# Section 23(1)(d) of the Labour Relations Act: the potential deprivation of employees' collective labour rights

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## ABSTRACT

Section 23(1)(d) of the *Labour Relations Act* 66 of 1995 is a provision that allows an employer and a trade union that enjoys representivity of the majority of employees at a workplace to enter into a collective agreement and extend it to employees who are members of a minority trade union, and employees who are not part of a trade union at all. This extension is also applicable to employees who are against the collective agreement and who do not agree with its terms.

This provision was introduced in the LRA to regulate employment relationships and promote orderly collective bargaining, but it also potentially deprives the members of minority trade unions of certain labour rights. The notion of extending collective agreements to minority employees and non-unionised members is established on the principle of majoritarianism, although this principle has the potential of infringing on the rights of the minority and non-unionised members.

This dissertation seeks to examine how section 23(1)(d) of the LRA has the potential to infringe on the labour rights of employees. This dissertation also discusses the findings of the Constitutional Court on section 23(1)(d) of the LRA as a provision that potentially deprives the rights of minority trade unions and non-unionised employees.



**Keywords:** Collective agreements, extension, principle of majoritarianism, limitation of employees' rights, collective bargaining

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| AMCU | Association of Mineworkers and Construction Union |
| BCEA | Basic Condition of Employment Act |
| CCMA | Commission for Conciliation Mediation and Arbitration |
| LAC | Labour Appeal Court |
| LRA | Labour Relations Act |
| ILO | International Labour Organisation |
| NUMSA | National Union of Metal Workers of South Africa |
| NUM | National Union of Mineworker |

# Chapter 1 Introduction

## 1.1 Introduction

This chapter provides an overview of section 23(1)(d) of the LRA as a section that potentially deprives members of minority unions of their collective labour rights and provides an exposition of the core issue that is investigated in this study. This chapter thus describes the objectives of the study, research problem and research methodology.

## 1.2 Problem statement

### *1.2.1 Background*

Numerous judgements were decided by the labour court that were an illustration of how section 23(1)(d) of the *Labour Relations Act* 66 of 1995 (hereafter the LRA) may potentially infringe on the constitutional and statutory rights of employees. Section 23(1)(d) of the LRA allows a collective agreement which was concluded by a majority trade union and the employer, to be extended to employees who were not part of the negotiations and the ultimate agreement.[1] This extension applies even if the employees are members of a different trade union, not members of a trade union at all, and are against the agreement.[2] The problem arises when this extension potentially deprives the relevant employees of their constitutional rights, such as the right to strike, the right to fair labour practices, the right to freedom of association, and to join and participate in trade union activities (or not to do so).[3] Section 23(1)(d) of the LRA consequently has the potential of creating unfavourable outcomes for employees who are part of a different trade union or who are non-unionised and deprive them of the opportunity to challenge the content of the agreement.

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1 Section 23(1)(d) of the *Labour Relations Act* 66 of 1995.
2 Braatvedt 2018 https://www.mondaq.com accessed on 23 August 2021.
3 Section 18, 23 (2)(a) and 23(2)(c) of the *Constitution of the Republic of South Africa*, 1996.

Section 18 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) grants everyone the right to freedom of association.[4] Freedom of association is "the right of employees to freely and voluntarily be part of an organisation of their own choice."[5] Furthermore, section 23(2) of the Constitution provides every employee with the right to "form and join a trade union, to take part in the activities and programmes of a trade union and to strike".[6] The right to strike is one of the fundamental labour rights that employees are entitled to. The LRA gives effect to the right to strike, the right to freedom of association and the right to form and join a trade union by providing a legislative framework where these rights can be exercised.[7] Employees have the liberty to exercise their right to strike and to join a trade union of their choice, or by the same token, the freedom not to join a trade union. The extension of a collective agreement may have an adverse impact on these rights by forcing non-union members or those that belong to different trade unions to follow/adhere to a collective agreement entered into with a majority trade union.

In the matter of *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,[8] it was argued that the application of section 23(1)(d) of the LRA deprived the minority employees[9] of their constitutional right to strike. In this case, there was a collective agreement signed by the employer and the majority trade union that regulated employees' wages and working conditions. The agreement effectively deprived the members of the minority trade union of their right to strike in demand of wages and better working conditions because they had to abide by the collective agreement that was extended to them. As mentioned above, section

4 Section 18 of the *Constitution of the Republic of South Africa*, 1996.

5 Rheeder date unknown https://www.labourguide.co.za accessed on 23 August 2021.

6 Section 23(2)(a) and (b) of the *Constitution of the Republic of South Africa*, 1996.

7 Section 64, 4 and 4(1)(b) of the *Labour Relations Act* 66 of 1995.

8 *Association of Mineworkers and Constitution Union and Others v Chamber of Mines of South African and Others* 2017 SA 3 (CC) para 3.

9 Minority employees are defined as "a distinct group that coexists with but is subordinate to a more dominant group. This subordinacy defines the characteristics of a minority group. As such, minority status does not necessarily correlate to population."

23(1)(d) of the LRA allows this extension. [10] It is worthwhile to note in this instance, that section 65 of the LRA prohibits employees from taking part in a strike over a dispute of mutual interest that has been resolved by a collective agreement. This leaves employees who belong to minority trade unions or non-unionised employees working under dissatisfying wages and conditions they did not agree to, and without the opportunity to exercise their right to strike on said unsatisfactory conditions.

In this matter, the *Association of Mineworkers and Construction Union* (hereafter AMCU) did not regard itself as bound by the collective agreement on the basis of not being part of the negotiating process.[11] The Labour Appeal Court contended that AMCU's members were bound by the collective agreement concluded by the majority unions and interdicted AMCU from embarking on a strike.[12] AMCU argued that section 23(1)(d) of the LRA is unfair, unconstitutional and prohibits its members' right to strike, including the right to bargain collectively through the union, fair labour practices and the right to freedom of association.[13] This matter was taken to the Constitutional Court where the Court had to interpret the provisions of section 23(1)(d) of the LRA and the constitutionality thereof. The outcome of this matter is investigated in this study.

In the matter of *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others*,[14] the Labour Court dealt with a collective agreement that regulated the process of retrenchment in accordance with section 189 of the LRA. In terms of section 189 of the LRA, employers are allowed to dismiss employees for operational requirements on the grounds of "economical, structural and technological"

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10 Among the substantive limitations to the right to strike in terms of the LRA, such as section 65 of the LRA, an employee may not strike on a matter which is already resolved through the conclusion of a collective agreement. By concluding a collective agreement, the parties will have effectively resolved the disputes between them and thus avoid strike.

11 *Association of Mineworkers and Constitution Union and Others v Chamber of Mines of South African and Others* 2017 SA 3 (CC) para 5.

12 *Association of Mineworkers and Constitution Union and Others v Chamber of Mines of South African and Others* (unreported) case number JA103/2014 para 108.

13 *Association of Mineworkers and Constitution Union and Others v Chamber of Mines of South African and Others* (unreported) case number JA103/2014 para 5.

14 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 1.

needs of the employer.[15] The negotiated collective agreement in this matter stated the terms of retrenchment and the employees to be dismissed. This agreement was concluded by the employer and the *National Union of Mineworkers* who "enjoyed majority support at the workplace".[16] The collective agreement was extended to employees who were not part of the negotiation and consultation process vis-á-vis the retrenchment.[17] AMCU contended that section 23(1)(d) of the LRA is unconstitutional and the application of the section adversely affected its members' right to fair labour practices and freedom of association as they were not included in the consultation process, but were disproportionally affected by the retrenchments in their numbers. Furthermore, AMCU stated that the LRA placed a duty on employers to have a "consensus-seeking process" with the employees likely to be affected, before retrenchments.[18] A consensus seeking process is an effort in which affected parties seek to reach an agreement on a course of action to address an issue, work together with the employer and find a mutually acceptable solution to avoid or minimise the retrenchments.[19] AMCU demanded for reinstatement of its members and stated that section 23(1)(d) of the LRA should not be applied to the retrenchment.[20] The Labour Appeal Court dismissed the appeal in its entirety and found no merit in the AMCU's argument regarding section 23(1)(d) of the LRA.[21]

This matter was taken to the Constitutional Court where the Court interpreted the provisions of section 23(1)(d) of the LRA and the constitutionality of the provision. The purpose of this study is to analyse the potential adverse effects of section 23(1)(d) of the LRA with reference to its possible limitation on the constitutional rights of employees who

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15 Section 189 of the *Labour Relations Act* 66 of 1995.

16 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 9.

17 Braatvedt 2018 https://www.mondaq.com accessed on 02 August 2021.

18 Neil 2020 https://www.chmlegal.co.za accessed on 02 August 2021.

19 The Consensus Council *Consensus-Based Decision-Making Processes* 1.

20 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* (unreported) case number J2578/15 19 December 2016 para 5.

21 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2018 27 SA (LAC) para 75.

were not part of the negotiations, which resulted in a collective agreement extended to them. The study intends to then critically investigate the final position as presented by the Constitutional Court and the motivation for the court's findings.

