IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA103/2014

In the matter between:

ASSOCIATION OF MINEWORKERS AND	
CONSTRUCTION UNION	**First Appellant**
THE PERSONS REFERRED TO IN ANNEXURE "A"	
TO THE NOTICE OF MOTION	**Second and Further Appellants**

and

THE CHAMBER OF MINES OF SOUTH AFRICA	
ACTING IN ITS OWN NAME AND ON BEHALF OF	
HARMONY GOLD-MINING COMPANY (PTY) LTD	
AND ANGLO GOLD ASHANTI LTD AND SIBANYE	
GOLD LIMITED	**First Respondent**
NATIONAL UNION OF MINEWORKERS	**Second Respondent**
SOLIDARITY	**Third Respondent**

UNITED ASSOCATION OF SOUTH AFRICA **Fourth Respondent**

MINISTER OF LABOUR **Fifth Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL

DEVELOPMENT **Sixth Respondent**

Heard: **21 August 2015**

Delivered: **24 March 2016**

Coram: Tlaletsi DJP, Musi *et* Coppin JJA

Summary: Extension of a collective agreement to employees in the workplace who are not members of the majority union parties to the collective agreement concluded in terms of section 23(1)(d) of the LRA. Trade union contending that it and its members were not bound by collective agreement entered into employers and other trade unions- trade union contending that individual mines where it had majority membership 'workplaces'; also contending that because agreement not signed under the auspices of the bargaining council but Chamber of mines, which it equated to a bargaining council, only Minister having legislative power to extend agreement to non-parties and because that was not done the agreement not binding on it and its members - union failing to establish as a fact that individual mines were separate workplaces as contemplated in section 213 of the LRA; Union also failing to distinguish between section 23 and section 32 of the LRA - section 32 of the LRA dealing with the extension of collective agreements concluded in a bargaining council which are extended to non-parties by the Minister - section 23 of the LRA allowing for collective agreements to be concluded outside bargaining councils at workplace plant level and/or on a centralised basis. Evidence adduced demonstrating that Chamber not a bargaining council and that collective agreement signed at plant level could not be extended by the Minister – section 23 having its own extension mechanisms: collective agreement binding on employees not members of the trade union or unions which are party to the collective agreement, if they are identified in the

agreement, the agreement expressly binds them, and the trade union, or unions, who are party to the agreement have as members the majority of employees employed by the employer in the workplace. Collective agreement meeting these requirements and consequently binding on the minority trade union. Moreover, trade union failing to prove that each individual mines operating as an independently workplace – evidence proving that each individual mine not independent operations in terms of their size, function or organisation as some departments are centralised and therefore constituting a single workplace.

Constitutionality of section 23 of the LRA – trade union contending that section 23, read with section 65 and the definition of 'workplace' in section 213 inter alia infringing its right to collectively bargain and strike as contemplated in section 23 of the Constitution in that it prohibits minority union from striking when bound by collective agreement that was extended to it - nothing unconstitutional about the majoritarianism principle – majoritarianism principle consonant with the Constitution, international law and the purpose of the LRA - extension of collective agreements on the basis of majoritarianism rational and reasonable as it ensures that collective bargaining is successful and brings peace and order in the workplace. Impunged sections do not infringe any other Constitutional rights contended for- limitations of rights justified as contemplated in terms of s36 of the Constitution- Labour Court's judgment upheld and appeal dismissed.

JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment and order of the Labour Court (Van Niekerk J)[1] in terms of which, in effect, the appellants ("*AMCU*") and its members were held to be bound to a collective wage agreement entered into between the first respondent ("*the Chamber*"), representing employers namely, the gold-mining companies, Harmony Gold Mining Company (Pty) Ltd

[1] The judgment of the Labour Court is published as: *Chamber of Mines of South Africa (acting in its own name and obo Harmony Gold Mining Company Ltd and others) v Association of Mineworkers and Construction Union and Others* [2014] 9 BLLR 895 (LC).

("*Harmony*"), Anglo Gold Ashanti Limited ("*Anglo Gold*"), Sibanye Gold Ltd ("*Sibanye*") and other unions, namely the second respondent ("*NUM*"); the third respondent ("*Solidarity*") and the fourth respondent ("*UASA*"), as contemplated in terms of section 23(1)(d)(iii) of the Labour Relations Act No 66 of 1995 ("*the LRA*") and interdicting AMCU and its members from striking in respect of the dispute settled in terms of a collective agreement and as contemplated in section 65(3) of the LRA. The appeal is also against the order of the Labour Court upholding the constitutionality of section 23(1)(d)(iii) of the LRA read with section 65(3) of the LRA.

[2] The appeal was opposed, principally by the Chamber and the employers it represents and NUM. The Minister of Labour, who is cited as the fifth respondent, opposes the appeal in respect of the constitutionality issue only.

[3] In brief, section 23(1)(d)(iii) of the LRA provides that a collective agreement entered into as contemplated in that section not only binds members of trade unions who are parties to that agreement, but may also bind all other employees in the workplace who are not members of the majority trade unions (in the workplace) and who are parties to the agreement. Section 65(3), *inter alia,* prohibits a person from participating in a strike, or any conduct in contemplation or in furtherance of a strike, if that person is bound by a collective agreement (including one as contemplated in section 23 of the LRA).

[4] It is *inter alia* common cause that each of the the mining companies, Harmony, Anglo Gold and Sibanye, owns more than one mine. Further, that at certain of the individual mines of those companies, AMCU had a majority membership and that at others, it did not, but that, overall, AMCU did not have the majority membership at most of the respective companies' mines.

[5] The main issue in the court *a quo* and on appeal, other than the question of the constitutionality of section 23(1)(d)(iii) of the LRA, was in effect, whether each individual mine, of the respective mining companies, constituted a "*workplace*", as defined in 213 of the LRA. AMCU contended that they were and if they were found not to be, that section 23(1)(d)(iii) of the LRA was

unconstitutional. There is a third issue, namely, whether the agreement was a sectoral agreement, which could not be extended in terms of section 23, but had to be extended in terms of section 32 of the LRA. The court *a quo* held on the facts that the individual mines of the respective companies did not constitute an independent workplace and that the sections under attack, including section 23(1)(d)(iii) of the LRA, was constitutional and that the agreement had been validly extended to other employees in the respective workplaces, including AMCU's members, in terms of section 23(1)(d)(iii).

[6] There was an application made at the outset of the hearing before us to condone the late filing of the record. The application was not opposed and was granted. There was also an application at the outset by AMCU to produce further evidence on appeal in relation to the issue regarding "*workplace*" and it was also not opposed. But the Chamber, and more particularly Anglo Gold, being the only party really affected by the request, filed affidavits in response to that application. In brief, AMCU sought to place before us affidavits, made by deponents on behalf of Anglo Gold in other proceedings, in which they described each of its mines as a separate workplace. In its answer, the Chamber (Anglo Gold) produced affidavits by those same deponents acknowledging having described each mine as such, but explaining that the term was used loosely in the context of those matters and was not intended "*to convey any meaning related to the statutory concept of a 'workplace' and that 'it was simply intended to refer to the concept of a separate business unit or units*'". We admitted the evidence tendered by AMCU and that of the Chamber (Anglo Gold) in response. I shall revert to this evidence in the course of my discussion of the issues.

[7] For now, I shall proceed to give a brief history and background of this matter, which is, effectively, common cause and then I will deal with the main issues and the sub-issues in turn.

<u>History/background</u>

[8] During 2013, the Chamber, which is a registered employers' organisation and which also acts as a collective bargaining agent of its members, including Harmony, Anglo Gold and Sibanye, entered into negotiations with all the unions which are cited in these proceedings.

[9] On 24 July 2013, NUM, Solidarity and UASA declared a dispute of mutual interest with the Chamber. The dispute was referred to the Commission for Conciliation Mediation and Arbitration ("*CCMA*").

