REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 99/14

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA	Applicant
ACTING IN ITS OWN NAME & OBO	
HARMONY GOLD MINING COMPANY LTD	
ANGLOGOLD ASHANTI LTD SIBANYE GOLD LTD	
and	
AMCU	First Respondent
NUM	Second Respondent
SOLIDARITY	Third Respondent
UASA – THE UNION	Fourth Respondent
EMPLOYEES LISTED IN ANNEXURE 'A'	
TO NOTICE OF MOTION	Fifth and Further Respondents

Heard: 22 January 2014

Delivered: 30 January 2014

Summary: Urgent application in terms of section 158 (1) (a) of the LRA – extension of the operation of a collective agreement to non- members in terms of section 23 (1) (d) of the LRA – constitutional right of minority union to collectively bargain. Majoritarian principle upheld – strike interdicted.

JUDGMENT

CELE, J

Introduction

[1] This application in terms of section 158 (1) (a) of the Labour Relations Act[1] (the Act) was brought on urgent basis and on less than 48 hours' notice to declare, as an interim relief, that the strike action called by the first respondent on 20 January 2014, set to commence at the mines of the members of the applicant from 23 January 2014, was unprotected. The applicant further sought, inter alia, an order to interdict the first respondent (AMCU) from inciting or otherwise encouraging its members and or any other employees from embarking on the unprotected strike and to interdict the fifth and further respondents from embarking on the unprotected strike.

[2] The basis for the application was that AMCU members, being the fifth and further respondents were bound by a collective agreement which regulated wages and other terms and conditions of employment dated 10 September 2013 entered into between the applicant, on behalf of its members, and the second third and fourth respondents. Clause 17 of that agreement expressly prohibited a strike by those bound by the agreement. The applicant further sought condonation for its failure to give the respondents a full 48 hour notice of this application in terms of section 68 (2) of the Act. AMCU, the fifth and further respondents opposed this application essentially on the basis that the strike in question was protected and that they were not bound by the wage

[1] Act Number 66 of 1995.

agreement as a collective agreement relied upon by the applicant. They however, did not contest the urgency of this application.

Factual background

[3] For the past 30 years, collective bargaining in the gold mining sector has been conducted centrally at industry-level, with the mines being represented by the Chamber (an employers' organisation). Centralised agreements are concluded between the Chamber (representing its members) and various unions, which have generally provided for uniform conditions of service across the industry within the bargaining unit. Since at least 2001, collective agreements have been applied by the mines to employees who are not members of the party unions to ensure the standardisation of conditions of service within the workplace.

[4] In circumstances where it had recently commenced recruiting members in the gold mining sector, AMCU was invited by the Chamber to participate in negotiations over the 2013-2015 wage agreement, together with other recognised unions. On 24 June 2013, Amcu, having accepted the invitation, submitted a list of demands to the Chamber, seeking the conclusion of an industry-wide agreement. During the ensuing negotiations, the Chamber represented a number of mines, including Harmony Gold Mining Company Ltd, (Harmony), Anglo Gold Ashanti Ltd, (AGA) and Sibanye Gold Ltd, (Sibanye). The unions who were party to the negotiations comprised AMCU, National Union of Mineworkers (NUM), Solidarity and UASA.

[5] On 24 July 2013, NUM, Solidarity and UASA declared a dispute of mutual interest and referred it to the CCMA. On 29 July 2013, the Chamber declared a dispute of mutual interest against AMCU and referred it to the CCMA. This in circumstances where AMCU had not moved from its original demands at all. Certificates of non-resolution were issued by the CCMA on 21 August 2013, in respect of the dispute referred by NUM and UASA), on 27 August 2013, in respect of the dispute referred by the Chamber against AMCU, and on 29 August 2013, in respect of the dispute referred by Solidarity.

[6] On 3 September 2013, and having given notice thereof, NUM members embarked on a protected strike. On 6 September 2013, the Chamber sent a revised offer to all the unions, with the deadline for acceptance being the close of business on 9 September 2013. On 9 September 2013, AMCU rejected this offer. On 10 September 2013, NUM, Solidarity and UASA entered into a wage agreement with the Chamber for 2013-2015 ('the wage agreement'). The strike by NUM was resolved on that basis. In terms of clause 1.2 of the wage agreement, read together with annexure 'A' thereto, the wage agreement was purportedly extended to employees who were not members of the party unions. That was done in circumstances where it was believed NUM, Solidarity and UASA represented the majority of employees at each employer's workplace.