### 1.2.2 Motivation

Section 23 of the Constitution states that every employee is entitled to fair labour practices, be a member of a trade union of their choice, collectively bargain and strike.[22] Furthermore, section 18 of the Constitution grants everyone the right to freedom of association.[23] Cohen[24] stated that in furtherance of these rights, "the LRA provides a regulatory framework in keeping with the constitutional obligations." Section 4 of the LRA grants every employee the right to freedom of association and section 64(1) grants employees the right to strike.[25] The purpose of the LRA is, amongst others, to encourage collective bargaining in a well-ordered manner and promote workplace democracy.[26] However, these rights appear to be infringed upon when applying section 23(1)(d) of the LRA, in effect limiting the employees' rights

Collective bargaining is a negotiating process that leads to a collective agreement when successful.[27] In this process, terms and conditions of employment such as, amongst others, working hours and wages are negotiated.[28] In other words, the result of the negotiating process is a collective agreement. A collective agreement is defined under section 213 of the LRA as:

> 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, one or more employers; one or more registered employers'

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22 Section 23 of the *Constitution of the Republic of South Africa*, 1996.

23 Section 23 of the *Constitution of the Republic of South Africa*, 1996.

24 Cohen 2014 *Potchefstroom Electronic Law Journal* 2210.

25 Section 4 and 64(1) of the *Labour Relations Act* 66 of 1995.

26 Khumalo *Extension of collective agreements in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa 329.*

27 Khumalo *Extension of collective agreements in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa* 329.

28 Khumalo *Extension of collective agreements in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa* 329.

organisations; or one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council.[29]

The issue with the extension and enforcement of collective agreements is that it potentially infringes on the right of non-parties and minority trade union employees to be involved in the process of collective bargaining and other rights mentioned earlier as granted by the Constitution. Although section 23(1)(d) of the LRA affects the constitutional rights of employees who are not part of the collective agreement, the courts believe that section 23(1)(d) of the LRA is of assistance as it creates labour peace at the workplace.[30] The aforesaid may be reasonable and justifiable in terms of section 36(1) of the Constitution. It is necessary to develop a better understanding of how section 23(1)(d) of the LRA may potentially limit the constitutional rights of employees and to provide critical clarity as to the findings of the Constitutional Court in addressing this conundrum.

This research subsequently demonstrates how section 23(1)(d) of the LRA potentially deprives employees of their collective labour rights and how the courts interpret the section.

### *1.2.3 Research question*

What is the current legal position of section 23(1)(d) of the LRA and its potential to deprive employees of their labour law rights?

## 1.3 Research aim and objectives

The main objective of this dissertation is to examine and identify the impact of section 23(1)(d) of the LRA on the constitutional rights of employees and their trade unions. This study analyses the different rights of employees and their trade unions which may be affected by the implementation of section 23(1) d) of the LRA. Furthermore, the study examines the potential justifiability of section 23(1)(d) of the LRA based on the

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29 Section 213 of the *Labour Relations Act* 66 of 1995.

30 Braatvedt 2018 https://www.mondaq.com accessed on 03 August 2021 and *Aunde South Africa (Pty)Ltd v NUMSA* 2011 10 BLLR 945 (LAC) para 32.

majoritarianism principle applicable in the South African labour market and explore the findings of the apex court in this regard to enhance clarity on the matter.

## 1.4 Research method

This study consists of desktop research concluded using a literature review of legislation, textbooks, government policy and applicable electronic resources. The investigation of primary sources, specifically case law, forms an important part of this study.

## 1.5 Framework

The core of this study is to analyse the impact of section 23(1) (d) of the LRA on employees and their trade unions. In order to achieve this, chapter 1 provides an overview of the study.

Chapter 2 discusses and examines the different types of rights that section 23(1)(d) of the LRA impacts. This chapter defines these rights and analyses the extent to which the section protects and caters for employees and their trade unions.

Chapter 3 discusses and contextualises the notion of section 23(1) (d) of the LRA as a section that limits the rights of employees such as, amongst others, the right to engage in collective bargaining, the right to strike, the right to freedom of association and the right to challenge a particular dismissal. Furthermore, this chapter critically discusses case law that illustrates how section 23 (1) (d) of the LRA potentially impacts the rights of employees and their unions.

Chapter 4 examines the justifiability of section 23(1)(d) of the LRA on the majoritarianism principle in the labour markets of South Africa and the findings of the Constitutional Court in this regard.

Chapter 5 draws conclusions on the findings made in the study, and the ultimate interpretation and position regarding the potential limitation of certain constitutional rights of employees due to the application of section 23 (1)(d) of the LRA.

## 1.6 Relevance for the research unit

The purpose of this research is to analyse the impact of section 23(1)(d) of the LRA on the constitutional rights of employees. The study falls within the primary research project of the Faculty of Law, being *Law, Justice and Sustainability*. It furthermore falls within the subproject *Vulnerable Societies*. The Constitution of South Africa and domestic labour legislation provide every employee with rights. This research highlights the rights that are granted by the Constitution and labour legislation and illustrate how section 23(1)(d) of the LRA may affect these rights but similarly provides clarity and understanding as to the justifiability and constitutionality of the said limitations.

## Chapter 2 An analysis of the rights that section 23(1)(d) of the Labour Relations Act potentially impacts

### 2.1 Introduction

This chapter aims to examine the different rights that section 23(1)(d) of the LRA impacts, and how these rights interrelate. This chapter defines these rights and analyse the extent to which it protects and caters for employees and their trade unions.

Section 23(1)(d) of the LRA potentially deprives employees of the below discussed rights as it allows a collective agreement which was concluded by a majority trade union and the employer to be extended to employees who were not part of the negotiations and the ultimate agreement. This extension applies even if the employees are members of a different trade union or not members of a trade union at all, and who are against the agreement. It subsequently appears that the application of section 23(1)(d) may stand contrary to other collective labour law rights of employees – a matter which this study aims to investigate.

### 2.2 Freedom of association

Freedom of association is a fundamental human right enshrined in the *Universal Declaration of Human Rights*.[31] This right is protected and recognised in both national and international law.[32] Freedom of association can be defined as "the right of employees to freely and voluntarily be part of an organisation of their own choice".[33] In South Africa, freedom of association was not always acknowledged. In the apartheid era, alliances between different races were regarded as being illegal.[34] Legislation drafted during apartheid such as, amongst others, the *Reservation of Separate Amenities Act* 49 of 1953 and the *Group Areas Act* 41 of 1950 established a concept that provided other races with

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31 Article 20 of the *Universal Declaration of Human Rights.*
32 Article 23(4) of the *Universal Declaration of Human Right*.
33 Budeli 2010 *Nelson Mandela University Law Journal* 18.
34 Budeli *Freedom of association and trade unionism in South Africa: From apartheid to the democratic constitutional order* 61.

fewer human rights than others.[35] The right to freedom of association and the right to form and join trade unions were granted to white employees only.[36] Anti-apartheid activists who challenged and refused to obey these laws were apprehended.[37] In 1979, the government established the Wiehahn Commission to examine the industrial relations system.[38] The Commission recommended that the LRA be amended to allow black employees to also form and join trade unions.[39] Through legislation, South Africa introduced ways to regulate the reality of freedom of association and employees who formed and joined trade unions to improve working conditions.[40]

In terms of section 18 of the Constitution, every person has the right to freedom of association.[41] This right has general application, and its wide scope could be interpreted to include employees' right to freedom of association. However, section 23(2) of the Constitution specifically emphasises that all workers have a right to form and join a trade union, and take part in its lawful activities.[42] The right to form and join a trade union is an essential feature of freedom of association that ensures that employees are protected against victimisation by their employers and to ensure that they have the opportunity to stand collectively against the employer and level the playing field.[43] This right is discussed in detail later in this chapter.

The LRA was implemented to give effect to section 23 of the Constitution.[44] Section 4(1) of the LRA expresses the right to freedom of association and the right of employees to form and join a trade union.[45] This right allows employees to be part of a trade union of their choice and be represented in collective bargaining. Furthermore, section 5(1) of the

35 SAHA date unknown https://www.saha.org.za accessed 06 October 2022.
36 SAHO 2011 https://www.sahistory.org.za accessed 08 October 2022.
37 SAHA date unknown https://www.saha.org.za accessed 06 October 2022.
38 SAHO 2011 https://www.sahistory.org.za accessed 08 October 2022.
39 SAHO 2011 https://www.sahistory.org.za accessed 08 October 2022.
40 SAHA date unknown https://www.saha.org.za accessed 06 October 2022.
41 Section 18 of the *Constitution of the Republic of South Africa*, 1996.
42 Section 23(2)(a) and (b) of the *Constitution of the Republic of South Africa,* 1996.
43 Budeli 2010 *Nelson Mandela University Law Journal* 18.
44 Section 1 of the *Labour Relations Act* 66 of 1995.
45 Section 4(1) of the *Labour Relations Act* 66 of 1995.

LRA protects the freedom of association of employees against discrimination.[46] An employer may not discriminate against an employee for choosing to be a member of a trade union of their choice or not to be part of a trade union at all. In *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town,*[47] the court held that freedom of association is a civil liberty that includes having the freedom to be part of any union, which can be political or religious. According to Budeli,[48] the LRA employed freedom of association and the right to join a trade union to establish extensive protection of the existence and functioning of trade unions. Manamela[49] on his part contended that the unequal bargaining power between the employer and employees had to be addressed by legislation. This was done by recognising freedom of association in the LRA to allow employees to form and join trade unions to ensure comprehensive power and support of trade unions.