[10] On about 27 August 2013, a certificate stating that the dispute remained unresolved was issued by the CCMA.

[11] On 29 July 2013, the Chamber declared a dispute of mutual interest with AMCU. The dispute was also referred to the CCMA and was conciliated.

[12] During August 2013, a certificate was also issued in respect of the Chamber's dispute with AMCU, stating that it remained unresolved.

[13] On 3 September 2013, NUM embarked on a protracted strike in support of their demands. On 6 September, the Chamber made a revised offer to the Unions, but AMCU rejected the offer. The Chamber then entered into a collective agreement with NUM, Solidarity and UASA which is at the heart of AMCU's discontent. The collective agreement (which for convenience, is also referred to as "the agreement"), deals with wages and other conditions of employment.

[14] The agreement itself provides in effect that it is an agreement as contemplated in section 23(1)(d) of the LRA. It binds all the employers and the unions including, employees employed in the workplace of each respective employer who were not members of the trade union parties to the agreement, which includes AMCU's members. It records that it is in full and final settlement of the disputes between the Chamber and the parties that are bound by it. Very relevantly, for this matter, it records that no party bound by the agreement will call for a strike or lockout in support of demands to amend wages and other conditions of employment for the duration of the agreement.

[15] Notwithstanding this agreement, AMCU called for a strike over the very matters the agreement precluded them from striking about. On 20 January 2014, AMCU gave 48 hours' notice of the commencement of the strike.

[16] On 21 January 2014, the Chamber brought an urgent application in the Labour Court in terms of section 68(2) of the LRA for interim relief, *inter alia*, declaring AMCU's intended strike action to be an unprotected strike and interdicting AMCU and its members from engaging in any conduct in furtherance or in support of the strike. This application was opposed by AMCU.

[17] The contention of the Chamber was that the strike was unprotected because AMCU was bound by the collective agreement that had been concluded in the Chamber and had been extended to all employees in the respective workplaces, including to those who were not members of the majority trade union parties, in terms of section 23(1)(d)(iii) of the LRA.

[18] The issue was whether the mines operated by each of the companies, Harmony, Anglo Gold and Sibanye, respectively, in each instance together constituted a single composite workplace at the respective company, or whether each individual mine was an independent workplace.

[19] If each individual mine was not an independent workplace, but each of the respective companies' mines together constituted a single composite workplace of that company, then the extension of the collective agreement (if it was an agreement as contemplated in terms of section 23(1)(d)) would be valid since AMCU was not a majority union in such a workplace. In such a case, the strike would also be unprotected, because AMCU is bound by the collective agreement as contemplated in section 23(1)(d)(iii) read with sections 65(1)(a) and 65(3)(a)(i) of the LRA. However, if each mine was an independent workplace, the extension would not have been valid in respect of those mines where AMCU had a majority membership and the strike would be protected.

[20] The Labour Court found in favour of the Chamber that the agreement was valid, that AMCU and its members, who were employees of the companies

that were party to the agreement, were bound by the agreement and granted interim relief, *inter alia,* interdicting AMCU from proceeding with its intended strike. In the interim, before final relief was to be considered by the Labour Court, AMCU brought a counter-application, challenging the constitutionality of, *inter alia*, section 23(1)(d) of the LRA.

[21] AMCU sought a declaratory order that the interpretation which the Labour Court gave to section 23(1)(d), read with section 65(1)(a) of the LRA and the definition of "*workplace*" in section 213 of the LRA, which was applied when granting the interim order, was unconstitutional, because it violated the rule of law and the constitutional rights of AMCU and its members. In particular, it was alleged that it violated their right to human dignity (section 10 of the Constitution[2]), right to freedom of association (section 18); right to freedom to choose and practice a trade, occupation and profession (section 22), labour rights (in particular the rights contained in sections 23(1), 23(2)(a), 23(2)(b), 23(2)(c), 23(4)(a), 23(4)(b) and 23(5) of the Constitution) and their right to administrative justice (section 34). And, in the alternative, if the court found that the interpretation of the Labour Court, when granting the interim order, was correct, AMCU sought an order that section 23(1)(d) read with section 65 and the definition of 'workplace' in section 213 of the LRA – was unconstitutional for violating the aforementioned rights – to the extent that the impugned sections granted private employers and trade unions the power to bind, by way of an extended collective agreement between them, other employees and trade unions who were not party to the agreement, and effectively preventing them from, *inter alia*, bargaining collectively and striking concerning matters of mutual interest.

[22] In the court *a quo*, AMCU abandoned the part of the relief they sought which is related to the interpretation of section 23(1)(d) by the court which granted the interim relief and confined itself with a slightly more direct attack on section 23(1)(d). In its judgment, the court *a quo*, nonetheless, albeit justifiably, describes the attack as "*defuse and far-reaching*".

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

[23] After a detailed and careful analysis of the facts and the law, including international law, and various relevant international Conventions, the court *a quo* concluded that the impugned provisions were not unconstitutional, confirmed the rule *nisi* issued when the interim relief was given and dismissed the counter-application of AMCU.

[24] On appeal, counsel for the appellants explained the relationship between the main application and the counter-application, and their position as follows:

24.1 that the issues were related because section 23(1)(d) read with section 65(1)(e) and section 65(3)(a)(i) of the LRA contains an express limitation of the right to strike;

24.2 when a court is interpreting a statutory provision which was enacted to limit a constitutional right, the court must at the interpretation stage – determine which of the two reasonably plausible interpretations is to be upheld;

24.3 the term "*workplace*" in section 213 of the LRA, looked at in context, can be reasonably interpreted to mean that each individual mine is a "*workplace*". And if this interpretation is adopted, AMCU has no problem, because, (according to the appellants) it "*has a majority mine at each employer and thus all employees may strike*". This interpretation, according to the appellants, "*does promote the fundamental rights to bargain collectively and to strike*";

24.4 in the alternative, if the word "*workplace*" in its context in section 23(1)(d), is reasonably capable of the interpretation which was given to it by the court *a quo,* then section 23(1)(d) read in context with section 65(1)(a) and 65(3)(a)(i) of the LRA is unconstitutional;

24.5 accordingly, if this Court finds in favour of the interpretation contended for by AMCU (and the other appellant) there would be no need to declare the impugned provisions unconstitutional.

<u>The issues</u>

[25] On appeal, there are accordingly two main issues for determination. The first main issue being whether AMCU is bound by the collective agreement concluded in the Chamber. The second main issue, which would only have to be determined if the first issue is decided against the appellants, is the constitutional issue.

Is the collective agreement binding on AMCU (the members of AMCU)?

[26] There are two sub-issues that arise under this heading. Firstly, whether the agreement is indeed a collective agreement as contemplated in section 23(1)(d) of the LRA and secondly, if it is, what the meaning of the word "*workplace*" is, in the context of section 23(1)(d) of the LRA.

[27] In respect of the first sub-issue, the appellants submitted that the collective agreement is in substance a sectoral level collective agreement which could only be validly extended to non-parties by the Minister of Labour in terms of section 32 of the LRA. Since the agreement was not extended accordingly, it did not bind non-parties (including the members of AMCU).

[28] I may mention that the same argument was raised in the urgent court and in the court *a quo* and was rejected.

[29] Section 32 of the LRA deals with the extension of collective agreements concluded in a bargaining council (i.e. at sectoral level). Section 23 of the LRA, on the other hand, allows for collective agreements to be concluded outside bargaining councils at workplace (plant) level and/or on a centralised basis. The recognition agreements which AMCU relies upon for its contention that each mine constitutes a separate workplace, makes it clear that collective bargaining in respect of wages and conditions of employment will be centralised.

