(d)[3] of the LRA,

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[1] Act 66 of 1995.

[2] Section 189A(13) provides that: "(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-
(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
(c) directing the employer to reinstate an employee until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

[3] 23. Legal effect of collective agreement
(1) A collective agreement binds -
(a) the parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates (i) terms and conditions of employment; or

in effect settled any dispute that non-union member employees and minority union members had about the retrenchment process. The appeal is with leave of the Labour Court.

[3] The appeal was heard on 17 September 2016. In the course of time, it came to our attention that a judgment of this Court[4] on which the parties and the Labour Court relied for part of its decision was a subject of appeal in the Constitutional Court. With agreement of the parties our judgment was withheld pending the judgment of the Constitutional Court which was decided on 21 February 2017.[5] The parties were given an opportunity to file further written submissions addressing the judgment of the Constitutional Court. The appellant filed its supplementary submissions on 24 March 2017 and the respondents on 20 March 2017. What then follows is our judgment.

Factual Background.

[4] The factual background is in essence common cause. The appellant is the National Union of Metalworkers of South Africa (NUMSA), a trade union duly registered in accordance with the provisions of the LRA.[6] The second and further appellants are its members. SAA is the National Carrier. SAAT is a subsidiary of SAA and provides it with technical services.

[5] During the 2013/14 financial year, SAA made a loss of about R2.6 billion. As a result, SAA undertook to save the costs of employment by embarking on a reduction of a vast number of jobs. The estimated reduction was to save an amount of about R350 million per annum.

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
(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 bind 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.

[4] *Association of Mineworkers & Construction Union v Chamber of Mines of SA* acting in its own name *& on behalf of Harmony Gold Mining Co (Pty) Ltd* [2016] ZALAC 11; (2016) 37 ILJ 1333 (LAC); [2016} 9 BLLR 872 9 (LAC).

[5] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC).

[6] Aviation Union of Southern Africa (AUSA), a trade union which was the first applicant in the Court *a quo* is not pursuing the appeal.

[6] SAA employed 4265 employees, of whom about 80% belonged to either National Transport Movement (NTM), South African Cabin Crew Association (SACCA) or United Association of South Africa (UASA). The three are unions recognised by SAA. The appellant had only 78 members (less than 2%) and was unrecognised. SAAT employed 2485 employees of whom 77 % belonged to UASA and South African Transport and Allied Workers' Union (SATAWU), the two recognised unions. NTM, Solidarity and the appellant also had membership but were unrecognised.

[7] On 22 April 2015, SAA issued a notice of retrenchment in terms of s 189(3) (the notice. Although there was initially an objection to only one notice being issued, the appellant and UASA accepted that a single notice issued would suffice for all the affected unions. A single facilitation process was agreed upon. Two facilitators from the CCMA[7] were appointed, and a facilitated consultation process was thereupon undertaken in terms of s 189A (17) of the LRA for both SAA and SAAT as agreed.

[8] The consultation process involved seven registered unions referred to above and two management representative bodies at SAA and SAAT respectively. The 60-day period provided for in s 189(A) (7) elapsed on 20 June 2015. On this day, the consultation process had not been concluded. The period was extended first to 9 July 2015, and later to 22 July 2015 and 22 August 2015, respectively. It is not disputed that the parties had over the course of some 3½ months conducted nine facilitated consultation sessions and 45 private consultation sessions.

[9] Certain events that led to the application in the Labour Court took place during the course of the consultation process. On 4 July 2015, the appellant raised a number of issues during the consultation meeting. The main issue was a demand for disclosure by the respondents of information relating to the commercial rationale and alternatives to dismissals. SAA adopted the position that the information relating to the commercial rationale and cost saving measures were already explained in the notice in terms of s 189(3) of the LRA, and that the request by the appellant amounted to duplication of

[7] The Commission for Conciliation Mediation and Arbitration.

information already provided and a mere delaying tactic. Although the other union parties had promised to support the appellant's request for information, they withheld their support at this meeting. It is significant to note that no less than 31 consultation meetings had taken place before the appellant requested information relating to the commercial rationale of the retrenchments. It is not clear why this request was left until right at the death of the process.