Employees have the right to associate with a trade union to achieve favourable workplace goals through collective bargaining. Section 23(5) of the Constitution provides trade unions with the right to engage in collective bargaining. Collective bargaining is a mechanism used by employees, through their trade unions to negotiate favourable working conditions and defend their interests.[50] Basson *et al*[51] contended that collective bargaining is a tool that employees use, through their representative to bargain for terms and conditions of employment. Employees are thus granted the liberty to gather with other colleagues to bargain and negotiate with their employer regarding their terms and conditions at work.[52] This right to bargain collectively emanates from the basis of freedom of association. Therefore, granting and protecting the freedom of association guarantees employees the right to bargain with employers to achieve better working conditions.

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46 Section 5(1) of the *Labour Relations Act* 66 of 1995.

47 *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town* 1994 SA 348 (IC) para 17.

48 Budeli *Freedom of association and trade unionism in South Africa: From apartheid to the democratic constitutional order* 46.

49 Manamela *The Social Responsibility of South African Trade Unions: A Labour Law Perspective* 7.

50 LexisNexis Survival Guide date unknown https://www.lexisnexis.co.za accessed on 09 July 2022.

51 Basson et al *Essential Labour Law* 55.

52 LexisNexis Survival Guide date unknown https://www.lexisnexis.co.za accessed on 09 July 2022.

Collective bargaining is the most recognised form of participation of employees in that it bestows upon employees, through their union, negotiating powers in the negotiating process.[53] Kruger and Tshoose[54] argue that the term "collective" in this regard, suggests that employees with their trade unions join together to intensify their bargaining power with the employer over terms and conditions of the workplace, with the hope of reaching a consensus on key issues at the end of said negotiations. The outcome of such successful negotiations would be a collective agreement. A collective agreement binds every employee, even employees who were not part of the collective bargaining process. Their right to freedom of association is potentially deprived as they are obliged to follow a mandate of a trade union, they are not a party to, or not part of a trade union at all. This illustrates the potential deprivation that is caused by section 23(1)(d) of the LRA.

It is important to note that as much as employees have a right to form and join a trade union, they equally have a right to choose not to join a trade union and to not participate in its activities.[55] The *Universal Declaration of Human Rights*[56] recognises the right not to associate with a trade union. Article 20 explicitly states that every person has a right to freedom of association and no person may be coerced to belong to an association. In *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town*,[57] the court stated that "freedom of association is manifested in two forms namely, the right to associate and the right not to associate". In other words, the aforementioned employees have a right to choose to join a trade union and the right not to choose to join a trade union. Basson *et al*[58] also stated that similarly, freedom of association has a negative interpretation; no employee may be forced to be part of a trade union and has the freedom to choose not to associate with a particular trade union.

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53 Budeli *Freedom of association and trade unionism in South Africa: From apartheid to the democratic constitutional order* 55.

54 Kruger and Tshoose 2013 PELJ 412.

55 Basson et al *Essential Labour Law* 31.

56 Article 20 of the *Universal Declaration of Human Rights* (1948).

57 *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town* 1994 SA 348 (IC) para 13.

58 Basson et al *Essential Labour Law* 31.

## 2.3 The right to join a trade union

In South Africa, trade unions have been operating for many years. Trade unions have not only challenged workers' rights within the ambit of workplaces but also beyond workplaces.[59] Trade unions began as small organisations with the intention to assist their members with different matters, including financial aid for education purposes and illness.[60] Despite the fact that trade unions were established to regulate the relationship between employers and employees, they carried out other activities in society which were regarded as their responsibility, such as assisting people financially for education and illness.[61]

Venter[62] contended that trade unions were established to primarily deal with the increased pressure and dominance of employers at the workplace. In this regard, Mgotsi[63] stated that trade unions protect and encourage the interests of their members, while Manamela[64] recognises that trade unions are independent organisations that act on behalf of employees to negotiate workplace conditions such as, amongst others, working hours and salaries. Section 213 of the LRA defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations."[65] The purpose of trade unions is to ensure that the relationship between employees and their employer is fair, and no one is subjected to unfair labour practices.[66]

South Africa ratified the *Freedom of Association and Protection of the Right to Organise Convention* (1948) No 87. As a result of this, South Africa had to develop a system that

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59 Manamela *The Social Responsibility of South African Trade Unions: A Labour Law Perspective* ii.
60 Manamela *The Social Responsibility of South African Trade Unions: A Labour Law Perspective* ii.
61 Manamela *The Social Responsibility of South African Trade Unions: A Labour Law Perspective* ii.
62 Venter *Labour Relations in South Africa* 32.
63 Mgotsi *The Role of Trade Unions in Enhancing Work Engagement, Work Commitment, Job Satisfaction and Job Performance in a Government Institution* 2.
64 Manamela *The Social Responsibility of South African Trade Unions: A Labour Law Perspective* 1.
65 Section 213 of the *Labour Relations Act* 66 of 1995.
66 Greenhalgh *Historical and Comparative perspective on Trade Union regulation with specific emphasis on the accountability of trade unions to their members* 35.

grants and regulates the right to join trade unions.[67] Upon drafting the Constitution, the legislature subsequently included workers' right to form and join a trade union.[68]

As mentioned above, the right to form and join a trade union is closely related to the right to freedom of association. Granting employees these rights simultaneously gives effect to their right to freedom of association. If the right to join a trade union was not granted, the right to freedom of association would be unfruitful.

## 2.4 The right to strike

To participate in a strike is a fundamental right that is recognised by the *United Nations International Covenant on Economic and Social and Cultural Rights*.[69] This Convention ensures the enjoyment of economic, social and cultural rights, including, amongst others, the rights to fair and just conditions of work.[70] The right to strike is an essential part of freedom of association and collective bargaining. Collective bargaining in general is a tool used by employees to maintain equality and fairness at the workplace by balancing the bargaining power of the employer and that of the employees. It is trite that employers have more authority and power in the individual employment relationship. As such, a mechanism such as a strike is required to level the playing field and grant the employees equal bargaining power. In *National Union of Mineworkers v Bader Bop*,[71] the Court highlighted this very fact, stating that the right to strike is an essential tool to provide employees with more bargaining power. Furthermore, the right to strike is critical in promoting the dignity of employees as it allows them to put their demands forward, be assertive and not be bullied into the employment terms and conditions set out by the

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67 Matee *Limitation on Freedom of association: the case of the public officers in Lesotho* 2.

68 Section 23 (2)(a) of the *Constitution of the Republic of South Africa*, 1996.

69 Article 8(1)(d) of the *United Nations International Covenant on Economic and Social and Cultural Rights* (1966).

70 Equality and Human Rights Commission date unknown https://www.equalityhumanrights.com accessed on 06 March 2023.

71 *National Union of Metalworkers of South Africa and Others v Bader Bop* 2003 SA 305 (CC) para 42.

employer.[72] It is important to note that, if the protection of collective bargaining and the right to strike were not granted, the right to freedom of association would again be fruitless.[73]

The right to strike is enshrined in both the Constitution and the LRA. Section 23(2)(c) of the Constitution and section 64 of the LRA explicitly express the right of every employee to strike.[74] Louw[75] highlights that section 64 of the LRA abolished the common law position that allowed employers to terminate the employment contract of employees who embarked on a strike. Given the aforesaid it is important to note that a strike must be protected, in that the strike adheres with the procedural requirements that are set out in section 64 of the LRA.[76] The purpose of the said abolishment was to create a balance in power at the workplace and give employees a voice. With reference to the termination of employment due to a strike, the relevant right is further protected by section 187(1)(a) of the LRA, in terms of which it would be automatically unfair to dismiss an employee for participating in a protected strike. Thus, the importance of the right to strike is evident from its coverage in the LRA.

A strike is a mechanism used by a group of employees to assert their demands. Section 213 of the LRA defines a strike as:[77]

> the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of

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72 *National Union of Metalworkers of South Africa and Others v Bader Bop* 2003 SA 305 (CC) para 43.

73 *Substantive Provision of Labour Legislation: The Right to Strike* date unknown https://www.ilo.org date accessed 10 October 2022.

74 Section 23(2)(c) of *the Constitution of the Republic of South Africa*, 1996 and section 64 of the *Labour Relations Act* 66 of 1995.

75 Louw 2018 *Potchefstroom Electronic Law Journal* 19.

76 Section 64 of the *Labour Relations Act* 66 of 1995 provides that firstly, the issue in dispute should be referred for conciliation to a bargaining council or to the CCMA. Secondly, that the required notice of the intended strike action be given to the other party to the dispute. Once the conciliation has failed, or 30 days period has lapsed from date on which the dispute was referred to the council of the CCMA for conciliation, the employees or their trade union must give the employer at least a 48 hours' written notice.

77 Section 213 of the *Labour Relations Act* of 66 of 1995.

any matter of mutual interest between employer and employee and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

For a strike to exist, it is clear from the above definition that the following elements must be present namely, the employees must refuse to work or cause retardation of work, the employees must have a common goal and the main aim for refusal to work must be to resolve a dispute with their employer or another employer.

For a strike to be lawful and protected, the requirements that are set out under section 64 of the LRA must be complied with. In terms of section 64 of the LRA no employee may embark on a strike if the matter in dispute was not referred to the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA) for potential conciliation first.[78] Further, a certificate must be issued by the CCMA stating that the dispute has not been resolved through conciliation within the allowed 30 day-period since the matter was referred to the CCMA.[79] After such a certificate is issued, an employer must be given a notice of 48 hours before a strike commences.[80] Failure to adhere to these requirements will result in the strike being unprotected, and, therefore, unlawful.