[30] The chamber is not a bargaining council as contemplated in the LRA, nor is it registered as a bargaining council as contemplated in that Act. The collective agreement, by which the Chamber and the other union sought to bind AMCU's members, was concluded in the Chamber and not in a bargaining council. On that basis alone section 32 would not be applicable.

[31] Centralised bargaining in the mining industry dates back to the early years of the 20th century. It has undergone changes and developments over the years but it is the traditional way in which bargaining has occurred in that industry. It is not a new concept.[3]

[32] I will however consider the argument raised by the appellants on the point in more detail, particularly in light of the implications of those arguments.

[33] It was submitted on behalf of the appellants that the following admissions of the Chamber were significant namely: that for the last 30 years, negotiations over wages and terms and conditions of employment in the gold-mining sector were conducted at industry level; that the Chamber has always entered into centralised agreements with the relevant unions and has purported to apply the agreements to all employees in the bargaining unit; furthermore, that the Chamber has admitted that the gold-mining sector would become unrest prone and unmanageable if different conditions were to be applied to employees who performed the same function, but belonged to different unions; that if AMCU's demands were acceded to, it would render gold-mining operations in South Africa unviable (even though AMCU intended to conclude an industry-wide agreement) and furthermore, that the Chamber had admitted that the total gold-mining sector employed 123 810 employees as at 10 September 2013[4]; and that between Harmony, Anglo Gold and Sibanye, they, collectively, employed about 92 140 employees.

[34] In light of those alleged admissions, the appellants- relying on the decision in *Transnet Soc Ltd v National Transport Movement and Others,*[5] where it was held that section 23(1)(d) only applied in an instance where a single employer and a single union contracted "*and could not be used by two or more unions or two or more employers to bind third parties*"- submitted that the section did not prevent non-parties from striking in support of their demands.

[3] For a comprehensive discussion of this topic see Godfrey, Maree *et al* "*Collective Bargaining in South Africa – Past, Present and Future*" (Juta; 2014) especially pages 203-210.
[4] 29 880 were employed by Harmony; 29 094 by Anglo Gold Ashanti; and 33 166 were employed by Sibanye.
[5] [2014] 1 BLLR 98 (LC) paras 17 and 18.

[35] In respect of the applicability of section 23(1)(d), the appellants further submitted that "*to ignore that the collective agreement is a sector level agreement … ignores substance over form*" and that "*the objective fact is that mines and the unions negotiate at sectoral level and do so on a collective basis, not on an individual basis*". According to the appellants, the Chamber and the mining companies (Harmony, Anglo Gold and Sibanye) "*operate like a bargaining council but are not complying with the provisions of the Act to the extent that it applies to them in substance*". The appellants alleged that the Chambers and the mines have "*avoided the obligation to register and have also avoided the requirements of section 32*".

[36] In elaboration of these points, the appellants go on to submit that while the court *a quo* was thus correct to find that the "*agreement de facto serves to regulate matters of mutual interest in a particular sector*", it was wrong in finding that the application of section 32 was not dependent on the nature of the agreement sought to be extended, but on the nature of the institution in which the agreement was concluded. According to the appellants, this finding gave "*precedence to form over substance*". According to the appellants, the Labour Court ought to have found that the purported extension of the agreement in terms of section 23(1)(d)(iii) of the LRA was invalid and of no force and effect.

[37] In light of those submissions, it is necessary to look at the wording and purpose of section 23(1)(d) and section 32, respectively, of the LRA. In doing so one bears in mind the salient principles of interpretation under our Constitution, including the crucial importance of context and that the interpretation, as far as possible, must be free of distortion and undue strain[6]. I have already dealt with the nature of the agreement earlier. Of significance, it does not purport to bind employers who are not parties to it, nor does it purport to bind the entire gold mining sector.

[38] Section 3 of the LRA directs that any person applying the LRA "*must interpret its provisions-(a) to give effect to its primary objects; (b) in compliance with the*

[6] See; inter alia, *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20

Constitution; and (c) in compliance with the public international law obligations of the Republic."

[39] Section 23 deals with the legal effect of a "*collective agreement*". In section 213 of the LRA the term "*collective agreement*" is defined as follows:

> '*Collective agreement' means a written agreement concerning 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 hand – (a) one or more employers; (b) one or more registered employers' organisations or (c) one or more employers and one or more registered employers' organisations.'*

[40] For the purposes of this discussion, I will merely quote section 23(1) which reads as follows:

> '***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 the conduct of the employers in relation to the employees or the conduct of the employees in relation to the 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 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."

[41] It is obvious from the definition of "*collective agreement*" and section 23(1), that the collective agreement contemplated in section 23(1)(d) is not confined to an agreement between a single trade union and a single employer. The appellants' reliance on the decision in the *Transnet Soc* case is based on a misreading of that decision. The court there was not interpreting section 23(1), or section 23(1)(d), but was interpreting another section. Section 23 of the LRA does permit an agreement between multiple parties. It clearly permits an agreement between an employer and employees, or two, or more, unions. Not only does the definition of collective agreement contained in section 213, which applies to section 23, imply and contemplate multiple parties to such an agreement, but section 23(1) reinforces it.

[42] Section 32 of the LRA also contemplates multiparty collective agreements, but is confined in its application to those agreements that are concluded in a bargaining council. Section 31 of the LRA deals with the binding nature of collective agreements concluded in a bargaining council. Sections 31(a), (b) and (c) are similar to section 23(1)(a), (b) and (c). Section 23(1)(d) goes on to deal with the extension of collective agreements, concluded outside a bargaining council, to non-parties. In respect of the extension of collective agreements concluded within a bargaining council, there are extensive provisions dealing with that matter which are contained in section 32. One significant difference between collective agreements concluded within and those concluded outside bargaining councils, is that the former are capable of extension to employers who are not parties to the collective agreement, while the same is not permissible in respect of the latter.

[43] It is apparent from a reading of sections 32 and 23, within their proper contexts within the LRA, that the two sections contemplate, essentially, two different kinds of collective agreement. In section 23, collective agreements outside bargaining councils are contemplated and provided for, whereas section 32 contemplates collective agreements concluded on a broader basis,

and more particularly, within bargaining councils. There are significant differences between the sections. I referred to one important difference earlier. A survey of the cases shows that it is principally employers who seek exemption from, or who challenge collective agreements entered into in terms of section 32, or who challenge the extension by the Minister of such agreements to them.

[44] It is rather simplistic to argue that the Chamber and the relevant mining companies are, "*de facto*", a bargaining council, without marshalling specific facts in support of the submission. The LRA in Part C, contains extensive provisions relating to the nature and establishment of bargaining councils. Section 27 deals with their establishment, section 28 with their powers and functions, section 29 deals with their registration and section 30 has extensive provisions regarding the constitution of such bodies.

[45] There is nothing in the LRA that allows for the recognition of a body as a bargaining council in circumstances, where, at least, the provisions of sections 27, 29 and 30 have not been complied with. Seemingly, there have been proposals for and consideration of the establishment of a bargaining council for the mining industry, but these have come to nought because of challenges with that industry. Besides the costs, the definition of the scope of such a council has been identified as a problem.[7]

[46] There is nothing in the substance of the agreement in question that makes it into an agreement concluded in a bargaining council. There are similarities between the two kinds of agreement contemplated in section 23 and section 32, respectively, but those similarities do not make one into the other.

[47] In sections 23 and 32, the LRA recognises the fundamental right to collectively bargain and that the absence of a bargaining council should not constitute an impediment to the exercise of that right. This is consistent with and in compliance with the Constitution, the public international law

[7] See further Godfrey, Maree *et* al *Collective Bargaining in South Africa-Past, Present and Future* (Juta 2014) pp209-210.

obligations of the Republic of South Africa and gives effect to the primary objects of the LRA.