[10] On 7 July 2015, the appellant brought a formal application for the disclosure of information in the CCMA. On 10 July 2015, the parties met with the Chief Executive Officer (CEO) of SAA and SAAT. What transpired at this meeting is not common cause. According to the appellant, the CEO agreed to provide all the requested information and that a facilitation session that was scheduled for 11 July 2015 would instead be utilised for discussions over the economic rationale for the retrenchment and alternatives to dismissals.

[11] The meeting of 11 July 2015 took place. However, according to the appellant the respondents reneged on the agreement reached at the meeting with the CEO. The meeting, nevertheless, adjourned on the basis that the respondents would file their answering affidavit in the disclosure application by 15 July 2015.

[12] On 22 July 2015, the respondents filed their answering affidavit in the disclosure application. On 23 July 2015, the respondents agreed to extend the consultation process to 22 August 2015. The respondents proposed five further consultation sessions. Also on this day, the respondents advised the unions of a further consultation meeting scheduled for the following day from 14h00 to 16h00, with the agenda being the "*economic and structural needs*" and "*proposed structures*". The appellant declined to attend the meeting citing its unavailability due to short notice, and further objected to the meeting being held in its absence and that of the facilitators. AUSA undertook to attend the meeting on a without prejudice basis. It however, supported the appellant's position that it did not make sense to engage over the agenda items until such time as the disclosure application had been decided.

[13] On the morning of 24 July 2015, a consultation meeting was held in the absence of the appellant and AUSA. The meeting resulted in the parties concluding a retrenchment agreement. Although the scheduled afternoon session also took place with AUSA in attendance, no mention was made of the conclusion of the retrenchment agreement. At 16h24, the appellant was emailed a copy of the retrenchment agreement. The conclusion of this agreement led to the launch of this application in the Labour Court.

[14] The collective agreement of 24 July 2015 was concluded by SAA, NTM, UASA, SACCA and SAA management employees. These entities jointly represent about 80% of employees at SAA workplace. The retrenchment agreement is applicable to SAA only. In terms of the agreement, the parties reached agreement on: the existence of an economic rationale for the retrenchment (and recorded that the issue had been consulted over); selection criteria; the termination date of the affected employees (being either 30 September 2015 or 30 November 2015); severance pay; training; vacancies; and the agreement by SAA with various bodies to provide further assistance or support to retrenched employees; the issue of re-employment; and ex gratia payment. The agreement also recorded that the parties would continue to consult over proposed organisational structure.

[15] The collective agreement provides that it is extended to non-parties in terms of s 23(1)(d)[8] of the LRA and further that it constitutes the agreement contemplated in terms of regulation 10 of the Facilitation Regulations.[9]

[16] On 5 August 2015, the parties to the retrenchment agreement concluded a further collective agreement which dealt with the outstanding issue that the parties had reserved for consultation in the first agreement, being "the organisational structure". This agreement, as the first one, does not relate to SAAT. The agreement recorded that consensus had been reached on most of the issues on organisational structure. The agreement also makes reference

[8] Clause 4.2 of the collective agreement.
[9] Regulation 10 reads under the heading "agreement "as follows: "If an employees who are likely to be affected by the proposed dismissal are represented in a facilitation by more than one consulting party, an agreement must be concluded by the consulting parties representing the majority of the employees concerned, for purposes of section s 189A (2) of the Act and these Regulations."

to the fact that it extended to non-party employees in terms of s 23(1) (d) of the LRA and that it is the agreement contemplated in regulation 10.

