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EMPLOYMENT RETRENCHMENT ALERT SERIES

The Employment Practice is doing a series of Alerts focused on Retrenchment, against the backdrop of the tough economic climate.

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RETRENCHMENTS: COLLECTIVE AGREEMENTS AND THE OBLIGATION TO CONSULT

Section 23(1)(d) of the Labour Relations Act, No 66 of 1995 (LRA) contemplates the extension of a collective agreement to members of a union that are not party to that agreement.

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RETRENCHMENTS: COLLECTIVE AGREEMENTS AND THE OBLIGATION TO CONSULT

This case sheds light on the scope of the obligation to consult where there is a collective agreement dealing with retrenchment, and specifically, consultation.

Section 23(1)(d) of the Labour Relations Act, No 66 of 1995 (LRA) contemplates the extension of a collective agreement to members of a union that are not party to that agreement.

The exclusion of minority unions from the consultation process is but one consequence of the majoritarian system of collective labour.

An employer, during a retrenchment exercise, has a duty to consult in terms of s189(1)(a) of the LRA. Section 189(1)(a) provides that whenever an employer contemplates dismissing one or more employees for operational requirements, that employer must consult any party with whom it is obliged to consult in terms of a collective agreement.

In the reportable case of AUSA and Four Others v SAA SOC Limited and 6 Others (J1506/15) [2015] ZALCJHB 258 (17 August 2015), the Labour Court examined the interaction between s23(1)(d) and s189(1)(a). This case sheds light on the scope of the obligation to consult where there is a collective agreement dealing with retrenchment, and specifically, consultation.

The first respondent (Employer) did not recognise the applicants (Minority Unions) as representative trade unions. Alleging an unfair procedure, the Minority Unions sought an interdict preventing the Employer from carrying out large-scale retrenchments.

The parties to the collective agreement were: the Employer, the 80% majority unions (the third to fifth respondents) and SAA Management Employees (the sixth respondent). The agreement envisaged the possible retrenchment of over 700 employees. This agreement was extended to non-parties in accordance with s23(1)(d).

Despite the agreement only requiring consultation with majority unions, the Employer had initially included the Minority Unions in the consultations. However, the Minority Unions were subsequently excluded when they began to stall the consultation process.

In attacking the validity of the consultations, the nub of the Minority Unions' argument was:

- s23(1)(d) was not applicable to collective agreements that regulate retrenchments; and
- while the Employer was entitled to exclude the Minority Unions, once it elected to include them, it was bound by this election.

The Labour Court rejected the first argument, explaining that the exclusion of minority unions from the consultation process is but one consequence of the majoritarian system of collective labour, as adopted by our legislature. There was no reason to interpret s23(1)(d) as not being applicable to retrenchment agreements.

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A collective agreement can potentially determine which parties can and cannot participate in the consultation process.

Similarly, the Labour Court was unconvinced by the second argument. It reasoned that the Minority Unions' initial inclusion was merely a show of good faith. However, there was no evidence to the effect that, in including the Minority Unions, the Employer had chosen to waive its right to exclude them later, should it feel that they were frustrating the process. This is exactly what transpired in this case, and the Employer was within its rights to act as it had.

The Minority Unions' claim was dismissed, and the Employer was free to continue with its consultations and, ultimately, the retrenchment process.

This case confirms that s23(1)(d) impacts on s189 consultations, in that a collective agreement can potentially determine which parties can and cannot participate in the consultation process by virtue of what is contained therein. Employers would be well-advised to take this principle on board as it can limit the numbers of "fingers in the pie" during the consultation process.

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