The definition of "workplace"

[48] If the definition of "*workplace*", contained in section 213, applies in section 23(1)(d)(iii), there is hardly any contentious issue of interpretation. The definition is reasonably clear and unambiguous and no absurdity results from its application in section 23(1)(d).

[49] Section 213 has a general introduction in the following terms: "*Definitions – in this Act, unless the context otherwise indicates* – and then goes on to define terms, one of them being "*workplace*". In relation to instances other than in the Public Service, the term is defined as meaning "*the place or places where the employees of an employer work*" and goes on to provide: "*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 the employees work in connection with each independent operation constitutes the workplace for that operation.*"

[50] It is evident from the definition (if it applies) that whether two or more operations of an employer constitute separate workplaces, is a matter of fact. They must be independent operations by virtue of their "*size, function or organisation*". The definition provides clear criteria by which to determine if such separate places, or operations are separate 'workplaces', notwithstanding that there is one employer.

[51] Section 213 of the LRA is unequivocal that the defined meaning will apply throughout the LRA, unless the context in which the term is used in the LRA indicates otherwise. This is not an unusual provision. It is an established principle of interpretation of statutes that where a statute contains definitions, the defined meanings must be applied throughout the Statute, unless the

court is satisfied that the defined meaning does not fit in the context and that another meaning is to be given to the word.[8]

[52] The court *a quo* effectively found that the context of the word "*workplace*" in section 23(1)(d), did not indicate that a meaning other than the defined meaning had to be given to that word. The defined meaning of "*workplace*" is, effectively, an independent operation with regard to its size, function or organisation.

[53] The court *a quo,* in essence found on the facts, that it was established (or not disproved) that the mines of each of the employers were not independent operations in terms of their size, function or organisation. Each of the employers represented in the Chamber filed supporting affidavits in the application proceedings in which they deposed to facts in support of their contention that their respective mines together, constituted a single 'workplace' as contemplated in section 213 of the LRA. The court *a quo* found that AMCU "*has failed to engage with the detailed factual averments afforded in the supporting affidavits of the employers*".

[54] In its answering affidavit, the deponent on behalf of AMCU (and its members) merely avers that a purposive interpretation of the LRA requires each mine to be treated as a separate workplace. In a supplementary affidavit filed by AMCU, it still failed to meaningfully engage with the Chamber's and the employers' averments that each of the companies conducted their respective mines as a single workplace. AMCU merely averred in the supplementary affidavit that it had concluded recognition agreements with the employers in respect of each of the mines[9] and that each of the mines had to report individually in terms of certain regulatory requirements.

[55] Harmony Gold filed a detailed supporting affidavit giving an overview of its mining operations and so did Anglo Gold Ashanti and Sibanye Gold. As the court *a quo,* in my view, rightly observed, the picture that emerges from the

[8] See *E A Kellaway Principles of Legal Interpretation (Statutes, Contracts and Wills)* (Butterworths, 1995) page 270; *Union Government v De Jager* 1946 AD 235 at 236; *Town Council of Springs v Moosa* 1929 AD 401, which are also referred to by *Kellaway*.

[9] In particular, with Harmony's Kusasalethu mine, Sibanye's Driefontein mine and that negotiations were underway in respect of Anglo Gold Ashanti's Mponeng, Savuka and Tautorum mines.

affidavits is that each of these employer companies had various gold-mining operations. The mining licences were held by the companies and not by individual mines operated by them. All the mines of each company are controlled from a central head office where production and financial planning, including the setting of production targets and staff levels, is performed. The mines of each company are also centrally managed financially. This includes the management of debtors and creditors and the receipt of income.

[56] In the case of Harmony, its mines do not operate their own bank accounts but the company operates a central account for all its mines. Support services, such as human resources and IT systems, are centralised. Procurement is centralised. While each mine is run by a manager – the manager reports to the centralised head office concerned and there are common policies and controls.

[57] Each company, in respect of each of its mines, applied to all of its mines the same mining methodologies and plant processes, all of which was standardised, including the security systems and the information technology (IT) systems. All assets are owned by the respective company and assets are transferred between the mines. Individual mines do not sell the gold they produce, but the gold produced from all the mines of each respective company is sold by that company. The individual mines are not employers, but each of the mining companies is.

[58] In its supporting affidavit in the concluding paragraphs under the topic "*Workplace*", the deponent on behalf of Harmony Gold states that.

> '*13.1 It is clear that Harmony operates as a single integrated unit whose sole purpose is the production of gold and sale on international markets. No mine or operation can be seen as being independent of the others.*
>
> *13.2 The mines are generally of a similar size, with the shared and support services themselves being sizeable. The mines' function in an almost identical manner with the support of shared and support services, which do not exist independently of the mines. From an overall*

perspective including for the purposes of collective bargaining mines and operations are organised as a coercive whole.'

[59] Similar concluding paragraphs under the topic "*Workplace*" appear in the supporting affidavits of Anglo Gold Ashanti. Sibanye Gold in its concluding paragraph on the topic states:

'*100. It is submitted that from the above it is clear that:*

100.1 Sibanye has, in a collective agreement concluded on 10 September 2013 with unions representing 72% of the industry workforce, defined all of its operations as constituted;

100.2 Employees on the mines are employed by Sibanye and not by the mining divisions;

100.3 The mines are divisions of the company (Sibanye) and are not independent entities in their own rights;

100.4 The company operates as a single integrated unit whose sole purpose is the production of gold for sale in the international markets and no mine can be seen as being independent of the others, particularly when this involves general management of the company and the setting and regulation of terms and conditions of employment;

100.5 The mines are of a similar size, they function in a similar manner, and from an overall perspective, including for the purposes of collective bargaining, the mines are organised and managed as a coercive whole;

100.6 All policies relating to human resource as well as technical, environmental, health and safety and production issues are determined at corporate office and apply equally across all mines and operations;

100.7 While mine level bargaining may exist, such bargaining is confined to operational level issues and the unions may not at mine level negotiate on wages and terms and conditions of employment;

100.8 As a result new terms and conditions of employment apply equally across all mines and operations;

100.9 Furthermore, to prevent conflict and ongoing disruption conditions of employment are not determined according to union membership and agreements regulating conditions of employment which have been concluded with unions which represent the majority of employees, are always extended to apply to employees who are members of minority unions, or who are not unionised; and

100.10 Whereas organisational rights are conferred on a decentralised basis in respect of specific recognition or bargaining units, or specific mines and operations, such agreements are concluded with Sibanye in respect of these mines.'

[60] In its answering affidavit, the deponent for AMCU and its members averred that due to time limits they were not in a position to answer each paragraph of the founding affidavit and the three supporting affidavits of the mining companies. In respect of the workplace issue, the deponent for AMCU and its members, without substantiation, merely avers, concerning AMCU, that they "*dispute that it is a minority union in the workplace as submitted by the applicants. Each mine is a separate workplace..."* Elsewhere in that answering affidavit, the deponent avers that "*the applicants have 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*".

[61] Having referred to specific mines where AMCU had the majority representation and where there was a recognition agreement in place, the deponent to the answering affidavit of AMCU, averred that the conclusion of the recognition agreements "*demonstrates*" that the respective mine it applied to is a separate workplace. Otherwise, AMCU did not refute or effectively counter the factual averments made by the Chamber and the respective mining companies in support of their contention that the companies, respectively, operated their mines as a single integrated unit.

[62] In their replying affidavit, the Chamber and the employers represented by it, *inter alia,* averred that AMCU had failed to plead any facts supporting a

conclusion that the individual mines of each employer constituted independent operations by virtue of their size, function or organisation.