[17] The relief sought by the appellant in the court *a quo* was amended by a written notice prior to the hearing of the application. At the hearing of the application, the relief sought was further pared-down to the following:

> 'a. A declarator that the companies "did not comply with a fair procedure pursuant to the issuing of the section [189(3)] notice dated 22 April 2015" (prayer 2 of the amended notice of motion);
>
> b. an order that SAA "not give effect to the purported [retrenchment] agreement ... and that to the extent necessary the said ... agreement be set aside" (prayer 3.1 of the amended notice of motion);
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> c. an order that the companies "engage with the applicants in meaningful joint-consensus seeking consultations, at least until 22 August 2015 as per the undertaking previously given ... but in any event until such time as per objectives of the [LRA] have reasonably been obtained" (prayer 3.3 of the amended notice of motion); and
>
> d. an order that pending compliance with the aforesaid orders, the companies be interdicted and restrained from terminating any contracts of employment pursuant to sec [189(3)] notice issued on 22 April 2015 and that [they] be interdicted from implementing any steps towards attaining the dismissal of employees (prayer 4 of the amended notice of motion).'

The Labour Court's Judgment

[18] The court *a quo* recorded that there were three questions that it had to determine in light of the parties' submissions: first, as a matter of legal principle: can a retrenchment agreement be validly extended to non-party employees in terms of s 23(1)(d) of the LRA; if the answer is in the affirmative, then the second question is whether, on the peculiar facts of this matter, it was permissible to do so; if the answer is also in the affirmative, then whether this put paid to the appellant's claim in relation to the first respondent (SAA).

[19] With regard to the first question, the court *a quo* held that while it may appear objectionable that s 23(1)(d) of the LRA can be used in a way that seem to deprive individuals and their unions of the right to challenge the fairness of a retrenchment process, the section permits all collective agreements to be extended in terms thereof and is not limited in its scope to only agreements that do not involve a deprivation of rights; that most collective agreements extended in terms of s 23(1)(d) of the LRA involve depriving non-party employees of some or other right, for example, the right to strike; that the fact that it is permissible is underscored by s 189(1)(a) of the LRA which has been interpreted as meaning that an employer and a majority union can enter into a collective agreement upfront to the effect that, in the case of a retrenchment exercise, the employer will only consult with the majority union.

[20] The court *a quo* referred to the decision of this Court in *Aunde South Africa (Pty) Ltd v NUMSA*[10] where it was held:

> 'The conclusion of a retrenchment agreement further to a process of consultation and its extension in terms of section 23(1)(d) has the same effect, and is unobjectionable. As held in Chamber of Mines (supra), section 23(1)(d) is amongst numerous sections in the LRA which encapsulate the legislative policy choice of majoritarianism. That choice is based on the legislature's assumption that it would best serve the primary objects of the LRA of labour peace and orderly collective bargaining. The conclusion of a retrenchment agreement with a majority union (or coalition) and extension to non-party employees accords with this.'[11]

[21] The court *a quo* rejected the appellant's submission that section 189A of the LRA does not contemplate the extension of a retrenchment agreement concluded with the majority consulting party, and that while the right to strike can be limited by a collective agreement extended to non-parties, there exists no comparative section binding non-parties to retrenchment agreements. In its view, sections 189 and 189A are legislative design to get parties to attempt to reach consensus, which consensus may result in the conclusion of a collective agreement. Such a collective agreement, the court *a quo* held, like

[10] [2011] 10 BLLR 945 (LAC); (2011)32 ILJ 2617 (LAC).
[11] At para 32.

any other collective agreements, is capable of extension in terms of s 23(1)(d) of the LRA if the requirements are met.

[22] Regarding the second question to the effect that the first respondent and SAAT (the companies) were bound by their election to follow an all-comers model of consultation involving a single facilitation process, and could not change tack, the court *a quo* distinguished the authorities relied upon by the appellant for its contention. It held, *inter alia*, that whilst it is so that the parties agreed that there will be a single facilitation process involving all corners, there is no evidence to suggest that the companies or the unions thereby waived their rights to conclude a retrenchment agreement on a per company basis, and to extend any such agreement in terms of s 23(1)(d) of the LRA. The court *a quo* reasoned that it would also be difficult to infer that because notwithstanding the single facilitation process, the obligation to comply with ss189 and 189A of the LRA rests with each separate (statutory) employer, and any retrenchment agreement and extension thereof would have to be in the name of that employer. The court found that it was not a case of the respondents having undergone a *volte face* to the prejudice of the appellant but a case of "*labour law at work*" entailing the parties engaging in a consultation process over a period of three and a half months.