Section 23(1)(d) of the LRA potentially deprives employees of their right to strike as a result of a collective agreement explicitly prohibiting them from embarking on a strike about the matter that has been resolved through negotiations between the employer and a trade union, they are not members of. *In Glencore Operations South Africa (Pty) Ltd and Other v National Union of Metalworkers of South Africa*,[81] a wage agreement entered into between the Chamber of Mines, Glencore and other majority trade unions was extended to other employees in terms of section 23(1)(d) of the LRA. The *National Union of Metalworkers of South Africa* (hereafter NUMSA) was not part of the collective bargaining process where the collective agreement was concluded and intended on

78 Section 64(1)(a)(i) of the *Labour Relations Act* 66 of 1995.
79 Section 64(1)(a) (ii)of the *Labour Relations Act* 66 of 1995.
80 Section 64(1)(b) of the *Labour Relations Act* 66 of 1995.
81 *Glencore Operations South Africa (Pty) Ltd and Other v National Union of Metalworkers of South Africa* 2018 SA 434 (LC) para 4.

embarking on a strike.[82] The Chamber of Mines and the majority trade unions that initially entered into the collective agreement entered into an addendum and inserted a peace clause.[83] This clause was extended to NUMSA, thus depriving NUMSA's members of their right to strike. Furthermore, in *Transnet SOC Ltd v NUMSA*,[84] the Labour Court contended that NUMSA and its members are bound by the collective agreement that was concluded by Transnet and the trade union that enjoyed the majority regarding the working conditions. Therefore, although NUMSA and its members were unsatisfied with the working conditions, they were prohibited from striking as they were bound by the collective agreement. These judgements illustrate the potential deprivation of the right to strike caused by section 23(1)(d) of the LRA.

## 2.5 The right to fair labour practices

Conradie[85] accurately states that a relationship between an employer and employee must be regulated lawfully to ensure that there is fairness and protection within the relationship. Under the common law, the relationship between an employer and employee was primarily regulated by the employment contract and no attention was given to the fairness of labour practices.[86] As a result, in the past, employees could easily be exposed to exploitation and subjected to unfair labour practices.

This *lacuna* in the South African labour law has since been addressed. Section 23(1) of the Constitution provides everyone with the right to fair labour practices.[87] No one, inclusive of employees, may be subjected to unfair labour practices. The concept of unfair labour practice can be defined as "any labour practice which has or may have the effect

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82 *Glencore Operations South Africa (Pty) Ltd and Other v National Union of Metalworkers of South Africa* 2018 SA 434 (LC) para 4.

83 *Glencore Operations South Africa (Pty) Ltd and Other v National Union of Metalworkers of South Africa* 2018 SA 434 (LC) para 4.

84 *Transnet SOC Ltd v National Union of Metalworkers of South Africa and Others* 2014 SA 282 (LC) para 19.

85 Conradie *A critical analysis of the right to fair labour practices* 2. In the employment contract, the employer had practically free reign to regulate the relationship how he saw fit and could include any terms within the contract.

86 Conradie *A critical analysis of the right to fair labour practices* 10.

87 Section 23(1) of the *Constitution of the Republic of South Africa*, 1996.

that any employee or class of employees is or may be unfairly affected at the workplace."[88] In *National Entitled Workers' Union v The Commission for Conciliation, Mediation and Arbitration*,[89] the Labour Court elucidated that fair labour practice is a right that ensures equality and fairness in the workplace.

South Africa's fair labour regulations emanate from the required standards of the International Labour Organisation (ILO) and a variety of sources such as the Roman-Dutch Law.[90] Section 185 of the LRA was enacted to give effect to section 23(1) of the Constitution. It also provides that no employee may be subjected to unfair labour practices, although the scope of this right is much narrower in terms of section 186(2) of the LRA than it is in the Constitution.[91] Unfair labour practices in terms of the LRA refers to very specific practices within an employment relationship, but it should be noted that all rights and practices protected by the LRA and other labour legislation, fall under the overarching right of fair labour practices in terms of section 23(1) of the Constitution (except for those rights who are recognised as free-standing fundamental rights in the remainder of section 23).[92] Furthermore, the *Basic Conditions of Employment Act* 75 of 1997 (hereafter the BCEA) was implemented to give effect to the right to fair labour practices. Section 2 of the BCEA explicitly states that the purpose of the BCEA is to "give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution".[93] The BCEA limited the exploitation employees were exposed to in that it now regulates the relationship between an employer and employee by providing minimum terms and conditions that are fair and reasonable to both parties.

Section 23(1)(d) of the LRA potentially deprives employees of this right as a collective agreement favours the judgement of the majority, leaving the minority with conditions

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88 Conradie *A critical analysis of the right to fair labour practices* 53.

89 *National Entitled Workers' Union v Commission for Conciliation, Mediation and Arbitration* 2017 SA 623 (LAC) para 14.

90 Conradie *A critical analysis of the right to fair labour practices* 9. South Africa became a member of the ILO in 1919.

91 Section 185(b) of the *Labour Relations Act* 66 of 1995.

92 Mcgregor *Labour Law Rules* 105.

93 Section 2(a) of the *Basic Condition of Employment Act* 75 of 1997.

they might not be satisfied with. For instance, in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,[94] the majority of employees had an opportunity to negotiate and decide on favourable wages and working conditions, while the minority was left with no choice but to agree with the negotiated wage and working conditions, as section 23(1)(d) of the LRA allowed for the collective agreement to be extended to them, even though they were disadvantaged. These members are not provided with an opportunity to bargain collectively and be heard on matters of mutual interest.

## 2.6 Conclusion

The rights that section 23(1)(d) of the LRA potentially deprives employees of, are recognised by international law and national law. These rights are interrelated and failure to grant employees one of them consequently deprives employees of all their rights. For instance, if employees are deprived of the right to strike, then their right to freedom of association and collective bargaining would be limited. An essential part of freedom of association is the ability of employees to choose a trade union they want to be part of and the ability to not choose to join a trade union. Casey[95] writes that freedom of association is of fundamental importance to labour relations for without a right to form unions, there could be no real collective bargaining. In *NUMSA and others v Bader Bop (Pty) Ltd*[96] the court contended that if the right to strike is prohibited where employees demand an interest that is associated with a fundamental right, then the right to strike is limited. Employees have a right to all the rights mentioned in this chapter and should not unjustifiably be deprived of these rights.

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94 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC).

95 Casey *The International and Comparative Law Quarterly* 699.

96 *National Union of Metal Workers of South Africa and Other v Bader Bop (Pty) Ltd* 2007 SA 513 (CC) para 35.

The next chapter discusses section 23(1)(d) of the LRA as a provision that limits the abovementioned rights and analyse case law that illustrates how these rights are affected by section 23(1)(d) of the LRA.

# Chapter 3 The notion of section 23(1)(d) as a section that limits the collective labour rights of employees

## 3.1 Introduction

This chapter discusses and contextualises the notion of section 23(1)(d) of the LRA as one that limits the collective rights of employees. Furthermore, this chapter critically reflects on case law which illustrates how section 23(1)(d) of the LRA could potentially impact the rights of employees and their unions as discussed in the previous chapter.

## 3.2 The application of section 23(1)(d) of the LRA

The LRA is a statute that regulates the employment relationship between the employer and employees. As previously stated, the purpose of the LRA is to give effect to the labour rights provided for in section 23 of the Constitution.[97] In the past, the LRA did not contain a provision regarding the enforcement and status of collective agreements.[98] Under common law, collective agreements are regarded as ordinary contracts concluded between an employer and a trade union.[99] Basson *et al*[100] argue that if collective agreements are regarded as contracts, then the normal contractual principles apply to all collective agreements. This would consequently mean that the collective agreement only binds the parties that concluded the agreement – which appears to be at odds with the notion that the collective agreement can be extended to parties who were not part of the negotiations and the agreement. Nevertheless, the common law has a set of rules that could rectify this problem. These rules are, amongst others, the theory of agency, and the theory of *stipulatio*.[101] Vathier[102] added that it should be noted that these rules were to some extent unsatisfactory. The binding effect of the collective agreement when applying the theory of agency stemmed from an order provided by trade union members

97 Section 1 of the *Labour Relations Act* 66 of 1995.
98 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 84.
99 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 84.
100 Basson et al *Essential Labour Law* 57.
101 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 84.
102 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 84.

to their representative to consult on their behalf.[103] In other words, the fact that trade union members ordered their representative to negotiate on their behalf, bound the union members. In terms of the theory of *stipulatio* (also known as stipulation, a basic form of contract based upon a simple question and answer in Roman Law), the union acts as a third party when concluding a collective agreement with an employer.[104] In other words, the benefits arising from the collective agreement belong to the trade union members and other union members.

Basson *et al*[105], however, contend that these rules are "difficult to apply in practice." This is because these rules could not provide a satisfactory explanation on the binding effect of collective agreements.[106] As a result, collective labour law established its own rules to regulate collective agreements. Grogan[107] states that a contract of employment differs from a collective agreement in that a contract is concluded by an individual and an employer, whereas a collective agreement is concluded by an employer and a trade union representing employees for favourable working conditions. A collective agreement is defined under section 213 of the LRA as:[108]

> 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, one or more employers; one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council.