[7] In terms of clause 17 of the wage agreement, the agreement is in full and final settlement of 'all demands and proposals made during the course of negotiations that led to the conclusion of this agreement', and 'wages and terms and conditions of employment' for the period 2013-2015. Clause 17 also contains various peace clauses, including that, for the period of operation of the agreement, the parties and any 'other person bound by' the agreement shall not: (i) seek to 'review or renegotiate' wages and other conditions of employment; or (ii) engage in a strike or lock-out over a demand 'to amend' wages and other conditions of employment.

[8] A controversy then arose regarding whether the wage agreement binds AMCU members–AMCU asserting that it does not, and the Chamber asserting that it does. AMCU called for a strike over matters of mutual interest, more particularly demands relating to wages and terms and conditions of employment. The demands made appear in a document annexed to the founding papers. On 20 January 2014, AMCU gave notice to Harmony, AGA and Sibanye that its members would commence with a strike on the morning shift on Thursday, 23 January 2014.AMCU thus provided 48 hours' notice of the commencement of the strike in writing as required by section 64 (1) (c) and there is no dispute that the notice complies with the requirements of the Act.

The issue

[9] The issue turns on the validity of clause 1.2 of the wage agreement, read together with annexure 'A' thereto, in terms of which the wage agreement was purportedly extended to employees who were not members of the party unions, done in circumstances where it was believed NUM, Solidarity and UASA represented the majority of employees at each employer's workplace. The meaning of how a "workplace" should be construed is part of the bone of contention as the parties have construed it differently. At the heart of the dispute lies the constitutional right of AMCU members to strike. AMCU contended that the collective agreement constituted a fundamental intrusion into and breach of the right of employees to strike over interest disputes as guaranteed in the Constitution[2] and the Act. The right to strike was sacrosanct and without it, the right to collective bargaining would simply be illusory.

Evidence

The workplace

1. Applicant's case

[10] Each of the companies represented by the applicant filed an affidavit with motivation on why each of their mines or operations constitutes a single workplace. One picture which the applicant contends emerges for each company is that the company has various mining operations, all of which are involved in the production of gold and mining licences are held by the company not by individual mines. The company is tightly controlled from a head office or corporate office, with the structure of the management portfolios reflecting how the company is managed overall with the financial and production planning, including the setting of production targets and staff levels, occurring at head office-level.

[11] Financial management is dealt with centrally, including the management of debtors and creditors, and the receipt of income. Centralised shared or support services are provided to the operations, for example, human

[2] The Constitution of the Republic of South Africa, 1996.

resources, and IT systems. Procurement is managed centrally and the mines do not procure their own goods and services. The mines are run by a general manager who reports into head office and is subject to overarching company policies and controls. Operating procedures, mining methodologies, and plant processes are standardised across the company. Security systems and IT systems are standardised across the company. All assets are owned by the company, with movable assets being transferred between the operations. All gold production is sold to Rand Refinery on a total production basis, not per mine.

[12] Mine recruitment is run centrally and all employees are employed directly by the company, which centrally manages employee remuneration. Each employee may be transferred between operations. Human resources policies are standardised across the company. Collective bargaining takes place at a centralised-level, with limited bargaining, typically over work practices, occurring at mine-level. Organisational rights are granted on a company-wide basis by AGA. Sibanye grants organisational rights on a per operation basis subject to an overarching company policy and subject to collective bargaining occurring centrally and Harmony has granted organisational rights at mine-level, but the agreements also require collective bargaining to take place centrally. Each of the three companies has uniform branding and signage across all operations.