[23] As regards the contention that the first respondent was bound by its election to consult with a number of unions and could not validly renege from its election and conclude the collective agreement with the majority unions, the court *a quo* reasoned that s 189(1)(c) of the LRA compels the employer to consult with all unions whose members are likely to be affected by the retrenchment, with it not being a matter in respect of which the employer makes an election. Regarding the argument that the first respondent negotiated in bad faith (in not disclosing the information), breaching the agreement with the CEO and concluding the retrenchment agreement in a "cavalier" fashion, the court *a quo* held that the retrenchment agreement, and its extension to non-party employees, constituted a settlement of any and all such complaints raised by the appellant.

[24] With regard to the final point for determination, the court *a quo* held that once it is accepted that as a matter of legal principle a retrenchment agreement can be extended in terms of s 23(1)(d) of the LRA to non-party employees, and that there exists no unique facts in this matter that somehow causes a different result, this put paid to the appellant's claim in relation to the retrenchment at the first respondent (SAA) since the retrenchment agreement, as extended, constitutes a settlement of any dispute falling within the scope of the agreement that non-party employees may have.

Parties' Submissions

[25] Mr Niehaus, for the appellant, submitted that the question whether a retrenchment agreement is a collective agreement capable of being extended to non-parties in terms of s 23(1)(d) of the LRA is fundamental to their case. He contended that the court *a quo* was wrong to follow the approach adopted by earlier judgments that said a retrenchment agreement is indeed a collective agreement capable of being extended in terms of s 23(1)(d) of the LRA. He submitted that such conclusion was reached without due regard to the constitutional right to fair labour practice enshrined in s23 of the Constitution[12] which can only be limited by way of a law of general application as provided in s36 of the Constitution. The LRA, he submitted, was enacted to give effect and content to the constitutional right to fair labour practice. It does not have any limitations to the right not to be unfairly dismissed and that there exists no other law of general application as envisaged in s 36 of the Constitution limiting the right not to be unfairly dismissed. In essence, the appellant's contention is that the agreement entered into between the recognised majority trade unions and the first respondent constituted a settlement agreement which was only binding on the parties and their members. It was not a collective agreement capable of extension to non-parties.

[26] It was also contended on behalf of the appellant that the entire structure of the LRA is premised upon a clear division between rights disputes (in respect of which no strike action is permissible and which disputes are to be resolved by

[12] The Constitution of the Republic of South Africa 1996.

way of arbitration or adjudication) and interest disputes (which are to be resolved by way of power-play). It was contended that the resolution of rights disputes by agreement results in the conclusion of settlement agreements, whilst resolution of interest disputes by way of agreement results in the conclusion of collective agreements. Therefore, it was argued, a proper consideration of s 23 of the LRA and collective agreements in general, should result in the conclusion that these pertain to the notion of collective bargaining, and relate to matters of interest and not rights issues.

[27] The appellant further argued that even if a retrenchment agreement was to be regarded as a collective agreement, such agreement is not capable of extension to non-parties in terms of s 23(1)(d) of the LRA in respect of those issues which resort within the ambit of rights disputes. Similarly, the appellant argues that the court *a quo*'s reliance on the Labour Appeal Court's judgments of *Kem-Lin Fashions CC v Bruton and Another* (2001) 32 ILJ 109 (LAC) and *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* 2001 (4) SA 1009 (LAC), and the Labour Court's judgment of *Chamber of Mines of SA v AMCU and Others* [2014] 9 BLLR 895 (LC) was misplaced because the issues in those matters pertained to true collective agreements regulating matters of mutual interest and did not deal with rights disputes. It was further contended that the court *a quo* erred in relying on *Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC) in support of the contention that a retrenchment agreement is a collective agreement because such statement was made *obiter*.

[28] Mr Boda SC, for the respondents, submitted that the judgment of the court *a quo* is unassailable. He contended that the court *a quo* was correct in finding that the retrenchment agreement constituted a collective agreement capable of extension to non-parties in terms of s 23(1)(d) of the LRA; that although the parties chose to consult in a single forum, nothing prevented the conclusion of a retrenchment agreement for SAA, and that once the collective agreement has been validly extended, the parties are bound by it with the result that all points of contention over the commercial rationale and alternatives had been resolved.