[63] In a supplementary affidavit filed by AMCU about two months after the Labour Court (Cele J) had delivered its judgment in respect of the interim relief, AMCU purported to engage the factual averments made by the employers in their respective supporting affidavits, but did not effectively or truly do so. They again raised a bare denial to the averments that the mines of the respective employers, namely, Harmony, Ashanti Gold and Sibanye Gold, were independent of each other and organised as a coercive whole. AMCU relied on its recognition agreements and the separate charter compliance reports which had to be submitted by each mine, as well as separate social and labour plans that each mine had to submit and which had been discovered.

[64] According to the deponent for AMCU, the reports were "*destructive*" of the allegation that these respective employers each operated all of their mines as a single workplace. The reports themselves are bulky documents that were merely annexed to AMCU's supplementary answering affidavit and no specific facts from those reports were relied upon in that affidavit of AMCU. The Chamber applied for the striking out of those reports, *inter alia,* on the ground that they were improperly attached by the deponent without identifying any particular portions on which reliance was being placed, apparently relying on the decision of *Swissborough Diamond Mines v Government of the Republic of South Africa.*[10] Despite applying for the striking out of those reports, the Chamber and the employers, represented by it, dealt with AMCU's averments.

[65] The point made in AMCU's affidavit was that the employers submitted separate reports in respect of each mine and that was proof that each mine was a separate operation. The Chamber submitted that that fact was irrelevant to the enquiry as to what constituted a "workplace "and furnished reasons for the separate reporting. In particular, that it was necessitated by the requirements of the Mining Charter which was published in terms of the

[10] 1999 (2) SA 279 (T) at 324F-G; see also *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others*[2014] 5 BLLR 434 (LAC) para 22 where the same principles were applied.

Mineral and Petroleum Resources Development Act[11] ("*the MPRDA*") and the Regulations published under that Act. One report was to be submitted per mining right acquired at the different mines.

[66] The Chamber denied that the submission of more than one report, or plan, was destructive of its averment that the mines of each company, respectively, together operated as a single, integrated workplace. The reports, or plans, were drafted in according to a standard pattern at central level, scrutinised and approved at central level and had to comply with "*central established*" requirements. They were also to be signed at that central level by senior executives.

[67] In my view, the court *a quo* was correct in striking out the annexures and finding that the appellants had failed to deal with the factual averments made by the first respondent and the employer companies.

[68] There was no genuine dispute of fact on the issue and the court *a quo* rightly accepted that a case had been made out that each of the employer companies conducted all their mines as a single workplace and not as separate workplaces.

[69] The fact that AMCU had recognition agreements in respect of some mines, or enjoyed majority support in such mines, did not make those mines independent workplaces. Further, that a mine may or might not be a bargaining unit, does not mean that it is an independent workplace. In any event, the very recognition agreements the appellants rely upon stipulates that collective bargaining on wages and substantive conditions of employment shall be at central level.

[70] Similarly, the submission of separate reports, by the individual mines, did not imply that the mines were independent workplaces. They did so in compliance with a statutory requirement pertaining to mining rights.

[71] The (new) evidence which the appellants introduced on appeal before us, does not take the matter any further. The first respondent has explained in

[11] Act No 28 of 2002.

what context the averments in those other applications were made, and the appellants were unable to refute what was a reasonable explanation and seemingly, accepted it.

Other arguments relating to the binding force of the collective agreement

[72] The appellants raised other points under the rubric, "the requirements of section 23(1)(d)(iii) were not satisfied", in support of their argument that the collective agreement was not binding on them.

[73] Firstly, with reference to the decision in *Early Bird Farms (PTY) Ltd. V FAWU and Others ('Early Bird Farms'),*[12] the appellants submitted that members of AMCU *"are not properly identified in the agreement",* and, secondly, that the Chamber "*did not demonstrate that the Unions (other than AMCU) have, as their members, the majority of employees employed by the employer in the workplace*". They also submitted in respect of this point that it was not *"clearly established whether the Chamber took into account all employees (including those falling outside the Bargaining Units) in determining their representivity figures*", and contended that each mine should be a separate workplace and that the basis on which the agreement was extended is therefore flawed.

[74] Thirdly, the appellants contended that the "no-variation "clauses, in the recognition agreements AMCU concluded with the employer companies, requires AMCU to sign an agreement before it can be bound thereby, and since the collective agreement was not signed by AMCU, it and its members, were not bound by the agreement.

[75] I shall briefly deal with these arguments in turn. I should point out that the appellants have made these arguments on the basis of and within the broader context that each mine constitutes a 'workplace'. That proposition cannot stand, as I pointed out earlier and was correctly rejected by the court *a quo.*

[12] [2004] 7 BLLR 628 (LAC).

[76] In any event, with regard to the first point, the appellants' reliance on the decision of this Court in *Early Bird Farms* is misplaced. There this Court concluded, with reference to a particular set of facts, which are distinguishable from those of the present case, that section 23(1)(d) of the LRA requires that the employees, who are intended to be bound, are to be identified, because it had not been done in that case. In this matter, clause 1.2 of the collective agreement, read together with annexure "A" to that agreement, specifically identifies employees who are to be bound by the collective agreement, as including those who are not members of the trade unions who are parties to the collective agreement. Clause 1.2 provides: "*the Chamber of Mines, acting on behalf of the Employers, and the Unions further agree that this Agreement shall, by virtue of the provisions of section 23(1)(d) of the Labour Relations Act 66 of 1995, as amended ("the LRA"), bind all other employees employed by the Employers, whether or not they are members of the Unions, who are employed in the abovementioned recognition units in the workplace of each respective employer, as defined in Annexure A hereto".*

[77] The "Unions" are identified as NUM, Solidarity and UASA. The "Employers" are defined in Annexure "A" to the agreement as Anglo Gold Ashanti, Goldfields Ltd, Harmony Gold Mining Co Ltd, Pan African Resources PLC, Rand Uranium Ltd, Cooke Operations, Sibanye Gold Ltd and Village Main Reef Ltd.

[78] Annexure "A" further provides that the agreement covers (i.e., is binding upon) those employees listed in respect of their respective workplaces, each of which comprises the mines and services as listed. In clause 1.1 of the agreement, the "Recognition Units" are identified. The clause specifically provides: "*this agreement shall apply to the Employers as well as to the Unions and their members who are employed in the category 4 to 8, miners and artisans and officials recognition units by the Employers".*

[79] In my view, there can be no issue of the employees not having been identified as contemplated in section 23(1)(d) of the LRA. The appellants did not suggest that each employee had to be specifically identified by name. In any

event, it would have been impractical and unduly onerous to describe each employee by name.

[80] The second argument relates to the facts. The court *a quo* found[13] as a proven fact that "*while AMCU represents a majority of the employees at five mines (three managed by Anglo Gold Ashanti, one by Sibanye and one at Harmony), the number of employees who are covered by the wage agreement on extension constitute a majority of the total number of employees employed by each of the employer parties to the agreement. It is also not disputed that despite an initial averment to the contrary and in compliance with section 23(1)(d), the majority threshold was determined by reference to the total number of employees employed by each of the employer parties, and not on the basis of those employees engaged by each of them in the agreed bargaining unit."* This finding of the court *a quo* was not challenged.

[81] On the correct interpretation and as factually established, the individual mines, where AMCU had a majority representation, were not workplaces on their own. The employees, who were members of the other trade unions who were parties to the collective agreement, constituted the majority of the total number of the employees, not only in the respective workplaces of those employers who were parties to the agreement, but arguably in the entire gold mining sector.

[82] AMCU's argument, that it is not bound by the collective agreement because it did not sign the agreement, is also not sustainable. It is contrary to and ignores the clear wording of section 23(1)(d), which does not require a signature to make it binding by extension. Employees in the respective workplaces (and by extension, the trade unions representing them), who are in the minority and who are not parties to the collective agreement are bound by it, if the requirements in section 23(1)(d) are met. The argument of the appellants is not only disingenuous, but undermines the entire concept of collective bargaining and the policy of majoritarianism that has been chosen by the lawmaker, as a mechanism to render the collective bargaining effective. The irony is that AMCU purports to rely on its majority in individual

[13] See: para 7 at p900 of the reported judgment (*supra*).

mines in order to enhance its status in the bargaining process. In any event, the variation clauses in the recognition agreements are not applicable to the collective agreement. The latter is not a variation of the former.