[13] AGA is used as an example of how each company runs its business mainly in South Africa. It owns and operates various gold mines in various countries in Africa, Australia and the America's. AGA is divided into various regions, one of which is the South Africa region consisting of 6 mines with the associated infrastructure. They are:

13.1 Moab Khotsong Mine situated in the North West Province. On 10 September 2013, the date on which the wage agreement was entered into, some 4310 employees were employed at this mine;

13.2 Great Noligwa Mine situated in the North West Province. On 10 September 2013, some 2624 employees were employed at this mine;

13.3 Kopanang Mine situated in the North West Province. On 10 September 2013, some 4870 employees were employed at this mine;

13.4 Mponeng Mine situated in Gauteng Province. On 10 September 2013, some 6419 employees were employed at this mine;

13.5 Savuka Mine situated in Gauteng Province. On 10 September 2013, some 861 employees were employed at this mine; and

13.6 Tautona Mine situated in Gauteng Province. On 10 September 2013, some 3898 employees were employed at this mine.

[14] The first 3 mines mentioned above, are situated within a radius of 12 km from each other, with the nearest big town being Orkney. They are separated from the other 3 mines by a distance of some 100 km. The second 3 mines are situated within a radius of 7 km from each other, with the nearest town being Carletonville.

[15] On 10 September 2013, AGA also employed some 2627 employees in its South African Regional Services who have offices and workshops located in close vicinity of the mines as well as a small Support Office located centrally in Potchefstroom occupied mostly by senior management and specialist support staff. These employees provide various services to the mines. They render, *inter alia*, the following shared services to the mines: Engineering; Human Resources; Property; Finance; and Procurement. In addition, two further support service divisions exist within AGA. These are Health Services with a workforce of some 862 as at 10 September 2013. These services are rendered to the mines through primary healthcare facilities and hospital services and Metallurgy Services and Mine Waste Solutions with a workforce of some 2465 as at 10 September 2013. The functions provided by Metallurgy Services and Mine Waste Solutions are directly connected with the production of gold in that they deal with the crushing and refining of the gold-bearing ore produced by the mines. The “plants” where this takes place are situated in close proximity to each mine.

[16] Sibanye, AGA and Harmony currently recognise 4 unions for the purposes of collective bargaining, namely NUM, AMCU, UASA and Solidarity. At Sibanye the number of employees who were members of these unions as at 10 September 2013, the time the wage agreement was entered into, were: NUM -18 269; AMCU–9709;Solidarity–881;and UASA-9861. From the above it is clear that the NUM, together with Solidarity and UASA, had 20285 members. These members constituted 61% of the 33 166 employees of Sibanye and therefore constitute a clear majority of the employees in the workplace, as described below. AMCU's representation of 9709 members equated to 29.27% representivity. The names of AMCU members are listed in annexure "A3" to the notice of motion.

[17] The number of employees of AGA as at 10 September 2013 who were members of these unions are: NUM–14 436 members; AMCU–8544 members; Solidarity–787 members; and UASA–2 610 members. It is clear that NUM together with Solidarity and UASA had as members 17 833 members. Their members constituted 61.3% of the employees in the workplace as described below, and thus constituted a clear majority. AMCU's representation of 8,544 members equated to 29.4% representivity. The names of the employees who are currently members of AMCU and who constitute the fifth and further respondent are listed in annexure "A2" to the notice of motion.

[18] As at 10 September 2013, union membership within the workplace at Harmony was: NUM-64,3 %; UASA-9,0 %; Solidarity-1,9 %; AMCU -6,0%; and no union affiliation-8,8 %.

[19] With the recent rise of AMCU in the mining industry, AMCU has gained members at some Harmony operations, and has made demands for recognition at two mines. In respect of Masimong Mine, Harmony and AMCU reached agreement for the granting of limited organisational rights to AMCU, following the referral of a dispute to the CCMA. In respect of Kusasalethu Mine, union rivalry between NUM and AMCU led to a number of unprotected underground sit-ins and strikes in the latter part of 2012. On 14 February 2013, a collective agreement was concluded between Harmony, NUM,

AMCU, Solidarity, UASA and the CCMA whereby the parties committed themselves to *inter alia* a code of conduct, the rule of law and established central collective bargaining processes. Following disputes about verification of membership and organisational rights, Harmony and AMCU have been engaged in negotiations regarding a recognition and procedural agreement which would grant AMCU organisational rights and recognition at the Kusasalethu mine.

[20] On 4 October 2013, Harmony concluded a Recognition and Procedural agreement with AMCU in respect of the Kusasalethu operations. In terms of this agreement, AMCU agreed to honour the current distinction between the current Category 4 to 8 bargaining unit, miners and artisans bargaining unit and official bargaining unit in accordance with the established practice at the Chamber. In addition, AMCU agreed that company level issues such as matters of mutual interest, including but not limited to wage rates, conditions of service, fringe benefits, allowances, job grading system or salary scales, medical aid and retirement fund contribution rates will be negotiated at Chamber level.