Section 23 of the LRA administers the "legal effect of collective agreements."[109] Section 23(1)(d) of the LRA explicitly makes provision for a collective agreement to be extended to members of a minority trade union and non-unionised parties provided that, the employees are recognised in the agreement;[110] the agreement must unequivocally bind

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103 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 84.
104 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 85.
105 Basson et al *Essential Labour Law* 57.
106 Vauthier *Collective agreements: a comparative study between Belgium and South Africa* 85.
107 Grogan *Workplace Law* 295.
108 Section 213 of the *Labour Relations Act* 66 of 1995.
109 Section 23 of the *Labour Relations Act* 66 of 1995.
110 Section 23(1)(d)(i) of the *Labour Relations Act* 66 of 1995.

the employees;[111] and the trade union with whom the agreement was concluded must have the majority of the employees as members.[112] Grogan[113] contends that collective agreements negotiated by majority unions bind all members identified in the agreement. This provision was enacted for purposes of peace and order in the workplace. If such a provision was not included in the LRA, the decision-making process would be tedious and ineffective in a situation where employees have different demands.

Section 23(1)(d) of the LRA appears to be harmless. However, the problem with the extension of collective agreements is it potentially infringes on the rights of employees discussed in Chapter 2, who are not members of a trade union that enjoys majority at the workplace or not part of a trade union at all. The extension of collective agreements occurs without consulting the aforesaid employees. As a result, employees who belong to a different trade union or are not part of any trade union at all are forced to follow a mandate of a trade union they are not a party to. Section 23(1)(d)(iii) of the LRA creates a conception that employees who are not part of a trade union that enjoys majority at the workplace do not have the ability to secure a favourable deal and that the discretion of the majority trade union is better than that of a minority trade union.

It is clear that the principle of majoritarianism is the basis of section 23(1)(d) of the LRA. This is because for a collective agreement to be extended to members of a minority trade union and non-unionised employees, the trade union that is part of the collective agreement must enjoy majority at the workplace as stated in section 23(1)(d)(iii) of the LRA.[114] It is further important to note that the South African democratic system is based on the principle of majoritarianism. This creates another conception that the interests of majority trade unions triumph over those who are members of minority trade unions and non-unionised employees. The principle of majoritarianism is explained below.

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111 Section 23(1)(d)(ii) of the *Labour Relations Act* 66 of 1995.
112 Section 23(1)(d)(iii) of the *Labour Relations Act* 66 of 1995.
113 Grogan *Workplace Law* 296.
114 Section (1)(d)(iii) of the *Labour Relations Act* 66 of 1995.

### *3.2.1 Principle of majoritarianism*

The principle of majoritarianism is not defined in the LRA. However, in the matter of *Transport and Allied Workers Union of South Africa v PUTCO,*[115] the Constitutional Court defined the principle of majoritarianism as a rule that allows the will of the majority to prevail. This principle supports the will of majority trade unions over minority trade unions and essentially prevents the said minority unions from practising their organisational rights.[116] The members of these unions are consequently not provided with an opportunity to bargain collectively on matters of mutual interest through their union.[117]

In *Fakude v Kwikot (Pty) Ltd,*[118] the Court maintained that majoritarianism provides a majority trade union with the power to decide how a conflict should be resolved irrespective of whether the members of a minority trade union are disadvantaged. This majoritarianism prejudice was recapitulated in *United Transport and Allied Trade Union/SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd.*[119] In this matter, the Court stated that the will of the majority prevails even if it's detrimental to the minority members.[120] Non-unionised employees and minority union employees appear to be put in a position where they are forced to be represented by a union, they did not choose. As mentioned above, this limits their collective labour rights such as, amongst others, their right to freedom of association, and by the same token, freedom *not* to associate.

In applying the majoritarian principle, an element of coercion is apparent, side-lining and stripping members of minority trade unions and non-unionised employees of their collective rights. The application of this principle suppresses minority unions and employees who are not members of a trade union at all. These employees are restricted

115 *Transport and Allied Workers Union of South Africa v PUTCO* 2016 6 (CC) para 61.
116 Braatvedt and Van Wyk 2020 www.mondaq.com accessed on 03 August 2022.
117 Braatvedt and Van Wyk 2020 www.mondaq.com accessed on 03 August 2022.
118 *Fakude v Kwikot (Pty) Ltd* 2012 SA 169 (LC) para 24.
119 *United Transport and Allied Trade Union/SA Railways and Harbours Union v Autopax Passenger Services* (SOC) Ltd 2014 35 (LC) para 72.
120 *United Transport and Allied Trade Union/SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* 2013 SA (LC) para 45.

from bargaining collectively with the employer, thus not allowing them to participate in decisions affecting them.

A critical discussion of case law follows below where arguments against the use of section 23(1)(d) of the LRA were made. The analysis illustrates the potential impact of section 23(1)(d) of the LRA on the collective rights of employees of minority trade unions.

### 3.3 Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and others

In the matter of *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,[121] the Chamber of Mines of South Africa took part in a wage and working conditions negotiation on behalf of its members. The Chamber of Mines negotiated with trade unions that enjoyed a majority at the mines and these negotiations were concluded with a collective agreement. This collective agreement bound the AMCU as it was a trade union that represented the minority of employees and stated that no party shall call a strike or lockout in relation to matters that are dealt with in the collective agreement. Lester[122] highlights that the Chamber of Mines used a company-based bargaining system where the principle of majoritarianism applies. The purpose of this system was to limit rivalry between trade unions.[123] AMCU did not regard itself as bound by the agreement as it was not part of the collective bargaining process between the Chamber of Mines and the trade unions that enjoyed majority at the workplace. Section 18 of the LRA allows majority unions to obtain organisational rights, and the right to determine representative thresholds.[124] On account of this, minority trade unions in the particular workplace were excluded from bargaining as they did not meet the thresholds.

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121 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 6.

122 Lester *Employee participation in decision making in the mining sector* 45.

123 Du toit et al *Collective bargaining in South Africa past, present and future* 21.

124 Section 18 of the *Labour Relations Act* 66 of 1995.

On 20 January 2014, AMCU served the employer of its members a notice to strike on matters that were dealt with in the collective agreement.[125] In response to the notice, the Chamber of Mines applied for an urgent interdict at the Labour Court forbidding AMCU from striking, and the application succeeded.[126] AMCU filed a counter application where the constitutionality of section 23(1)(d) of the LRA was challenged. AMCU contended that section 23(1)(d) of the LRA unjustifiably limits its members' right to strike, including the right to bargain collectively through the union, fair labour practices and the right to freedom of association.[127] AMCU stated that the right to strike is an essential part of collective bargaining; if this right is prohibited, then the right to collective bargaining is fictitious.[128] Achmat[129] argues in this respect that the right to strike is a vital factor for functional collective bargaining. Prohibiting an employee from exercising his right to strike over a matter of mutual interest consequently undermines the right to collective bargaining. AMCU further contended that its members are treated as coerced employees, and this strips their right to dignity.[130] In *NUMSA v Bader Bop,*[131] the Labour Court stated that the right to strike is an important right for protecting the dignity of employees, as its employees may not be treated as "coerced employees".

The finding in this court was that the limitation of the constitutional rights mentioned by AMCU is reasonable and justifiable and meets the requirements prescribed by section 36 of the Constitution. Niekerk J,[132] found that section 23(1)(d) of the LRA is valid and not unconstitutional. AMCU appealed this judgment at the Labour Appeal Court (hereafter

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125 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 8.

126 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 8.

127 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 18.

128 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 29.

129 Achmat *The right to strike and its limitations* 22.

130 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (LAC) para 21.

131 *National Union of Mineworkers v Bader Bop* 2003 (LC) para 316.

132 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (LAC) para 28.

LAC). However, the appeal was dismissed.[133] AMCU then took the matter to the Constitutional Court to challenge the constitutionality of section 23(1)(d) of the LRA. The findings of the Constitutional Court are dealt with in chapter 4.

Another case that illustrates the impact of section 23(1)(d) of the LRA on the collective rights of employees of the minority trade union is discussed below.

## 3.4 Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others

In the matter of *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others*,[134] the Court dealt with a collective agreement that regulated the process of retrenchment in accordance with section 189 of the LRA. On 30 September 2015, Royal Bafokeng Platinum Limited employees arrived at work as usual to execute their duties.[135] Their entry to the mine was denied as they attempted to clock in for work. The employees were requested to wait outside for a human resource officer to address them.[136] Upon the arrival of the human resources officer, the employees were instructed to board a bus to the protection services department of the mine.[137] The employees queued at the protection services department as requested and they were issued with retrenchment notices.[138] The date of these retrenchment notices was 18 September 2015, exactly two weeks before the employees were issued with the retrenchment notices.[139] Most of these employees were members of AMCU.

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133 *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 8.

134 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 1.

135 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 2.

136 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 2.

137 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 3.

138 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 3.

139 *Association of Mineworkers and Constitution Union and others v Royal Bafokeng Platinum Limited and Others* 2020 SA 1 (CC) para 3.

Royal Bafokeng Platinum Limited had a consultation with the National Union of Mineworkers (hereafter NUM) as a trade union that enjoyed majority at the workplace. This was due to section 23(1)(d) of the LRA. In this regard, this section allowed Royal Bafokeng Platinum Limited and NUM to enter into a collective agreement that set out the terms of the retrenchment and who will be retrenched. This was extended to the minority trade union, being AMCU.