Summary

[83] In summary then, the definition of "*workplace*" in section 213 of the LRA is applicable to section 23(1)(d) of the LRA. The word "*workplace*" in that section, means the "*place or places where the employees of an employer work*". The fact that an employer has more than one place of work does not mean that each of those places of work is a "*workplace*".

[84] In terms of section 213, if an employer carries on or conducts more than one operation – that is independent of the other by reason of its size, function or organisation, the place or places where the employees work in connection with each independent operation, constitutes a workplace for that operation.

[85] Whether each mine of the respective employer or each such mine where AMCU had a majority, constituted a 'workplace' of the employees of the employer, was a question, not of interpretation, but of fact. To constitute a separate 'workplace' it had to be established that the mines (of each respective employer) were independent operations by reason of their size, function or organisation. In this instance, appellants merely made the allegation, but failed to substantiate it. On the contrary, it was established on the papers that each employer carried on its respective mines as a single independent operation.

[86] The court *a quo* correctly found that the collective agreement bound the members of AMCU who were employed by the respondent employers, and by extension, bound AMCU as the trade union of those employees. The collective agreements contemplated in section 23 are not the same as those contemplated in section 32. The latter are collective agreements concluded within a bargaining council, while the former are collective agreements concluded elsewhere.

[87] The collective agreements envisaged in section 23 cannot be extended in terms of section 32. Section 23 contains its own extension mechanism. The section provides that the collective agreement will be binding, *inter alia,* on employees, who are not members of the trade union or unions who are party to the collective agreement, if they are identified in the agreement, the agreement expressly binds them, and the trade union, or unions, who are party to the agreement, have as members the majority of employees employed by the employer in the workplace. These requirements were rightly held to have been met. The collective agreement between the first respondent and the trade unions, effectively identified the employees that were to be bound by it, including AMCU members, and expressly made the agreement binding upon them – and the other trade unions, who were parties to the collective agreement, had as their members the majority of employees employed by each of the respective employers in their respective workplaces.

Constitutional challenge

[88] In light of the conclusion reached in respect of the meaning of "*workplace*", I will now consider the constitutional challenge.

[89] The appellants did not persist in this Court with the relief they sought in prayer 3 of their counter-application, but sought the relief described in prayer 4, as an alternative to the relief in prayer 3.

[90] Prayer 4 reads as follows:

> '*Alternatively to 3 above, to the extent that the Court hearing the proceedings on the return day finds that the interpretation placed upon the provisions of section 23(1)(d) as read with section 65(1)(a) and the definition of 'workplace' in section 213 of the Labour Relations Act 66 of 1995, by Cele J, in the judgment under case number J99/14 dated 30 January 2014, is correct (because such sections cannot reasonably be interpreted otherwise), declaring that the provisions of section 23(1)(d) as read with section 65(1)(a) and the definition of 'workplace' set out in section 213 of the Labour Relations Act, 66 of 1995, conflicts with the Constitution of the Republic of South Africa*

1996 in particular sections 10 (human dignity), 18 (freedom of association), 22 (freedom of trade, occupation and profession), 23(1), (2)(a), (b), (4)(a) and (b) and (5) (labour relations) and section 34 (administrative justice) to the extent that these provisions:

4.1 Grant private employers and Trade Unions the power to secure by means of an extended collective agreement the imposition of binding obligations upon employees and Trade Unions not party to such agreement; and/or

4.2 Grant private employers and Trade Unions the power by means of an extended collective agreement to prevent non-party trade Unions and their members from exercising their aforesaid fundamental rights, including but not limited to their right to collectively bargain and their right to strike over matters of mutual interest.'

[91] In terms of prayer 5:

'*[A] declarator is sought that the extension of the collective agreement is unconstitutional and invalid and declaring that the provisions of clauses 17.3 and 17.4 (which prohibits the appellants from collective bargaining or striking in support of demands of any issue covered in the agreement or any other existing terms and conditions of such agreement) to be unconstitutional and invalid and that the strike by the appellants would be protected under the Labour Relations Act and making such further order that is just and equitable in terms of section 172 of the Constitution of the Republic of South Africa 1996.'*

[92] The appellants' constitutional attack is relatively diffuse. It is directed at section 23(1)(d) read with section 65(1)(a) and the definition of "*workplace*" in section 213 of the LRA.[14] The appellants bear the onus to prove the infringement(s) of their constitutional rights[15]. The challenge ought to be clear and forthright, not only clearly identifying the alleged offending provision(s) and the constitutional right(s) that have been infringed thereby[16], but also

[14] More particularly the proviso to the definition that provides the criteria for determining whether two or more operations of the employer are separate workplaces as defined.
[15] See, *inter alia*, *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 49.
[16] See, inter alia*, Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) ; 2006 (2) BCLR 274 (CC) para 43.

demonstrating ,in the clearest possible language, the nature and extent of the alleged infringement. The diffuseness of the appellants' challenge not only makes it difficult for the opposing parties to respond and for the court to determine the matter, but for the appellants themselves to discharge their onus.

[93] The appellants' attack appears to be directed to an extent at section 23(1)(d) of the LRA, insofar as the principle of majoritarianism is part of that provision. Section 23(1)(d), read with section 65(1)(a) of the LRA, prohibits minority employees from striking if the collective agreement they are bound by, albeit by extension, so provides. The irony of the attack is that the appellants are contending for certain rights in terms of the LRA, on the ground that their members are in the majority at certain of the individual mines owned by the respondent mining companies. Their argument was not *per se* in opposition to the principle, but to the fact that it is operative in section 23(1)(d), which according to them, does not have similar safeguards to section 32 of the LRA.

[94] It was submitted on behalf of the second respondent that the appellants' attack was mainly based on the argument that section 23(1)(d) of the LRA limits their right in terms of section 23 of the Constitution, namely, their rights to strike and engage in collective bargaining. In that regard, it was submitted, on behalf of NUM, that section 23(1)(d), on its own, does not limit the right to strike, but that 65(1)(a) of the LRA limits a person's right to strike if that person is bound by a collective agreement that contains a peace clause, and does so despite the fact that such a person, or her trade union, is not party to the collective agreement and that its binding effect has been extended to the person in terms of that agreement as contemplated in section 23(1)(d).

[95] However, it was submitted on behalf of all the respondents that to the extent that section 23(1)(d) of the LRA, read with the other provisions, limits the rights to strike and to collectively bargain, the limitation was reasonable and justifiable.

[96] In terms of section 23(2) of the Constitution, every worker has the right to strike, to form and join a trade union and to participate in the activities and the programmes of a trade union.

[97] In terms of section 23(5) of the Constitution, every trade union has the right to engage in collective bargaining. But collective bargaining may be regulated through national legislation. However, in terms of that section, any limitation of, *inter alia,* those rights must comply with section 36(1) of the Constitution.

[98] Section 39 of the Constitution[17] provides:

"*(1) When interpreting the Bill of Rights, a court, tribunal or forum-*

(a)must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[99] Section 33 of the Constitution further provides:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[100] The meaning of section 23(5) of the Constitution is unambiguous. If, objectively viewed, the regulation of collective bargaining impacts negatively, or more particularly, limits any of the rights included under section 23 of the

[17] See:*Investigating Directorate; serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) para 23 on the application of section 29(2).