[21] In terms of the recognition agreement with AMCU, they also agree that it shall negotiate annually , or as otherwise agreed with Harmony, in the Gold Sector Central Forum where Harmony is represented by the Chamber. AMCU specifically agreed that in such forum all existing conventions and house rules will continue to apply. This, applicant said, acknowledged that AMCU would abide by current conventions and house rules of established centralised bargaining under the auspices of the Chamber which included that all of Harmony's mines were regarded as a single workplace for the purpose of collective bargaining at the Gold Sector Central Forum and collective agreements entered at such level.

[23] All three companies insisted that their mining operations operated as single integrated units which were not independent of one another by reasons of their size, function or organisation. As with AGA the *modus operandi* they followed contributed to the company's ability to remain competitive, efficient, cost effective and it enhanced quick decision-making. In the result, it was the

Chamber's case that the various mine operations making up Harmony, AGA and Sibanye constituted a single workplace and that NUM, Solidarity and UASA, in conjunction with each other, had majority representation within the Harmony, AGA and Sibanye workplace at the time of the conclusion of the wage agreement, and accordingly, that the wage agreement was validly extended in terms of the Act. The Chamber contended that the strike by AMCU was unprotected.

AMCU's case

[24] In its answering affidavit, AMCU stated that it was unable to deal with all allegations raised by the applicant, due to limited time frames within which it could respond to the factual case put up by the applicant. AMCU found it impossible, within the short space of time it had, to verify the applicant companies' representivity figures. It said that except for Harmony Gold, the Chamber did not provide the representivity figures for each mine until requested to do so, at which time it was then too late. It then denied the correctness of the representivity figures. It chose not to ask for more time and relied on the fact that the order sought by the applicant was interim The case of the union was that the strike which was due to commence on 23 January 2014 by AMCU members was protected and AMCU was not bound by the agreement relied upon by the applicant for at least three independent alternative reasons:

24.1 The collective agreement purportedly extended to AMCU members is in substance a Sectoral Level collective agreement which can only be validly extended to non-parties by the Minister of Labour and cannot be extended in terms of section 23 (1) (d) of the Act.

24.2 AMCU members have a constitutional right to strike. Even if the collective agreement may be extended to AMCU members, the collective agreement cannot prohibit AMCU members, as non-parties, from striking in support of demands for more generous terms and conditions.

24.3 AMCU disputes that it is a minority union in the workplace as submitted by the applicant. Each mine is a separate workplace and AMCU members constitute a majority at five of the individual mines. A strike at these mines cannot be prohibited. As these mines fall under the operation of each one of the employer applicants, all the workers employed by that applicant may strike.

[25] AMCU members were also not properly identified in the agreement. But quite apart from this, the applicants have not demonstrated that the second, third and fourth respondents have, as their members, the majority of employees employed by the employer in the workplace. First, it is not clear to AMCU whether, in calculating the representivity figures, the applicants have taken into account all employees, including those falling outside the bargaining units, in determining their representivity figures. It is accordingly, disputed that the applicant has demonstrated that the second, third and fourth respondents are in the majority. Secondly, the applicant has not treated each mine as a separate workplace. A purposive interpretation of the Act would require each mine to be treated as a separate workplace. On this basis, the first respondent is the majority at the following mines:

25.1 Harmony's Kusasalethu operation–Harmony Gold and AMCU has concluded a separate recognition and procedural agreement for the Kusasalethu operation. AMCU has majority representation in the bargaining unit as defined in this agreement. The recognition agreement has not been cancelled and remains in force. Pursuant to clause 14 of the recognition agreement, AMCU members at this operation are entitled to strike. The conclusion of this agreement also demonstrates that the Kusasalethu operation is a separate workplace. It has not been possible for AMCU to verify the information contained in the supporting affidavit of Mr David John Thatcher because of the short notice of this application. The deponent to the answering affidavit, AMCU President is however, in a position to point out that the contention advanced that Harmony operates a single, integrated unit is not borne out by the conclusion of a specific recognition agreement for

this operation. In terms of clause 18.1 of the recognition agreement: 'no amendment of this agreement shall be of any force and effect unless reduced to writing and signed by the parties'.

