Extension of Collective Agreements In Terms of Section 23(1)(D) of The Labour Relations Act With a Specific Focus on Retrenchments

By Alex Davies

1. **Introduction**
   - The principle of application of majoritarianism as endorsed by the Labour Relations Act ("**LRA**") is trite. The principle essentially prescribes that the view of the statistically dominant employees within a workplace prevails over the views of the minority.
   - This article provides a brief overview of the principles of extensions of collective agreements[1] as well as the application thereof to instances relating to retrenchments.
2. **Collective agreements:**
   - The LRA[2] provides that the purpose of the Act is *inter alia* for the self-regulation of matters of mutual interest by way of collective bargaining between employers, employers organisations and unions acting on behalf of their members. In this was orderly[3] collective bargaining is envisaged, with employees participating[4] in decision making within the workplace.
   - Collective agreements are binding and enforceable on the parties to the agreement. Collective agreements can also be extended to non-parties to an agreement with the effect that the non-parties are similarly bond to the terms of the agreement as if they were signatories to the agreement. Extensions of collective agreements are either done in terms of section 23(1)(d)[5] or section 32[6]. For the purposes of this article the focus is placed on extensions in terms of section 23(1)(d).
   - In order for a collective agreement to be extended to non-parties (employees and their trade unions) the employees must be identified[7], the agreement must expressly bind the employees[8] and the trade union parties to the collective agreement must represent the majority of the employees within the workplace[9].
   - The constitutional validity of the principle of extensions in terms of section 23(1)(d) has been upheld as constitutionally valid by the Constitutional Court in *AMCU and others v Chamber of Mines of South Africa and others*[10].
3. **Collective Agreements In Relation To Retrenchments**
   - In the matter of *Association of Mineworkers and Construction Union (AMCU) and Others v Bafokeng Rasimone Management Services*[11] the Applicants challenged the constitutionality of the extension of collective agreements to matters of mutual interest concerning the retrenchment of employees.
   - Factually, Bafokeng Rasimone Management Services ("**Bafokeng**") entered into a collective agreement with the majority unions in the workplace being the NUM and UASA who together represented the majority of the workers in the workplace. The parties engaged in consultations and negotiations relating to the possible retrenchment of employees at the mine. AMCU was not party to these consultations or to the agreement which was ultimately reached. The agreement was extended to non-parties thereto in accordance with the prescripts of section 23(1)(d). Employees were retrenched in accordance with the provisions of the agreement.
   - AMCU challenged the constitutionality of the extension in this context and alleged that it resulted in unfair dismissals of individuals who were not party, by way of representation, to the agreement. The Labour Court dismissed the application finding that extensions in terms of section 23(1)(d) were constitutionally acceptable.
   - The Labour Appeal Court ("**LAC**") handed down the judgment[12] in the appeal in the matter on 26 June 2018. The LAC confirmed it endorsed the principle of majoritarianism in the workplace and that it was applicable to instances of retrenchments.
   - The LAC stated that the parties to the agreement have an obligation not to unfairly discriminate against non-parties. In the event of discrimination it would be possible for an employee to challenge the fairness of their dismissal.
   - The LAC also confirmed that the extension of a collective agreement amounts to the exercising of a public power which is in principle possible to challenge by way of review proceedings. The LAC was theretofore satisfied that disgruntled employees do retain a right of recourse in law notwithstanding an extension of a collective agreement to them. [13]
4. **Conclusion**
   - The extension of collective agreements remains a binding and constitutionally valid principle in the South African law. This may be utilised in matters of mutual interest including retrenchments. There are sufficient safeguards in place to ensure that aggrieved employees have a right of recourse in instances such as discriminatory or other unfair conduct which can result in disputes relating to the fairness of dismissals or reviews of the extension of impugned collective agreement.

[1] In terms of section 23(1)(d) of the LRA

[2] Section 1 of the LRA

[3] Section 1(d)(i) of the LRA

[4] Section 1(d)(iii) of the LRA

[5] Collective agreements concluded by representative parties within a specific workplace

[6] Collective agreements concluded under the auspices of a bargaining council

[7] Section 23(1)(d)(i) of the LRA

[8] Section 23(1)(d)(ii) of the LRA

[9] Section 23(1)(d)(iii) of the LRA

[10] 2017 (3) SA 242 (CC)

[11] (2017) 38 ILJ 931 (LC)

[12] Currently unreported judgement under case number JA23/2017

[13] At paragraph 52