Constitution, including the right to strike, then the regulation must be evaluated under section 36(1) of the Constitution.[18]

[101] The LRA is the national legislation which, *inter alia,* regulates collective bargaining. One of the purposes of the LRA is, *inter alia,* in terms of section 1(c) "*to provide a framework within which employees and their trade unions, employers and employers' organisations can (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy*".

[102] In terms of section 1(d) of the LRA, the purpose of the LRA is also to "*promote – (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace and the effective resolution of labour disputes*"[19]. The stated purposes of the LRA are doubtlessly consistent with the Constitution, but the means adopted to achieve those purposes must also pass constitutional muster. If the chosen means limit any of the rights contained in, *inter alia,* section 23 of the Constitution, in order to pass muster, the limitation must be reasonable and justifiable in the sense contemplated in section 36.

[103] All relevant factors are to be taken into account, including the nature of the right that is limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether the purpose could have been achieved by any less restrictive means.[20] Section 36 contemplates a proportionality analysis in terms of which those factors are weighed in order to determine the justifiability of the limitation[21]. In performing the required exercise courts are not to "adhere to a

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[18] Compare: *Affordable Medicine Trust and Others v Minister of Health* 2006 (3) SA 247 (CC) especially at para 58 (*Affordable Medicines Trust)*.

[19] In *Chirwa v Transnet* 2008 (4) SA 367 (CC) para 110 the Constitutional Court held that:"*the objects of the LRA are not just textual aids to be employed where the language is ambiguous.This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitutio..The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA."*

[20] See section 36 of the Constitution of the Republic of South Africa, 1996.

[21] See: *inter alia*, *S v Makwanyane* 1995 (3) SA 391 (CC) para 149.

sequential check-list", but are to"engage in a balancing exercise and arrive at a global judgment on proportionality".[22]

[104] In this matter, the complaint is essentially that by virtue of the principle of majoritarianism, which is contained in section 23(1)(d) of the LRA, minorities in the workplace may be bound by a collective agreement entered into between the employer/employers and the majority of employees, or the representatives of that majority, in the workplace. Section 23(1)(d) read with section 65(1)(a) of the LRA effectively means that minorities (employees and their unions who are bound in the sense contemplated by section 23(1)(d)), are also precluded from striking in respect of the subject-matter of the agreement which is binding upon them. The objection to this consequence is primarily based on the notion that section 23(1)(d) does not have the safeguards which section 32 of the LRA has in relation to the extension of collective agreements to non-parties.

[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,*[23] this Court (per Zondo JP) expressed itself on the topic as follows:

> '*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.'*

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[22] *S v Manamela & Another (Director-General of Justice Intervening*)2000 (3) SA 1 (CC) para 32.
[23] [2001] 1 BLLR 25 (LAC) at para 19. See also; *Mzeku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) paras 55 and 67.

[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.

[108] This principle is also recognised in international law and, in particular, in the applicable conventions and recommendations of the International Labour Organisation ("*ILO*").

[109] The two relevant conventions of that body, which are binding on the Republic of South Africa and which are also referred to in the judgment of the court *a quo,* are Convention number 87, namely, the Freedom of Association and Protection of Right to Organised Convention of 1948 and Convention number 98, namely, the Right to Organised and Collective Bargaining Convention of 1949.

[110] The jurisprudence of the committees engaged in ensuring the observation and application of those Conventions, including the recommendations, is also an important resource. Specifically with regard to the principle of majoritarianism, both, the Committee of Experts and the Freedom of Association Committee of the governing body of the ILO have "*held that the majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time*". (footnotes omitted)[24]

[111] The respondents have submitted that the adoption of the principle of majoritarianism in the context of section 23(1)(d), is rational and reasonable, i.e. is justified, in terms of section 36 of the Constitution. I will return to this issue after considering some of the other factors.

[112] The principle of extending collective agreements to minorities or non-member workers in the workplace is not contrary to international law. The appellants have, seemingly, accepted the legitimacy of such extension, but for the fact, according to them, that section 23(1)(d) of the LRA does not have the

[24] As per O'Regan J in *NUMSA and Others v Bader Bop (Pty) Ltd and Another* [2003] 2 BLLR 103 (CC) at para 31.

"*safeguards*" found under section 32 of the LRA. The Freedom of Association Committee of the ILO, for example,[25] states that:

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

[113] In their General Survey,[26] the Committee of Experts confirm that the extension of collective agreements to non-parties is not contradictory to the principle of voluntary collective bargaining and does not violate Convention No. 98.

[114] With regard to the nature of the main right, which the appellants assert has been unconstitutionally impacted, namely, the right to strike, it is necessary to bear in mind that even though it is undoubtedly essential for the success of collective bargaining, like all other organisational rights, it is not an end in itself.[27] It is one means to the end of collective bargaining, which is the conclusion of a binding collective agreement. Strike action is an essential, albeit ultimate, means of finding, or achieving, negotiated solutions to disputes of interest. It is not an absolute right and its limitation may be justified as contemplated in the Constitution.

[115] The LRA does not confine collective bargaining to bargaining councils under section 32. Section 23(1)(d) refers to and recognises collective bargaining outside the system of bargaining councils. The LRA also recognises that besides bargaining within bargaining councils, that process may occur outside bargaining councils at different levels and particular at plant level and at a central level.

[25] Para 1052 of the "*Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO"* (Fifth (revised)edition; 2006).
[26] See; *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*,2008 (Report III (Part1B), ILO Conference 102st Session, 2012, p 99 para 245.
[27] See: *Inter alia, NUMSA and Others v Bader Bop (Pty) Ltd and Another (supra)* para 13.

[116] I have already dealt with some of the important differences between sections 23(1)(d) and 32. The reason for requiring extensions of collective agreements, concluded within bargaining councils, to be effected by the Minister, has to do with the extent of the coverage of those agreements. It may apply to an entire sector, or area, and not only to non-party employees, or minority unions, but to all employers and workers within that sector, whereas collective agreements concluded in terms of section 23(1)(d) may only bind the employers and employees (and trade unions) who are parties to it, as well as non party employees, who are minorities in the workplaces of those employers and to whom the agreement has been made binding.

[117] It would be impractical if minority workers were not bound to collective agreements concluded at workplace level between the employer(s) and trade unions who represented the majority of the employees, simply because they were not parties to that collective agreement. Furthermore, to require unanimity amongst all employees, despite different trade union membership or affiliation would be unrealistic. To prohibit extension of the collective agreement to the minority employees, who were not parties to the collective agreement, so that they are not bound by it, would not only undermine the enforcement and therefore the effectiveness of the collective agreement, but also be destructive of collective bargaining *per se*, to peace in the workplace and to the achievement of fair labour practices[28]. Such consequences are clearly not in conformity with the LRA and the Constitution.

[118] The extension of such collective agreements on the basis of majoritarianism is not only rational, but is also reasonable. It is a means of ensuring not only that collective bargaining is successful, but that it brings about peace and order in the workplace.

[119] Section 23(1)(d) of the LRA expressly allows for employees, who are not members of the trade unions who are party to the collective agreement, to be bound by the agreement if the requirements or conditions stipulated in that section are met. Those employees must be identified in the agreement, which

[28] See; *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC);{2009} 1 BLLR 1 (CC) oara 56.

must specifically bind them and the trade unions, who are party to the agreement, must have as their members the majority of the employees employed by the employer in the workplace.

[120] The binding of non-parties is not only necessary to achieve the objectives of section 23(1)(d), but also of the broad purposes of the LRA, referred to earlier, including effective and orderly collective bargaining. The mechanism provided by section 32 for the extension of collective agreements concluded in bargaining councils is not a less restrictive means at all.