25.2 Sibanye's Driefontein Consolidated Limited operation, previously KDC West, the applicant's attorneys, in their letter dated 21 January 2014, has admitted that AMCU has majority support at this mine. Clause 26.2 of the recognition agreement concluded between Sibanye and AMCU stipulates that no amendment to any terms of the agreement shall be effective unless reduced to writing and signed by the parties,

25.3 AGA's Mponeng, Savuka and Tautona Mines–AMCU enjoys majority support at all three of the aforementioned mines, and is still in the process of negotiating recognition agreements.

[26] The mines operated independently by size and function. AMCU was clearly the majority union at these mines. The agreement which purportedly extended its terms to Amcu's members was invalid and of no force and effect because it calculated the representivity figures in the workplace on a flawed premise. It was disputed that the mines of Harmony, Anglo Gold and Sibanye Gold ought to be grouped in each category as a single workplace.

[27] The non-variation clauses contained in the recognition agreements mentioned above required AMCU to sign a written agreement before being bound thereby. It was therefore not permissible for the applicants to extend the collective agreement concluded with the second to fourth respondents to AMCU as this contradicted the express terms of the recognition agreements.

[28] The Kusasalethu operation fell under Harmony, Driefontein operation fell under Sibanye and the Mponeng, Savuka and Tautona mines fell under AGA. All the employees employed by these employers might strike in support of the demands at these mines and engage in a primary strike. Clearly therefore, all employees of a single employer might engage in a primary strike in support of workers that may be employed at one branch of the employer. In the result, the entire strike was protected.

Evaluation

[29] The parties in this matter differed in how this application is to be determined. The case of the applicant is essentially reliant on section 23 (1) (d) of the Act and the meaning therein of the 'workplace'. The respondents took the main position, among the three proffered, as being that the constitutional right of employees to strike[3] had to be decisive. The applicant bore the onus to prove that it was entitled to the order it sought. Section 23 (1) (d) of the Act which the applicant placed its reliance on reads:

> '(1) A collective agreement binds-
>
> (d) employees who are not members of the registered trade union or trade unions party to the agreement if –
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees
>
> and
>
> (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace'.

[30] Section 23 (2) of the Constitution relied on by the respondents reads:

> 'Every worker has the right
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union and
>
> (c) to strike'.

[30] A similar right is accorded by section 23 (3) Of the Constitution to the employer to form and join an employers' organisation. Then section 23 (5) of the Constitution reads:

[3] See section 23 of the Constitution.

> '(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)'. See also *Sandu v Minister of Defence and Others*[4].

[31] National legislation to be enacted to regulate collective bargaining and which legislation may limit a right in the Bill of rights is a clear reference to the Act, section 23 (1) (d) of which is at issue. For present purposes, I shall assume that section 23 (1) (d) of the Act is constitutional. The meaning of 'workplace' in section 23(1) (d) is for the present purposes a key issue. The term is defined in section 213 to read:

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

[32] As correctly submitted by Mr A Myburgh for the applicant, the general rule is stated in the primary part of the definition, all the place or places where employees of an employer work constitute a single workplace. The second part of the definition is in the nature of a proviso, it is not an independent clause, but rather provides an exception to the primary part of the definition[5]. Commenting on a workplace Clive Thompson[6] wrote:

> 'A "workplace" encompasses *all* the different places of work of an employer (unless some of them are independent in the sense specified in the definition). On the other hand, one worksite may be fragmented into several "workplaces" if independent operations are identified there. Compare the Australian approach, which focuses on the individual geographical site: a workplace is "a single physical area occupied by the establishment from

[4] [2007] 9 BLLR 785 (CC).
[5] Mzeku and Others v Volkswagen SA (Pty) Ltd and Others [2001] 8 BLLR 857 (LAC) at paras 55 and 67.
[6] Thompson and Cheadle, et al Current Labour 1997 at 3.

> which it engages in productive activity on a relatively permanent basis'. (Original emphasis.)