The matter was taken to the Labour Court to dispute the "fairness of the procedure that led to their dismissal".[140] AMCU argued that Royal Bafokeng Platinum Limited did not have a consultation with them prior to the retrenchments. AMCU contended that the LRA places a duty on employers to have a "consensus-seeking process" with the employees likely to be affected before retrenchments. A consensus seeking process is an effort in which affected parties seek to reach an agreement on a course of action to address an issue, work together with the employer and find a mutually acceptable solution to avoid or minimise the retrenchments.[141] AMCU contended that section 23(1)(d) of the LRA violates its members' right to freedom of association, right to equality, and the right to fair labour practice.[142] AMCU argued that the minority employees were not granted the same opportunity to be heard as the majority because the section excludes the minority.[143] AMCU sought that section 23(1)(d) of the LRA be re-examined in a manner that corresponds with the aforesaid constitutional rights.[144] Further, AMCU argued that operational requirement dismissals regulated by collective agreements should not be extended to employees who were not a party to the agreement. Furthermore, AMCU

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140 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 208 (LC) para 8.

141 The Consensus Council *Consensus-Based Decision-Making Processes* 1.

142 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 9(1).

143 *Association of Mineworkers and Construction Union (AMCU) and Others v Bafokeng Rasimone Management Services (Pty) Ltd and Others* 2017 SA 208 (LC) para 25.

144 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 9(4).

sought that the retrenchment agreement should be reviewed and set aside and the retrenched employees must be reinstated.[145]

The Labour Court stated that there is nothing unconstitutional about section 23(1)(d) of the LRA, and it is justifiable in terms of section 36 of the Constitution.[146] The Court stated that section 23(1)(d) of the LRA promotes orderly collective bargaining and brings labour peace.[147] AMCU took this matter to the LAC, and the LAC similarly found that section 23(1)(d) of the LRA is constitutional and justifiable. AMCU further took the matter to the Constitutional Court, and the judgement of was fully analysed in the next chapter.

## 3.5 Conclusion

The above clearly illustrates the potential impact section 23(1)(d) of the LRA has on employees who are not part of the majority trade union. Members of minority trade unions are bound by an agreement concluded by the employer and the majority trade union. This restriction infringes upon the abovementioned collective labour rights of minority employees. This section potentially strips the rights of employees who are members of minority trade unions. Every person has a right to be granted all the labour related rights provided in the Constitution. Section 23(1)(d) of the LRA however potentially oppresses non-unionised employees and minority trade unions as it does not allow these employees to decide on matters that affect them and forces them to comply with agreements they were not a party to, and which may contain provisions that are not in their best interest.

The next chapter critically discusses the judgement of the Constitutional Court on the abovementioned case law and examines the justifiability of section 23(1)(d) of the LRA based on the majoritarianism principle in the South African labour market.

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145 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 9(4).

146 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 17.

147 *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (LC) para 17.

# Chapter 4 The justifiability of section 23(1)(d) of the LRA based on the majoritarianism principle and the findings of the Constitutional Court

## 4.1 Introduction

This chapter intends to investigate the ultimate legal position regarding the question of whether section 23(1)(d) of the LRA infringes on particular rights of employees or not, and whether it is subsequently unconstitutional or not. In this regard, the role of the majoritarianism principle in the labour markets of South Africa is highlighted. In addressing the ultimate question of whether section 23(1)(d) of the LRA unjustifiably limits the rights of employees or not, the findings of the Constitutional Court in the matters of *AMCU v Chamber of Mines of South Africa*[148] and *AMCU v Royal Bafokeng Platinum Limited* [149] are be scrutinised. This investigation attempts to show the current position on the topic at hand.

## 4.2 The rationale of section 23(1)(d) of the LRA and the principle of majoritarianism

Before the LRA was established, there was uncertainty regarding the binding effect of collective agreements.[150] Collective agreements that were concluded at industrial courts were the only agreements that were binding and were also regarded as "subordinate legislation".[151] However, Khumalo[152] contended that the labour courts have declared that the will of the majority should always prevail. In *Ramolesane & another v Andres Mentis*

148 *Association of Mineworkers & Construction Union v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC).

149 *Association of Mineworkers & Construction Union and Others v Royal Bafokeng Platinum Limited and Others* 2018 SA 208 (CC).

150 Khumalo *Extension of collective agreements in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa* 332.

151 Vauthier *Collective Agreement: A Comparative Study between Belgium and South Africa* 82.

152 Khumalo *Extension of collective agreements in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of mines of South Africa* 332.

*& another,*[153] the court supported this notion by stating that "where the collective interests of the majority members conflict with the interests of the minority members, it only makes sense that the collective interests of the majority should prevail." This alludes that the majority enjoys preference as such trade unions have more power and influence, simultaneously avoiding the proliferation of trade unions in one workplace.

The uncertainty of the binding effect of collective agreements was removed by section 23(1)(d) of the LRA. According to Nxumalo,[154] section 23(1)(d) of the LRA validates the legislative policy of the principle of majoritarianism as it allows collective agreements concluded by majority employees and the employer to be extended to minority unions and non-unionised employees. In *Mzeku and others v Volkswagen SA (Pty) Ltd and others*,[155] the court confirmed the aforesaid by stating that collective agreements that are concluded by a trade union which enjoys majority at the workplace and the employer may be extended to all other employees. Other employees include those who are not part of a trade union at all, and also those who are ex-members of the majority trade union and future employees who will be employed while the collective agreement still exists. Malan[156] contended that the rationale behind the extension of collective agreements is to avoid chaos and allow all the employees to follow one mandate. In a situation where a conclusion cannot be reached, applying the majoritarianism principle makes sense. However, it is important to note that the principle of majoritarianism will not apply if it prevents minority trade unions from "operating and representing their members in individual disputes".[157]

From the above, it is apparent that section 23(1)(d) of the LRA clearly encapsulates the policy of majoritarianism. Phalane[158] added that majoritarianism is a principle that is

153 *Ramolesane & another v Andres Mentis & another* 1991 329 (LAC) para 335H.
154 Nxumalo *Majoritarian Principle in the Context of Retrenchments* 56.
155 *Mzeku and others v Volkswagen SA (Pty) Ltd and others* 2001 857 (LAC) para 55.
156 Malan *South African Law Journal* 436.
157 Beenzu *A demarcation of majoritarianism within the South African and German labour law context* 30.
158 Phalane *A critique of recent developments on the regulation of collective agreements in South African labour law: Extension and enforcement to non-parties* 39.

recognised internationally. South Africa acknowledged this principle in *Kem-Lin Fashions v Bruton,*[159] where the Labour Appeal Court maintained that the policy of majoritarianism is one of the principles that the legislature had to adopt for purposes of orderly collective bargaining and peace at workplaces. In *AMCU v Chamber of Mines of South Africa,*[160] the Constitutional Court asserted that the principle of majoritarianism is a "founding principle of the LRA." This legislative choice is based on the presumption that it will promote orderly collective bargaining, advance labour peace and serve the objective of the LRA.[161] Employees, through their union, have the right to negotiate acceptable conditions with their employer, and this is known as collective bargaining as explained in chapter one. As discussed in chapter two, all employees have a right to "form and join a trade union".[162] In most cases, workplaces have more than one trade union that represent employees. In a situation where employees, through their union have different demands regarding employment terms and wages, it would be practical to negotiate with a trade union that represents the majority of employees at the workplace to avoid disputes and protracted negotiations. By doing so, orderly collective bargaining and labour peace can be achieved.

In *Free Market Foundation v The Minister of Labour and Others*,[163] the applicant argued that allowing a collective agreement to be extended is unconstitutional and discriminates against the minority. However, the High Court maintained that majoritarianism promotes orderly collective bargaining and the LRA ingrains provisions that protect every employee, including the minority against discrimination.[164] This encourages the principle of majoritarianism that allows the will of the majority to prevail.

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159 *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) para 19.

160 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 49.

161 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 66.

162 Section 23(2)(a) of the *Constitution of the Republic of South Africa*, 1996.

163 *Free Market Foundation v The Minister of Labour and Others* 2016 ZAGPPHC 266 para 51 and 57.

164 *Free Market Foundation v The Minister of Labour and Others* 2016 ZAGPPHC 266 para 64.

Furthermore, in *Transport and Allied Workers Union of South Africa v Public Utility Transport Corporation*,[165] the applicant argued that a collective agreement cannot be extended to employees who were not on strike and were not a party to the dispute. However, the Labour Appeal Court held that collective agreements bind every employee, even though they were not a party to the bargaining council.[166] The Labour Appeal Court further held that even though the will of the majority prevails, the employees who are members of a minority trade union would benefit if the outcome of the negotiation is positive, as much as these members would be prejudiced if the outcome of the negotiation was negative.[167] In other words, if the majority trade union decides to strike and the strike causes the employer to accept the demands, employees who are members of a minority trade union would benefit from the positive results caused by the strike. It would not be fair to spare the minority in unfavourable situations.

As was highlighted above, the principle of majoritarianism is rooted in the labour market both nationally and internationally.[168] The Freedom of Association Committee, a supervisory body of the *International Labour Organisation* maintain that the will of the majority should prevail provided that the minority trade unions are not prohibited from operating.[169] The ILO has expressed that it is not unfair to allow the most represented group of employees to have certain privileges, provided that they are not biased and oppress the minority.[170] With this, it is clear that the ILO embraces the principle of majoritarianism, thus justifying its inclusion within the South African labour law framework. Zishiri[171] contends that the practice of majoritarianism in South Africa

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165 *Transport and Allied Workers Union of South Africa v Public Utility Transport Corporation Limited* 2014 SA (LC) 7 para 8.

166 *Public Utility Transport Corporation v Transport and Allied Workers Union of South Africa* 2015 SA (LAC) 14 para 51.