Analysis

[29] This Court, in essence, is called upon to decide the same issues that were decided by the Court *a quo*, namely, whether the Court *a quo* erred in finding that in principle a retrenchment agreement concluded between SAA and the Majority Unions constitutes a collective agreement which could validly be extended to non-party employees in terms of s 23(1)(d) of the LRA and whether on the facts the extension put paid to the appellant's claim in relation to SAA.

[30] The starting point in the inquiry is to consider the meaning of a "collective agreement" for the purposes of the LRA. In terms of s 213 of the LRA, a "collective agreement" means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered Trade Unions on the one hand, and on the other by one or more registered employers' organisations; or one or more employers and one or more registered employers organisations. It therefore means that an agreement which meets or satisfies the requirements set out herein constitutes a collective agreement.

[31] The contention on behalf of the appellant that the Court *a quo* should have declined to follow the approach adopted in earlier judgments (i.e. *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC) *and Sigwali and Others v Libanon (a division of Kloof Gold Mine Ltd* [2002] 2 BLLR 216 (LC) to the effect that a retrenchment agreement constitutes a collective agreement, is, in my view, unfounded. The ratio in those decisions remains valid. I also find no merit on the further contention that the Court *a quo*'s reliance on the decisions of this Court in *Kem-Lin Fashions CC v Brunton and Another* (2001) 22 ILJ 109 (LAC) *and Mzeku and Others v Volswagen SA (Pty) Ltd and* Others 2001 (4) SA 1009 (LAC); (2001) 22 ILJ 1575 (LAC*) and Association of Mineworkers and Construction union and Others v Chamber of Mine of South Africa* takes the matter no further. The issues in those matters pertains to the collective agreements regulating the matters of mutual interest and did not deal with rights disputes. An attempt to distinguish the said authorities on

what is said to be a distinction between "matters of mutual interest" and "rights dispute" is somewhat, for the reasons that follow hereunder, artificial.

[32] There is, in my view, merit in the respondent's contention that the fundamental misconception by the appellant is to confuse the term "mutual interest" with two other terms being "interest dispute" and "rights dispute". In this regard, the appellant contended that the words "(or) any other matter of mutual interest" serve to qualify and circumscribe the preceding words "terms and conditions of employment" in the definition of a collective agreement in s 213 of the LRA, in order to restrict it to the realm of matters of interest (i.e. the creation of new rights) and not rights issues (existing rights). The definition of a collective agreement, goes the contention, contemplates the resolution of interest dispute, i.e. the creation of new rights and does not pertain to the settlement of disputes concerning existing rights.

[33] There is in my view nothing in the definition in s 213 of the LRA that suggest that the words "any other matter of mutual interest" should be limited as suggested on behalf of the appellant. The term "matter of mutual interest" is broad enough to cover both interest and rights disputes. This Court in *Pikitup (SOC) Ltd v South African Municipal Workers Union obo Members and Others*[13] favoured a broad meaning to the term "a matter of mutual "where it held:

> 'I therefore agree with Hulley AJ that the health and safety issues in this matter are matters of mutual interest. In my view, Snyman AJ's judgment unjustifiably limits the phrase matters of mutual interest to terms and conditions of employment only. In any event, the fact that an employee would work in a safe and healthy environment and the parties' (employer and employee) duties thereanent is at least an implied term of a contract of employment. Snyman AJ found that nothing changed except that the employee had to give a breath sample before receiving the keys to a truck. This is an over simplification of the situation. The Constitutional rights of the

[13] [2014] 3 BLLR 217 (LAC).

> employees were infringed without their consent. In my view, that represents a substantial change".[14]

A matter of "mutual" interest is one in which the Trade Union and the employer parties have a material and simultaneous interest which relates to the employment relationship and can be reduced to, or regulated by a collective agreement[15]. In my view, the issues covered in s 189(2) of the LRA are manifestly mutual interest issues. A retrenchment agreement between an employer and a trade union settling a retrenchment dispute is therefore a collective agreement, for as long as it meets the requirements set out in s 213 of the LRA.