[33] In his commentary on the Act Martin Brassey had the following to say:

> 'In the private sector the nature of a "workplace" is a question of fact. If the employees all work in one place, it is the workplace: if they are divided into separate branches or depots, the separate locations can each be a workplace. Deciding whether two locations are separate workplaces entails an examination of the extent to which they operate independently of each other, which in turn entails a consideration of the size, function and organisation of each. Geographical separation will be important, but will not always be decisive.'[7]

[34] In effect, it is thus for the applicant to establish that the various mines or operations operated by Harmony, AGA and Sibanye constitute a single workplace for each entity and it is for AMCU to establish that the various mines or operations constitute separate workplaces on the basis that they are 'independent of one another by reason of their size, function or organisation'. This approach assumes that section 23 (1) (d) is applicable in this matter. The contention by the respondents is that it is not applicable because the wage agreement is a Sectoral agreement which could only be extended to non-parties by the Minister of Labour in terms of section 32 of the Act. The submission is further that the Chamber and its members are purporting to by-pass the legislative scheme by extending the agreement to non-parties in the gold mining sector; and consequently, that the extension is invalid.

[33] The latest interpretation of section 23 (1) (d) of the Act by this court, per van Niekerk J, is found in the matter of *Transnet SOC Ltd v National Transport Movement and Others*[8] where it was held that the provisions of section 23 (1) (d) applied only to a case where a single employer in a single union contracted and could not be used by two or more unions or two or more employers to bind third parties. The Court also recognised that even if this

[7] Brassey Commentary on the Labour Relations Act at A9-35–A9-36 (RS 2, 2006).

[8] [2014] 1 BLLR 98 (LC).

was permissible, it did not mean that they could prevent non-parties from striking in support of their demands, by holding that:

> '[17] I am not persuaded that section 18 read with clause 4.4 of the agreement serves to limit any exercise of the right to strike by the first respondent. First, section 18 contemplates an agreement between a single majority trade union and the employer, at least where the threshold agreement is not concluded in a bargaining council. The section refers to an agreement between 'an employer and a trade union..'. It specifically does not contain the qualifications incorporated in section 14(1) and section 16(1), which specifically permits one or more unions acting jointly to make up the majority for the purposes of acquiring the right concerned. If it was the intention that a union could act jointly with others to fix thresholds applicable to other unions seeking organisational rights, it would have said so.
>
> [18] In the present instance, it is common cause that the collective agreement was concluded between Transnet and four trade unions. Because it is an agreement concluded between an employer and more than one union (none of which, incidentally, is in its own right a majority union), it is not an agreement contemplated by section 18, and does not bind the first respondent. Secondly, even if section 18 were to permit agreements between an employer and two or more minority unions acting jointly to bind non-party unions and fix thresholds that they are required to meet to gain the organisational rights referred to in sections 12, 13 and 15, there is no express limitation in section 64 or section 65 which would preclude a minority union demanding those rights from seeking to bargain collectively to acquire them, or from exercising its right to strike should the employer resist the demand. Given that this court is enjoined to adopt an interpretation of the LRA that is consistent with international labour standards and with the fundamental rights contained in section 23 of the Constitution, section 18 does not present a bar to the exercise of the right to strike in the present instance'.

[34] Section 23 (1) (d) of the Act was legislated for a purpose, which this Court clearly recognised in the *Transnet* decision above. Any interpretation of it that renders the section nugatory needs to be avoided. In terms of this section a collective agreement binds employees who are not members of the registered trade union or trade unions party to the collective agreement if three

conditions stated therein are met. This section does not purport to exclude from its operation any employee only on the basis of being a member of a trade union that is not a party to the collective agreement, hence the third condition in the sub-section referring to the majoritarian principle. The *Transnet* decision clearly states that two or more minority unions acting jointly to bind non-party unions and fixing thresholds that they are required to meet to gain the organisational rights, would not preclude a minority union demanding those rights, from seeking to bargain collectively to acquire them.

[35] With these legal principles in mind, I return to the facts of this matter. There is a factual issue about how the workplace is constituted in respect of each company represented in this matter by the Chamber. In resolving the dispute, I take note that an answering affidavit and a replying affidavit have been filed by the parties, even though the order sought is still of interim in nature. I shall accordingly be guided by the principles enshrined in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9]. While the respondents set out to contradict the evidence of the applicant on the structural arrangements of each company, no real, genuine or bona fide dispute of fact has been raised against detailed descriptions of each company given in the supporting affidavits of the applicant. The issue of the service of the papers within a period shorter than 48 hours, though raised in the papers, was not pursued with when the matter was presented.

