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EMPLOYMENT ALERT

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CONSULTATION DURING RETRENCHMENT – A TALE OF DAVID AND GOLIATH?

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AMCU referred an unfair dismissal dispute to the CCMA and challenged the constitutionality of the provisions which permitted the employer to extend the retrenchment agreement to minority unions and unrepresented employees.

What happens if the "unrepresented" employees do not agree with the terms agreed on by the representative union? Does the lack of consultation with the "unrepresented" employees constitute procedural unfairness? Must employees who were not represented by their unions simply "deal with it"? These are the issues that were considered in *Association of Mineworkers and Construction Union (AMCU) and Others v Royal Bafokeng Platinum Limited and Others* [2018] ZALCJHB 208.

The employer operated a mine in which, initially, the majority of its employees were members of the National Union of Mineworkers (NUM) and the United Association of South Africa (UASA). Progressively, a number of employees switched allegiance and became members of the Association of Mine Workers and Construction Union (AMCU). Notwithstanding the change in the composition of union membership, in terms of a collective agreement, the employer recognised NUM and UASA for bargaining purposes and extended operational rights to them - to the exclusion of AMCU. As a result, the employer undertook only to consult with NUM and UASA regarding the retrenchment of employees. The retrenchment agreement reached by the employer, NUM and UASA was extended to all other minority unions and employees in terms of the collective bargaining agreement.

On 30 September 2015, the employees reported for duty and were issued with retrenchment notices dated 18 September 2015. AMCU referred an unfair dismissal dispute to the CCMA and challenged the constitutionality of the provisions which permitted the employer to extend the retrenchment agreement to minority unions and unrepresented employees. AMCU proffered the argument that the employer must consult with *individual employees* and *minority unions* when retrenchment is contemplated, notwithstanding the existence of any collective agreement to the contrary. It stated that the lack of an obligation on the employer to consult with the individual employees and minority trade union violates, *inter alia*, the right to equality, dignity, freedom of association, fair labour practices and access to information.

In making its ruling, the Labour Appeal Court (LAC) found that the principle of majoritarianism permeates the entire labour dispensation and does so to limit the multiplicity of consultation and to minimise union rivalry and industrial strife. Importantly, the LAC highlighted that employees who are not represented by the representative union are not left without

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The extension of a collective agreement constitutes an exercise of public power.

recourse. If the representative union acts unfairly against an employee and such conduct leads to the unfair retrenchment of the employee, such employee has the right to challenge the fairness of his individual dismissal. In stating that the extension of a collective agreement constitutes an exercise of public power, the court relied on the *AMCU v Chamber of Mines South Africa* [2017] 7 BLLR 641 (CC) where the court stated that the extension of an agreement under s23 of the LRA has many implications for members of the public and relies on statute. Therefore invoking s23 of the LRA constitutes public power, which is reviewable under the common law principle of legality.

Lessons from this case - Employers must consult with representative trade unions in terms of a collective agreement and any agreement reached between the parties may be validly extended to other minority unions and employees.

It seems that David was not entirely triumphant in securing his place in the consultation process, however, as the LAC highlighted, employees are not left without recourse where unfairness and discrimination exist.

Michael Yeates and Adjekai Adjei

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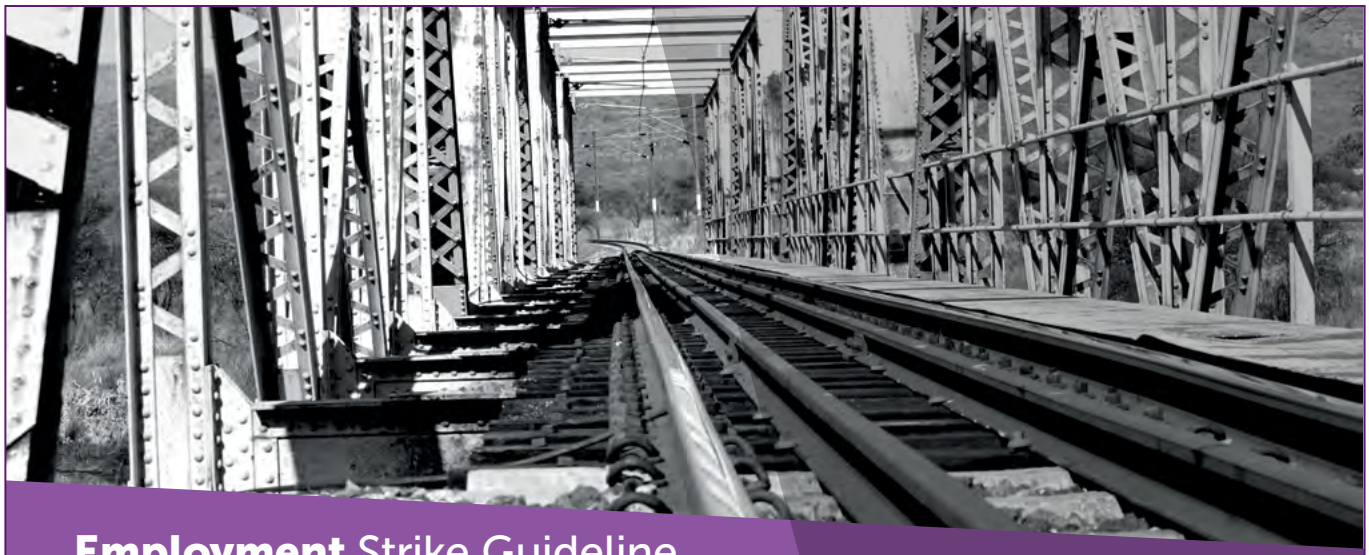

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