[34] It was further contended on behalf of the appellant that s 23 of the Constitution of the Republic of South Africa, 1996 affords to everyone a fundamental right to fair Labour Practices, which in terms of s 36 of the Constitution can only be limited by way of a "law of general application" and that nowhere in the LRA is there any limitation of the aforesaid substantive right not to be unfairly dismissed (as an inherent part of the fundamental Constitutional right to fair labour practices). It was submitted that the erroneous approach adopted by the Court *a quo* was to effectively find that s 23(1)(d) of the LRA constitutes such a statutory authorised and constitutionally compliant limitation to the right to fair labour practices. As it will be shown later, s 23 of the LRA is a deliberate choice by the legislature to limit the rights enshrined in s 23 of the Constitution in order to attain orderly collective bargaining and fair and expeditious resolution of disputes in appropriate instances. It may be an unfair limitation in general, but it is justifiable, depending on the circumstances and facts of a particular case.

[35] In *Aunde South Africa (Pty) Ltd v NUMSA (Aunde South Africa*) [16] *this Court* held that:

> 'Where an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an

[14] At para 66.
[15] See City of Johannesburg Metropolitan Municipality v SAMWU [2011] 7 BLLR 663 (LC) at para 11.
[16] [2011] 10 BLLR 945 (LAC).

> employer has no obligation in law to consult with any other union or any individual employee over the retrenchment. If such a consultation exercise culminated in a collective agreement that complies with the requirements of a valid collective agreement, all employees including those who are not members of the representative trade union that consulted with the employer are bound by the terms of such collective agreement irrespective of whether they were party to the consultation process or not.'[17]

[36] The Court *a quo* correctly recognised that it may appear objectionable that s 23(1)(d) can be used in such a way as to deprive individuals (and this their unions) of the right to challenge the fairness of a retrenchment process, which the section permits all collective agreement to be extended in terms of s 23(1)(d) of the LRA and is not limited in its scope to only agreements that do not involve a deprivation of rights that most collective agreements extended in terms of s 23(1)(d) of the LRA involve depriving non-party employees of some or other right. The Court *a quo* correctly reasoned with reference to the *Aunde South Africa* decision above, that:

> 'The conclusion of a retrenchment agreement further to a process of consultation and its extension in terms of section 23(1)(d) has the same effect, and is unobjectionable. As held in *Chamber of Mines (supra)*[18], section 23(1)(d) is amongst numerous sections in the LRA which encapsulate the legislative policy choice of majoritarianism. That choice is based on the legislature's assumption that objects to the LRA of Labour peace and orderly collective bargaining. The conclusion of a retrenchment agreement with a majority to non-party employees accords with this.'

[37] In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa,*[19] the appellant also contended *inter alia,* that the principle of majoritianism contained in s 23(1)(d) read with s 65(1)(a) of the LRA to the effect that minorities (employees and their union) are bound by a collective agreement concluded between the majority union and the employer, which agreement, had been extended to them, had the effect of prohibiting

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[17] At para 32.
[18] This was in reference to the judgment of the Labour Court reported under: *Chamber of Mines of South Africa v Association of Mineworkers and Construction Union and Others* [2014] 9 BLLR 895 (LC).
[19] [2016] 9 BLLR 872 (LAC).

the minority from striking on the issues agreed to the collective agreement. Such prohibition unfairly limited their right in terms of s 23 of the Constitution in the circumstances where s 23 (1)(d) of the LRA does not have similar safeguards to s 32 of the LRA. This Court held that:

> [105] Section 23(1) (d) of the LRA is but one instance in the LRA where the legislature had chosen to apply the principle of majoritarianism. There is nothing unconstitutional about the principle itself. It is a useful and essential principle applied in all modern democracies, including the Republic of South Africa. It has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace and the different sectors. In *Kem-Lin Fashions CC v Brunton and Another,*[20] this Court (per Zondo JP) expressed itself on the topic as follows:
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> '*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.'*
>
> [107] It is also correct, as the second respondent has submitted, that the weight of academic authority has endorsed the Legislature's choice of majoritarianism as essential for collective bargaining.'