[36] The workplace, according to the respondents is simply the area where the organisational rights are to be exercised. It was conceded though that the greatest difficulty in defining a workplace arises in the context of a business which operates at different sites or has different divisions. Different operations where employees work independently of one another are contemplated as constituting a workplace. The respondents contend that such independence may be established with reference to one or more of the criteria of size, function or organization. Indeed these criteria are not defined and must be interpreted with reference to a specific organization.

[9] [1984] 2 All SA 366 (A).

[37] Yet, with reference to the companies represented by the Chamber, a common thread appears to run through each in that each company has various mining operations, all of which are involved in the production of gold where mining licences are held by the company and not by individual mines. Each company is tightly controlled from a head office or corporate office, with the structure of the management portfolios reflecting how the company is managed overall. Financial and production planning, including the setting of production targets and staff levels, occurs at head office-level. Financial management is dealt with centrally and this includes the management of debtors and creditors, and the receipt of income.

[38] Centralised shared or support services are provided to the operations for example, human resources, and IT systems. Procurement is managed centrally, with the mines not procuring their own goods and services. Each mine is run by a General Manager who reports into head office and is subject to overarching company policies and controls. Operating procedures, mining methodologies, and plant processes are standardised across each company. Security systems and IT systems are standardised across the company. All assets are owned by the company, with movable assets being transferred between the operations. All gold production is sold to Rand Refinery on a total production basis, not per mine. Recruitment of personnel is run centrally. All employees are employed directly by the company, and may be transferred between operations. Employee remuneration is managed centrally. Human resources policies are standardised across the company.

[39] Collective bargaining has for many years been taking place at a centralised-level, with limited bargaining, typically over work practices occurring at mine-level. Organisational rights are granted on a company-wide basis by AGA. Sibanye grants organisational rights on a per operation basis subject to an overarching company policy and subject to collective bargaining occurring centrally. Harmony has granted organisational rights at mine-level, but the agreements also require collective bargaining to take place centrally.

[40] Accordingly, I find that the applicant succeeded in proving that the various operations or mines making up Harmony, AGA and Sibanye constitute a

single workplace. The respondents did not effectively dispute that NUM, Solidarity and UASA in conjunction with each other had majority representation within the Harmony, AGA and Sibanye workplace, as now determined, at the time of the conclusion of the wage agreement. Only a bold denial statement was made which carried less evidential weight against the detailed explanation of the applicant. From the figures given by the applicant[10]NUM was the majority union which, in conjunction with Solidarity and UASA formed an even larger majority. Unlike in the *Transnet* matter *supra*, this was not the ganging up of the minority unions against one union. The majoritarian principle should accordingly carry the day in a democratic collective bargaining exercise.

[41] The respondents have raised an important constitutional issue of the right of the employees, being members of AMCU, to strike, to collectively bargain and a right to freedom of association. Section 23 (1) (d) was said not to expressly permit the limitation of the right to strike of non-parties to the collective agreement. It was contended furthermore, that it was clear from the text of section 23 (1) (d) (iii) that the section was intended to apply to the workplace of an individual employer and not to employers acting collectively. The respondents submitted that the words **"**the employer in the workplace" clearly demonstrate that the reach of the provision did not extend to permit the conclusion of collective agreements by more than one employer jointly as the applicant has purported to have done in this instance. The submission was that the words "that person is bound by a collective agreement" in s 65 (1) (a) must be interpreted restrictively to be limited to the parties to that collective agreement. The further submission was that the Act and particularly the provisions of section 23(1) (d) read with section 65 (1) (a) & (b) must be read restrictively and in a manner which is consistent with the Bill of Rights. I concur with these meritorious submissions.

[42] The effect of the collective agreement being assailed by the respondents needs then to be considered. In doing so, the constitutional right of the employer to engage in collective bargaining should similarly be upheld. As

[10] See paragraphs 16 to 18 hereof.

already pointed out earlier, Sibanye, AGA and Harmony currently recognise 4 unions for the purposes of collective bargaining, namely NUM, AMCU, UASA and Solidarity. The collective agreement binds each company, individually, with each of the unions. Put differently, the pulling out of one of the companies, for instance due to liquidation, would not affect the legality and validity of the collective agreement. Seen in that light, each company has entered into a collective agreement with each of the unions, without the other company or companies lending legality or efficacy to the collective agreement, in the same manner as a federation could represent a group of unions. Accordingly, the provisions of section 23(1) (d) read with section 65 (1) (a) and (b) are applicable in this matter, without violating the meaning of the words **"**the employer in the workplace". In any event, a registered employers' organisation is expressly referred to in section 23 (1) (c) of the Act as a possible party to a collective agreement.