167 *Public Utility Transport Corporation v Transport and Allied Workers Union of South Africa* 2015 SA (LAC) 14 para 51.

168 Beenzu *A demarcation of majoritarianism within the South African and German labour law context* 30.

169 ILO 2016 http://www.ilo.org accessed on 25 October 2022.

170 ILO 2016 http://www.ilo.org accessed on 25 October 2022.

171 Zishiri *Effect of the principle of majoritarianism on the right of the minority to freely associate in the workplace within the context of the South African context of the South African Constitution* 21.

consequently complies with ILO standards and further states that according to ILO, the principle of majoritarianism is compatible with fundamental rights such as the right to freedom of association. This is due to the fact that the majoritarianism principle does not deprive members of joining trade unions, and it does not hinder minority unions from existing.

Section 23(1)(d) of the LRA thus encloses the principle of majoritarianism and as shown below, the South African courts have ruled that the majoritarianism principle and section 23(1)(d) of the LRA are constitutional. Therefore, the limitation it poses appears to be reasonable and justifiable.

## 4.3 The Constitutional validity of section 23(1)(d) of the LRA: Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others

In this matter, AMCU challenged the constitutionality of section 23(1)(d) of the LRA. As mentioned in the previous chapters, AMCU contended that section 23(1)(d) of the LRA unjustifiably limits its members' right to strike, including the right to bargain collectively, fair labour practices and the right to freedom of association.[172]

The Constitutional Court dismissed this argument and held that this limitation is reasonable and justifiable.[173] The Constitutional Court stated that AMCU is correct that section 23(1)(d) of the LRA limits the right to strike.[174] However, the Constitutional Court contended that the limitation is justified because "majoritarianism benefits orderly collective bargaining".[175] Majoritarianism, therefore, finds expression when a collective

172 See para 3.3 above.

173 *Association of Mineworkers & Construction Union v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 46.

174 *Association of Mineworkers & Construction Union v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 50.

175 *Association of Mineworkers & Construction Union v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 50.

agreement has been entered into, and extended to minority unions and their members in an attempt to advance orderly collective bargaining.[176]

As mentioned above, AMCU argued that section 23(1)(d) of the LRA deprives its members of the right to freedom of association. In *National Union of Metal Workers of South Africa v Bader Bop,*[177] the Constitutional Court noted the importance of freedom of association as a right that originates from international instruments, such as the *Freedom of Association and Protection of the Right to Organise Convention* (1987) No. 87 for the interpretation of the LRA. It further noted that even though the *Freedom of Association and Protection of the Right to Organise Convention* (1987) No. 87 does not require trade union pluralism, the principle of the majoritarianism system operates fairly, as it allows minority unions to still exist. Therefore, the limitation caused by section 23(1)(d) of the LRA is thus justifiable.[178]

In the AMCU case, the Constitutional Court ultimately confirmed that section 23(1)(d) of the LRA encloses the principle of majoritarianism.[179] Zondo JP[180] added that in *Kem-Lin Fashions CC v Brunton*, the Court stated that the principle of majoritarianism which allows the will of the majority to prevail is good for orderly collective bargaining. The author further stated that the concept of allowing the will of the minority to prevail is irrational – a position the Constitutional Court in the above matter appears to support. The Court, therefore, found that section 23(1)(d) of the LRA provides the majority with power at the workplace in the pursuit of orderly collective bargaining and labour peace.[181] If section 23(1)(d) of the LRA did not allow this, collective bargaining would be fruitless. Therefore,

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176 Le Roux *Obiter* 2.

177 *National Union of Metal Workers of South Africa v Bader Bop* 2002 SA 30 (CC) para 31.

178 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 55.

179 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 39.

180 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 43.

181 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 44.

collective bargaining prefers the majoritarianism system for a well-ordered collective bargaining process. It would be impractical for a collective agreement to only bind members of the majority trade union, and it would also be untenable for the will of the minority to prevail.

To determine whether the limitation is reasonable and justifiable, the Constitutional Court put the limitation to the test. Section 36 of the Constitution states that:[182]

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:
>
> a) the nature of the right
> b) the importance of the purpose of the limitation
> c) the nature and extent of the limitation
> d) the relation between the limitation and its purpose; and
> e) less restrictive means to achieve the purpose.

Even though the Constitutional Court did not address each factor one after the other, the findings illustrate that all relevant factors were considered. Section 23(1)(d) of the LRA does not impose a limitation that revokes the rights of the minority and non-unionised members.[183] Cheadle[184] added that the extension imposed by section 23(1)(d) of the LRA does not hinder the minority from being part of the collective bargaining process, it merely limits the rights for purposes of orderly collective bargaining and labour peace as discussed above. Pienaar[185] in this regard also admitted that the legislature had "no less restrictive means to achieve the purpose" of orderly collective bargaining and labour peace. As a result, the limitation of the relevant rights passes constitutional muster.

It is worth noting that a collective agreement that is extended to the minority and non-parties only applies for the duration of the agreement with regard to the issues it covered,

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182 Section 36 of the *Constitution of the Republic of South Africa*, 1996.

183 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 77.

184 Cheadle *Collective bargaining* 153.

185 Pienaar *Minority trade unions are bound by extended collective agreements* 13.

it does not apply to them indefinitely.[186] Section 23(1)(d) of the LRA does not allow far-reaching extensions.[187]

The Constitutional Court ultimately admitted that this provision directly limits the right to strike but considering the significance of the purpose of extending collective agreements, it can be justified.[188]

## 4.4 The constitutional validity of section 23(1)(d) of the LRA: Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Limited

As was unpacked in the previous chapter, in this matter, AMCU similarly challenged the constitutionality of section 23(1)(d) of the LRA in allowing a collective agreement to be extended to the minority and non-union members in respect of retrenchments.[189] AMCU argued that allowing a collective agreement that was concluded by the employer and a majority trade union regarding operational requirement dismissals of members who did not conclude the collective agreement, was unconstitutional.[190] In other words, according to AMCU, extending a collective agreement regarding who would be retrenched to the minority and non-unionised members who were not part of the consultation process, is unconstitutional.

AMCU[191] further contended that section 189(1) of the LRA is unconstitutional as it allows an employer who is contemplating dismissing an employee for operational requirements to consult "any person whom the employer is required to consult in terms of collective

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186 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 58.

187 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 58.

188 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 58.

189 *Association of Mineworkers & Construction Union and Others v Royal Bafokeng Platinum Limited & Others* 2020 SA 1 para 20.

190 *Association of Mineworkers & Construction Union and Others v Bafokeng Rasimone Management Services PTY LTD* (unreported) case number J2578/15 of 17 December 2016 para 1.

191 *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services PTY LTD* case number J 2578/15 of 17 December 2016 para 7.

agreement".[192] AMCU required that section 189(1) and section 23(1)(d) of the LRA be interpreted in a way that requires the employer to consult with minority trade unions even after the employer concluded a collective agreement with the majority trade union.[193]

AMCU argued that section 23(1)(d) of the LRA infringes on the right to fair labour practices, and the right to freedom of association, and that section 23(1)(d) of the LRA should be reinterpreted in a manner that is consistent with the Constitution.[194] AMCU argued that the Court should declare that collective agreements that have been concluded to regulate the retrenchments of employees on the basis of operational requirements with majority trade unions should not be extended to employees who were not part of the majority trade union and that section 23(1)(d) of the LRA should not allow the conclusion of collective agreements to regulate retrenchments.[195]

The Constitutional Court had to analyse two legal issues, being "the effects of the principle of majoritarianism on inclusive consultation and the constitutional validity of sections 189(1) and section 23(1)(d) of the LRA promoting majoritarianism."[196]

The Constitutional Court judges viewed the constitutionality of section 189(1) of the LRA differently. It can be argued that through the divisiveness amongst the Constitutional Court judges, AMCU's constitutional attack may be justified. However, in the majority judgement, it was found that section 189(1) of the LRA is constitutionally valid as section 23(1) of the Constitution does not grant a person a right to be individually consulted. Frahm[197] confirmed that section 23(1) of the Constitution does not imply individual

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192 Section 189(1)(a) of the *Labour Relations Act* 66 of 1995.

193 *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services PTY LTD* case number J 2578/15 of 17 December 2016 para 2 and 4.

194 *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services PTY LTD* case number J 2578/15 of 17 December 2016 para 7.

195 *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services PTY LTD* case number J 2578/15 of 17 December 2016 para 28.

196 Kengi *Balancing majoritarianism and the right to consultation: Association of Mineworkers and Constitutional Union and Others v Royal Bafokeng Platinum Limited and Others* 4.

197 Frahm-Arp *South Africa: The continued omnipotence of the principle of majoritarianism in South Africa Labour Law 6.*

consultation. In *Aunde South Africa v NUMSA*,[198] the Labour Appeal Court held that if a collective agreement requires an employer to consult with a majority trade union over retrenchment, such employer does not have a duty in law to consult with other individuals or unions.[199] In this regard, Le Roux[200] added that just because the minority was not consulted before the extension does not mean that an extension is irrational. This is because the purpose of the extension is orderly collective bargaining and labour peace. The Labour Court in *AMCU v Royal Bafokeng* stated that "it would be impractical to require an employer to consult with every employee who faces retrenchments".[201] Therefore, the view that section 189(1) of the LRA is unconstitutional is invalid.