[121] It is clear from section 32 that the Minister does not have a wide discretion concerning the extension of collective agreements concluded in bargaining councils. If the requirements stipulated in that section have been complied with, the Minister, effectively, has to act upon the request for the extension of the agreement. Section 32(2) of the LRA provides that within 60 days of receiving the request, the Minister "*must*" extend the collective agreement if the requirements stipulated in sub-section (3) have been met.[29]

[122] In terms of section 32(5), the Minister may extend the collective agreement despite sub-sections (3)(b) and (c) of section 32, if the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council and the Minister is satisfied that the failure to extend the agreement will undermine collective bargaining at sectoral level or in the Public Service as a whole.

[123] The appellants have, seemingly, misconstrued the Minister's powers in terms of section 32. The Minister's involvement in the bargaining process at workplace level is more likely to stultify the process and would certainly not contribute to its effectiveness or promote stability and peace in the workplace. The Minister's involvement in the process at workplace, or centralised level cannot enhance matters.

[124] The second respondent has gone as far as submitting that in setting a requirement of ministerial approval before a collective agreement can be

[29] For discussion of the topic see Karen Calitz "*The Extension of Bargaining Council Agreements to Non-Parties*" (2015) 27 S A Mercantile Law Journal; and H Cheadle 2006 27 ILJ 663.

extended, would in itself be a violation of the right to engage in collective bargaining and a contravention of ILO Convention No. 98.[30]

[125] In the gold-mining industry, collective bargaining at central level has a long history. While collective bargaining within an established bargaining council would be ideal for some, there are possibly reasons why this has not occurred in this industry. There appears to be problems and challenges specifically to the mining industry which has resulted in the continuation of current practice.[31]

[126] The appellants' argument that section 23(1)(d) gave the parties to the collective agreement (as contemplated there) "*unbridled powers*" which left non-parties with no remedy against abuse, overlooks the fact that non-parties were not precluded from approaching the Labour Court or the appropriate forum for suitable relief in the event of abuse.

[127] In terms of section 23(1)(d), read with the collective agreement concluded and extended in terms of that section, and section 65(1)(a) of the LRA, the right to bargain collectively, including the right to strike, is only limited, temporarily, for the duration of the collective agreement and in respect of the issues regulated by the agreement. The purpose of the limitation is to ensure effective and orderly collective bargaining and peace in the workplace. The means chosen to achieve that purpose (i.e. the limitation) is rationally linked to the purpose and is proportional to it.

Alleged violation of other constitutional rights

[128] The appellants have alleged and argued that other rights of theirs have been infringed by the limitation. I shall now briefly deal with those contentions.

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[30] See:eg.The Digest para 1015 which states:"*The requirement of previous approval by a government authority to make an agreement valid might discourage the use of voluntary collective bargaining between employers and workers for the settlement of conditions of employment. Even though a refusal by the authorities to give their approval may sometimes be the subject of an appeal to the courts, the system of previous administrative authorization in itself is contrary to the whole system of voluntary negotiation."* And para 1017 where it is stated*, inter alia,* that *'the requirement of ministerial approval before a collective agreement can come into effect is not in full conformity with the principles of voluntary negotiation laid down in Convention No. 98."*

[31] See Godfrey, Maree et al *Collective Bargaining in South Africa- Past, Present and Future* (Juta 2014) at 218 *et seq.*

Overall, I am of the view that the appellants have failed to show a limitation of any of those rights.

[129] The first is the right to dignity. The appellants allege their right has been breached. This argument is similar to the argument that had been raised in *Nokotyana v Ekurhuleni Metropolitan Municipality (Nokotyana),*[32] namely, that the denial of access to housing and basic services, not only impacted the right to such access and basic services, but also the right to dignity.

[130] The Constitutional Court held in *Nokotyana* that "*the right to dignity alone is rarely dispositive of a constitutional matter*" and that where a court can identify the infringement of a more specific right, that right should be invoked rather than the general right (i.e. to dignity).

[131] That, in my view, is the short answer to the argument. The actual right impacted was the right to engage in collective bargaining and more specifically the right to strike. Enquiry into whether the right to dignity was infringed in circumstances of this matter will not lead to a different conclusion.

[132] The appellants next contend that the Employees' right to choose a trade occupation or profession freely, as contemplated in section 22 of the Constitution, had been infringed.

[133] In my view, the appellants have not shown at all that such a right was infringed. In any event, in terms of section 22 of the Constitution, the practice of a trade, occupation or profession may be regulated by law. Section 23(1)(d) arguably is no more than a reasonable regulation of the trade occupation or profession contended for by the appellants. In *Affordable Medicines Trust,*[33] the Constitutional Court held that it is only if the regulation, viewed objectively, negatively affects the right to freely choose a trade, occupation or profession that the regulation of the practice of the same must be evaluated under section 36(1) of the Constitution. In my view, section 23(1)(d) clearly does not negatively affect or impact the right contained in section 22, or as contended for by the appellants.

[32] 2010 (4) BCLR 312 (CC).
[33] *Supra*.

[134] The appellants have also argued that their right to freedom of association has been infringed. In my view, the appellants, in this regard, have also failed to show any such infringement. Insofar as the right implies the freedom of the employees, whom they represent, to form and join trade unions of their choice, it has not been shown that the right has been directly affected by the application of section 23(1)(d). Even then, for the reasons mentioned above, any impact or limitation of that right would be justified as contemplated in section 36(1) of the Constitution.

[135] The appellants also invoked a transgression of the rule of law in the litany of their complaints. Essentially, the argument was that by extending the collective agreement in terms of section 23(1)(d) to non-party employees, the parties to the agreement were essentially exercising a public power. The court *a quo* rejected this argument on the basis that section 23(1)(d) is "*not concerned with the exercise of public power*" and that it was "*simply an instance of national legislation creating legal consequences that flow from specific facts*". The court *a quo* also held in this regard that "[*t]here is nothing inimical to the rule of law for legislation to provide for legal consequences to flow from the conduct of private parties*" and that legislation did so "*frequently, in a range of contexts without requiring the consent of all affected parties*".

[136] In my view, the court *a quo* was correct in its conclusions. Section 23 does no more than create legal rights and obligations which flow from the conduct of private parties. The section does not purport to make all the trade unions and employees and employers and employers' organisations, who are parties to the collective agreements contemplated there, public figures or state organs (or state actors). It is an instance where the LRA allows self-regulation by private parties as a means to achieve, in particular, its purpose in respect of collective bargaining outside bargaining councils. In any event, the parties do not exercise any power. The legislature has provided for a consequence if the requirements of section 23(1)(d) are met.

[137] The respondents have also (correctly in my view) submitted that the ILO Recommendation 91, does not assist the appellants in their argument that extension of a collective agreement is only permissible if a state organ has a

regulatory role in the process. Recommendation 91 does not make regulation by a state organ peremptory. In fact, it is clear from their writings that the Committees promote minimal state interference in collective bargaining.[34]

[138] It follows that the appellants' constitutional attack was rightly dismissed by the court *a quo*. In light of the aforegoing, the appeal must fail. In respect of costs of the appeal, the parties are in agreement that even if the appeal were to fail it constituted an attempt by the appellants to vindicate constitutional rights and consistent with the rule in such cases, there should be no order as to costs. In light of the circumstances, I am of the view that there should be no costs order.

[139] In the result:

The appeal is dismissed.

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P Coppin

Judge of the Labour Appeal Court

Tlaletsi DJP and Musi JA concurred in the judgment of Coppin JA.

[34] See *The General Survey on the Fundamental Conventions Concerning Rights at Work* (2012) at para 167; the comments on Convention No. 98, the most important elements of which are *'(i) the principle of the independence and autonomy of the parties and of free and voluntary bargaining;(ii) the effort made, in the context of the various bargaining systems, to reduce to a minimum any possible interference by the public authorities in bipartite negotiations; and (iii) the primacy accorded to employers and their organisations and to trade unions as the parties to negotiations,*';and also see the Digest, eg. para 369 and generally.

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