[43] In *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others*[11], the LAC found that, in terms of section 23 (1) (d), a majority union can conclude a collective agreement that is binding even on employees who are not its members. What remains clear is that section 23 (1) (d) of the Act can be extended only to the employees who are not parties to the collective agreement. It may not lawfully be extended to the employers. It is, inter alia, in this respect that section 23 (1) (d) differs from section 32 of the same Act. The submission by the respondents that sector level collective agreements may only be extended to non-parties by the Minister of Labour, in terms of section 32 of the Act, after the majority parties in the sector have established a Bargaining Council for the sector and area in terms of Part C to the Act, has nothing to do with the extension of collective agreements in terms of section 23 (1) (d) of the Act. The submission that the applicant is purporting to by-pass the legislative scheme for the promotion of Sectoral collective bargaining by concluding an agreement between itself and the three unions and then to extend it to non-parties in the sector is far from the truth.

[11] [2001] 8 BLLR 857 (LAC).

[44] The constitutional right of employees to strike in this matter must not be seen in isolation from the right of the members of NUM, Solidarity and UASA to collectively bargain with their employers. Accepting that NUM, Solidarity and UASA represented the majority of the employees in the workplace, it would be constitutional to allow the democratic process of the majoritarian representation to prevail. If the minority employees represented at the workplace by AMCU were to succeed and have a new wage agreement to come about and to supplant the existing collective agreement, the minorities would be governing for the majority in the workplace. That result is certainly undesirable. Clearly therefore the submissions by the respondents are untenable.

[45] I conclude that the wage agreement contains a series of section 23 (1) (d) extensions on a per employer basis, which, in my view, is clearly permissible. The applicant has shown that it is entitled to an interim interdict having shown the existence of a *prima facie* right, that irreparable harm would visit the companies it represents and that a balance of convenience favours the granting of a relief where there is no satisfactory alternative remedy.

[46] Accordingly:

1. A *Rule Nisi* is issued calling upon the First Respondent and fifth to Further Respondents herein to appear and show cause on **14 March 2014 at 10:00am** or soon thereafter why a final Order should not be granted on the , in the following terms:

1.1 Declaring the strike action called by the first Respondent on the 20 January 2014, set to commence at the mines of the members of the Applicant from 23 January 2014, is unprotected;

1.2 Interdicting the first respondent from inciting or otherwise encouraging its members and or any other employees from embarking on the unprotected strike;

1.3 Interdicting the fifth to further respondents from embarking on the unprotected strike;

1.4 Ordering the first respondent to communicate the terms of the court order to its members on an urgent basis; and

1.5 Ordering the first respondent to pay the costs of this application.

2. Prayers 1.1 to 1.4 above shall operate as an interim interdict with immediate effect and shall remain in force until such time as it is confirmed, varied, extended or discharged by this court.

3. The order shall be served on the first and fifth to further respondents in the following manner:

3.1. By service on the first respondent's Attorneys and heads office

3.2. By service on one of the first respondent's branches representatives at each mine where the strike has been called;

3.3. By attaching copies of the order, together with a letter explaining the effect of the order to notice boards in hostels and gathering areas

3.4. By reading aloud by a person/s nominated by the applicant to so many of the fifth and further respondents as are present at the applicant's premises at the time

3.5. By distributing copies of the order to as many of the fifth and further respondents as may request same; and

3.6. By SMS to known cellular phone numbers of the fifth and further respondents with the wording: *"the Labour Court has interdicted the strike that was planned to commence on 23 January 2014. The panned strike is interdicted as of 30 January 2014 and you must continue to report for work.*

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the appl*icant:* *Mr A Myburgh SC with Mr G Fourie*

Instructed by Edward Nathan Sonnenbergs

For the respondents: *Mr P M Kennedy SC with Mr Boda.*

Instructed by L Dave Attorneys