Le Roux[202] further contended that the Constitutional Court found that collective bargaining and collective agreements are essential parts of the structure of the LRA. A collective agreement is a purposefully powerful instrument and has the ability to infringe the provisions of the LRA once validly concluded.[203] Likewise, the Constitutional Court referred to the ILO for guidance regarding procedural fairness when dealing with retrenchments.[204] The mere fact that the majority trade union had a seat at the consultation table to discuss retrenchment optimally represented all employees. This avoids an untenable situation that would cause chaos at the workplace by consulting every employee and serves peace and orderly collective bargaining. This does not mean that employees who were not consulted are not represented, since a trade union that has a majority status ought to act fairly to both non-unionised members and its members, without discrimination.[205] In turn, the employer must also act fairly to both minority

198 *Aunde SA (Pty) Ltd v National Union of Metalworkers* 2011 SA 32 (LAC) para 32.
199 *Aunde SA (Pty) Ltd v National Union of Metalworkers* 2011 SA 32 (LAC) para 32.
200 Le Roux *Obiter* 485.
201 *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Limited* 2018 SA 208 (LC) para 17.
202 Le Roux *Obiter* 500.
203 Le Roux *Obiter* 500.
204 *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Limited* 2018 SA 208 (CC) para 78.
205 ILO 2018 www.ilo.org accessed on 10 November 2022.

employees and non-unionised employees when concluding a collective agreement with the majority trade union.

The Constitutional Court argued that a collective agreement regarding retrenchment that binds employees who are not members of the majority party, and non-unionised members, is fair and justifiable as collective agreements can always be contested regarding legality and lawfulness. Kengni[206] added that this point of view is supported by the fact that measures can be taken should employees argue that their "retrenchment was substantially unfair" due to a collective agreement.

The constitutional attack on section 23(1)(d) of the LRA, therefore, had no basis. Kengi[207] added that the Constitutional Court found section 23(1)(d) of the LRA to be constitutional and valid on grounds that AMCU failed to illustrate how this section unjustifiably infringes the right to fair labour practices and freedom of association.

Similar to the Chamber of Mines matter, the Constitutional Court had to test whether the limitation is reasonable and justifiable. The limitation must be justifiable in terms of section 36 of the Constitution. In this matter too, the court did not address each factor individually. However, the Constitutional Court contended that the limitations implemented are justifiable because it gives expression to the majoritarianism principle.[208]

## 4.5 Conclusion

From the above, it can be concluded that extending a collective agreement to the minority and non-unionised employees is binding and constitutional, even if it might have the potential to limit some of the relevant employees' rights.[209] In *AMCU v Chamber of Mines*

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206 Kengi *Balancing majoritarianism and the right to consultation: Association of Mineworkers and Consultation Union and others v Royal Bafokeng Platinum Limited and Other* 8.

207 Kengi *Balancing majoritarianism and the right to consultation: Association of Mineworkers and Consultation Union and others v Royal Bafokeng Platinum Limited and Other* 11.

208 *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Limited* 2018 SA 208 (CC) para 67.

209 Khunou *A detailed case discussion on the case: AMCU obo members v Royal Bafokeng Platinum LTD & Others* 12.

*of South Africa,*[210] the Court confirmed the minority employees' right to strike can be limited by extending a collective agreement due to the principle of majoritarianism as it serves peace and orderly collective bargaining. While the principle of majoritarianism is a principle element of the LRA, it only finds expression when a collective agreement is concluded with a majority trade union and an employer and extended to the minority and non-unionised employees as allowed by section 23(1)(d) of the LRA.

Majoritarianism is a principle that can infringe on fundamental rights in the Constitution and the LRA, no right is immune to the limitation that is caused by section 23(1)(d) of the LRA. Le Roux[211] added that in both Royal Bafokeng and Chamber of Mines cases, the Constitutional Court contended that section 23(1)(d) of the LRA is a valid, constitutionally sound provision that can limit the rights of employees for purposes of peace and orderly collective bargaining. The Labour Court in *AMCU v Royal Bafokeng Platinum Limited*[212] found that during retrenchment consultations, section 23(1)(d) of the LRA can limit the right of employees to be represented by their own trade union. The Constitutional Court confirmed that once a collective agreement regarding retrenchments has been extended, the employer has no obligation to consult with other trade unions that were not a party to a collective agreement, although they might be affected by the retrenchment.[213]

Fundamental rights are not immune to majoritarianism. The principle of majoritarianism is a straightforward tool deliberately established for labour peace and orderly collective bargaining.[214] In *Chamber of Mines* and *Royal Bafokeng*, the Constitutional Court respected the purpose of the principle of majoritarianism by not interfering with the justified limitation the application of this principle caused.

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210 *Association of Mineworkers & Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 SA 3 (CC) para 76.

211 Le Roux *Obiter* 502.

212 *Association of Mineworkers & Construction Union and Others v Royal Bafokeng Platinum Limited* 2018 SA 208 (LC) para 24.

213 Le Roux *Retrenchment law* 88.

214 Nxumalo *Majoritarian Principle in the Context of Retrenchments* 56.

The next chapter draws conclusions on the findings made in the study, and the ultimate interpretation and position regarding the potential limitation of certain constitutional and labour rights of employees due to the application of section 23(1)(d) of the LRA.

# Chapter 5 Conclusion and Recommendations

## 5.1 Introduction

The main problem introduced by this study is that section 23(1)(d) of the LRA has the potential of depriving specific groups of employees (those represented by minority trade unions or not unionised at all) of certain labour rights. The study set out to investigate this issue and to determine what the current legal position in this regard is. This chapter concludes with the findings made in the study, and the ultimate interpretation and position regarding the potential limitation of certain constitutional rights of employees due to the application of section 23(1)(d) of the LRA.

This chapter further provides recommendations to the problems identified in this study with regard to the extension of section 23(1)(d) of the LRA.

## 5.2 Conclusion

The study found that section 23(1)(d) of the LRA potentially deprives the minority employees and non-unionised employees of their right to strike, freedom of association, and the right to fair labour practices as the applicants contended in *Chamber of Mines* and *Royal Bafokeng*. This study discovered that section 23(1)(d) of the LRA does not provide the minority employees and non-unionised employees with an opportunity to strike against unfavourable terms and conditions after a collective agreement relevant to these terms and conditions has been extended to them. Similarly, employees' right to not associate with a trade union, or to be represented by one specific trade union is also encroached upon as section 23(1)(d) of the LRA forces them to follow a mandate of a trade union they are not a party to by virtue of a collective agreement they do not necessarily agree with. Furthermore, they may not be provided with an opportunity to challenge a retrenchment by way of a strike, as was illustrated in *Royal Bafokeng*.

The South African courts made it clear that the extension of collective agreements to the minority employees and non-unionised employees is binding and constitutional. This

is applicable in instances of retrenchments and matters of mutual interest. The study has shown that the extension of collective agreements to minority unions and non-unionised employees is enforced for purposes of labour peace and orderly collective bargaining.

This study discovered that section 23(1)(d) of the LRA can endure constitutional scrutiny, mainly when examined within the context of the principle of majoritarianism enclosed in the LRA and the overall purpose thereof. The Constitutional Court upheld the constitutionality of section 23(1)(d) of the LRA. Khumalo[215] in this regard argues that an attack on section 23(1)(d) of the LRA is also an attack on the relevant legislative policy. This has a significant impact as it includes the whole Act and not section 23(1)(d) of the LRA only. One of the objectives of the LRA is to encourage effective ways to resolve labour disputes, and the study has shown that section 23(1)(d) of the LRA is an effective tool to reach a conclusion with regard to the terms and conditions of mutual interest at work.

The study also discovered that section 23(1)(d) of the LRA ensures that employees may still carry out their right to collective bargaining outside a bargaining council effectively. The fact that their collective labour rights are limited does not mean that they cannot form a trade union and participate in its activities or choose not to do so. The collective labour rights mentioned in the study that are potentially deprived by section 23(1)(d) of the LRA such as the right to strike are not absolute, and the limitation has been found to be reasonable and justifiable. The study has also discovered that international law recognises and accepts majoritarianism and the application of section 23(1)(d) of the LRA. All employees are entitled to collective labour rights, but this does not mean that these rights cannot be limited under appropriate circumstances.

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215 Khumalo *Extension of collective agreement in terms of section 23(1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa* 23, 36.

## 5.3 Recommendations

It is clear in this study that the will of the majority always prevails. However, the study suggests that, in case of retrenchment, the employer should at least consult the trade unions of all employees who may be affected by the retrenchment and not simply conclude a collective agreement in this regard with the majority trade union. There is indeed potential that the employees of the minority trade unions, or those not unionised at all, may be disproportionately affected because they did not have a seat at the consultation table.

Section 32 of the LRA has requirements that should be followed before a collective agreement can be extended to non-parties.[216] These requirements should also be applicable under section 23(1)(d) of the LRA. To ensure that these requirements are complied with, an agent can be appointed.

The Collective Agreements Recommendation, 1951 (No.91) recommends that before a final decision can be taken, non-parties should be provided with an opportunity to present their position to indicate why a collective agreement should not be extended to them.[217] This would satisfy the principle of true collective bargaining. South Africa should adopt this mechanism, and it should be mandatory. This would provide non-parties with an opportunity to decide on matters that affect them and ultimately serve the interests of all the parties within a workplace, not just the majority.

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216 Section 34 of *the Labour Relations Act* 66 of 1995.

217 ILO R901-*Collective Agreements Recommendations* 1951 (NO.91).

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