

30 JANUARY 2020

EMPLOYMENT ALERT

IN THIS ISSUE

GROUNDBREAKING JUDGMENT

Is the exclusion of minority trade unions from retrenchment negotiations constitutional?

In *AMCU and others v Royal Bafokeng Platinum Ltd and others* (CCT 181/18 dated 23 January 2020), the Constitutional Court was requested to consider whether the provisions of section 189(1) of the Labour Relations Act (LRA) were constitutionally valid. In this case, the collective agreement regulating with whom the employer should consult in a large scale retrenchment process, was concluded by the employer with the majority trade union, NUM, and extended to bind the members of a minority union, AMCU. The union UASA was a signatory to this collective agreement.

Is the exclusion of minority trade unions from retrenchment negotiations constitutional?

AMCU did not enjoy collective bargaining rights but, more importantly, it also did not enjoy or qualify for organisational rights.

In *AMCU and others v Royal Bafokeng Platinum Ltd and others* (CCT 181/18 dated 23 January 2020), the Constitutional Court was requested to consider whether the provisions of section 189(1) of the Labour Relations Act (LRA) were constitutionally valid. In this case, the collective agreement regulating with whom the employer should consult in a large scale retrenchment process, was concluded by the employer with the majority trade union, NUM, and extended to bind the members of a minority union, AMCU. The union UASA was a signatory to this collective agreement.

Importantly, and what is not clear from a reading of the decision of the Constitutional Court, is that AMCU's level of representation in the workplace was extremely limited, hardly reaching 11% of the eligible employees in the workplace. AMCU did not enjoy collective bargaining rights but, more importantly, it also did not enjoy or qualify for organisational rights.

The employer had a commercial rationale for the contemplation of retrenchments, and issued a section 189(3) notice to all its employees. The employer extended the requisite consultations to NUM and UASA, with whom it was contractually bound so to do. AMCU was excluded. The consultation process yielded a further collective agreement between the employer, NUM and UASA which set out all the terms applicable to the retrenchments, including the identity of retrenchees and severance pay. This collective agreement was likewise extended to AMCU members and non-unionised employees in terms of section 23(1)(d) of the LRA.

Upon being served with notices of termination of employment on the ground of retrenchment and denied access to their work stations, AMCU's members were aggrieved as their chosen trade union had been excluded from representing their interests during retrenchment consultation with the employer.

AMCU's initial challenge as to whether a fair procedure had been applied by the employer was withdrawn once it became apparent that the employer relied upon a valid collective agreement in line with section 189(1) of the LRA. This collective agreement provided that absent a workplace forum, any applicable collective agreement indicating with whom the employer must consult applied, even if to the exclusion of the minority union, AMCU.

AMCU then mounted a different challenge: was this hierarchy of consultation in section 189(1) constitutional and valid? The Labour Court and Labour Appeal Court found that it was. AMCU thus applied for leave to the Constitutional Court. The Constitutional Court was divided. The majority judgment is supported by five judges which trumped the minority judgments endorsed by four judges.

Majority judgment

In an endorsement of orderly collective bargaining and the principle of majoritarianism, the majority of the Constitutional Court declined to strike down section 189(1)(a) of the LRA as being unconstitutional. On this, Froneman J held that the constitutional right to fair labour practices (as enshrined in section 23 of the Constitution) does not include the right to be individually consulted before being retrenched.

Is the exclusion of minority trade unions from retrenchment negotiations constitutional?...*continued*

In the minority judgment, Ledwaba AJ struck down section 189(1)(a) of the LRA as being unconstitutional.

In arriving at this conclusion, the majority judgment appears to have attached great weight to the fact that the LRA allows a disgruntled retrenchee to still challenge the substantive fairness of his or her retrenchment and that the constitutional process prescribed in section 189 of the LRA complies with international standards.

The majority judgment also considered case law on the right to be consulted before retrenchment before concluding that there is "clear doctrinal history" which supports the contention that there is no right to individual consultation before retrenchment.

Minority judgment

In the minority judgment, Ledwaba AJ struck down section 189(1)(a) of the LRA as being unconstitutional. The minority judgment held that whilst retrenchment is a collective exercise, it affected each employee individually and therefore each employee, either individually or through a minority union, had the right to be heard before being retrenched.

The minority judgment therefore essentially held that the constitutional right to fair labour practices included the right to be heard, either individually or through an elected representative including a minority union. This constitutional right, so the minority judgment asserted, trumped Labour jurisprudence considerations such as orderly collective bargaining and the principle of majoritarianism.

Conclusion

Both the majority and minority judgments declined to strike down section 23(1)(d) of the LRA as being unconstitutional. It is apparent from the minority judgment (with which the majority judgment agreed on this issue) that the Constitutional Court declined to do so because AMCU was unable to show that section 23(1)(d) of the LRA per se infringed the constitutional right to fair labour practices.

It is our view that the seemingly timeless question of majoritarianism was put to the test in this case. The Constitutional Court was asked to decide whether the exclusion of minority trade unions from retrenchment negotiations infringed on the right to fair labour practices, as envisioned by section 23(1) of the Constitution. The judgment, decided by the narrowest of margins, will no doubt spark debate and controversy in both labour and constitutional circles. The 5-4 split seen in the judgments of the Constitutional Court is reflective of the difficult terrain that must be navigated when balancing constitutional, labour and economic interests and rights, all while operating in the shadow of a historically politicised industry.

Fiona Leppan and Bheki Nhlapho

EMPLOYMENT

CASE LAW UPDATE 2019

CLICK HERE
to access CDH's
Employment Law
booklet to assist
you in navigating
the employment
relationship during
the current economic
uncertainty.



STOP SEXUAL HARASSMENT

E-learning Offering

Our Employment practice recently launched an e-learning module:
A better place to work

The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

CLICK HERE FOR MORE INFORMATION 

CHAMBERS GLOBAL 2014 - 2019 ranked our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2019 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2019 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2018 - 2019 in Band 2: Employment.

Gillian Lumb ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 4: Employment.



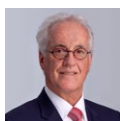
CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

OUR TEAM

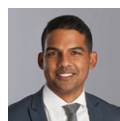
For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



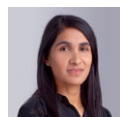
Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Bheki Nhlapho
Senior Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 8610/JAN