[38] The above reasoning of this Court and the court below in the *AMCU v Chamber of Mines of South Africa* cases were endorsed by the Constitutional Court in a further appeal to that court in *AMCU v Chamber of Mines of South Africa and Others.*[21] The Constitutional Court held:

> '[50] AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation. Both the Labour Court and the Labour Appeal Court gave detailed and extensive consideration to this. I do not seek to improve their reasoning. In short, the best justification for the limitation the

[20] [2001] 1 BLLR 25 (LAC) at para 19. See also *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) at paras 55 and 67.
[21] (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC).

principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.'[22]

[39] In its supplementary submissions, the appellant accepts that the majoritarianism principle contained in s 23(1)(d) of the LRA is a legitimate and justifiable limitation to the right to strike. It however, contends that reference in the Constitutional Court judgment is only made to a collective agreement and its extension by the majority in the context of and as the product of collective bargaining ("interest dispute") and that, nothing contained in the judgment provides any support or authority for the proposition that a retrenchment settlement is a collective agreement. I have already found that as the Court below did and other authority of this Court that a retrenchment agreement that meets the requirements set out in of the LRA is a collective agreement and is capable of extension in terms of s 23(1)(d) of the LRA. The retrenchment agreement in *casu* meets the requirements of s 213 of the LRA and was duly extended in terms of (1)(d) of the LRA. The short answer to the contention that the Constitutional Court limited itself to instances of collective bargaining, is that the principle of majoritarianism finds expression in s23(1)(d) as well as in section 189(1) and 189(A) of the LRA. The application of s 23(1)(d) of the LRA to the process set out in s 189 of the LRA is necessary and justifiable to ensure orderly and peaceful consultation process aimed at minimising dismissals and contributing to economic viability. To allow a situation where a minority party would, right at the end of the consultation process, not be bound by a product of a legitimate and fair process, particularly where it was part of that process, would lead to chaotic situations. It would be difficult, if not impossible, for a consultation process under s189 of the LRA to be concluded.

[40] As indicated already, the parties, including the appellant, followed an extensive consultation process involving about 45 consultation meetings over a period of 3½ months. The appellant, despite its challenges to the validity of the extension, accepted that the retrenchment agreement effectively resolved the entire retrenchment at SAA and that the agreement is legally binding on the parties thereto. In my view, the appellant has failed to place facts or

[22] At para 50.

present acceptable evidence for the Court *a quo* and this Court, to review the agreement under the principle of legality, or to set its extension to the appellant aside. The Court *a quo* was in my view correct in not exercising its wide-ranging powers set out in s 159(1)(a) of the LRA to set the collective agreement aside or interfere with its extension. As regards the complaint that the first respondent was bound by the election to follow an all-comers model of consultation involving a facilitation process, and could not change tack, and that for that reason the retrenchment agreement should not be extended to the appellant, the Court *a quo*, reasoned inter *alia* that:

> 'While it is so that the parties agreed that there would be a single facilitation process involving all-comers, I can find no evidence to suggest that the companies (or unions for that matter) thereby waived their rights to conclude a retrenchment agreement on a per company basis, and to extend any such agreement in terms of section 23(1)(d). It would also be difficult to infer this, because notwithstanding the single facilitation process, the obligation to comply with sections 189 and 198A rests with each separate (statutory) employer, and any extension thereof would have to be in the name of that employer.'

The above reasoning cannot be faulted.

[41] For the above reasons, the appeal falls to be dismissed. There is an ongoing relationship between the parties. The issues in the appeal involved constitutional rights and have public significance. For these reasons, it shall be in accordance with the requirements of the law and fairness that there be no order as to costs.

[42] In the result, the following order is made.

The appeal is dismissed.

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Tlaletsi DJP

Molemela JA and Savage AJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANTS:	Mr M Niehaus of Minnar Niehaus Attorneys Port Elizabeth
FOR THE RESPONDENT:	Mr FA Boda SC Instructed by Cliffe Dekker Hofmeyer Inc. Sandton.