CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 181/18

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	First Applicant
INDIVIDUAL PERSONS WHOSE NAMES ARE LISTED IN ANNEXURE "A"	Second to further Applicants
and	
ROYAL BAFOKENG PLATINUM LIMITED	First Respondent
NATIONAL UNION OF MINEWORKERS	Second Respondent
UASA – THE UNION	Third Respondent
MINISTER OF LABOUR	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent

Neutral citation:	*Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited and Others* [2020] ZACC 1
Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J and Theron J
Judgments:	Ledwaba AJ (minority): [1] to [99] Froneman J (majority): [100] to [132] Jafta J (dissenting): [133] to [203] Theron J (concurring): [204] to [211]

Heard on: 30 May 2019

Decided on: 23 January 2020

Summary: Labour Relations Act 66 of 1995 — constitutionality of sections 23(1)(d) and 189(1) — principle of majoritarianism — retrenchment — consultation

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court) the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

LEDWABA AJ (Mogoeng CJ, Jafta J and Madlanga J concurring):

Introduction

[1] This matter concerns the unfortunate reality of retrenchments, where a company chooses to dismiss a portion of its workforce in order to remain economically viable or competitive. This process often occurs unexpectedly. It typically has the destructive effect of leaving certain employees jobless through no fault of their own. That is precisely what happened in this case. A platinum mine operated by Royal Bafokeng Platinum Limited (respondent) decided to retrench 103 of its employees, some of whom

were members of the Association of Mineworkers and Construction Union (AMCU), including the second to further applicants in this matter (applicants).

[2] This is how it happened. On 30 September 2015, during the early hours of the morning, the applicants and various other employees, arrived at the mine to begin their workday. Their attempts to clock in for work were unsuccessful. To their surprise, the access system at the mine no longer afforded them entry. The employees were instructed to wait outside the mine entrance until a time at which the respondent's human resources personnel could address them.

[3] A human resource assistant arrived at approximately 06h15 and instructed the applicants to board buses that would transport them to the mine's protection services department. Upon arrival, the employees were queued and issued with notices of their retrenchment. These were dated 18 September 2015, just under two weeks earlier.

[4] The applicants dispute the fairness of the procedure that led to their dismissal. The challenge to the dismissals was adjudicated before the Commission for Conciliation Mediation and Arbitration (CCMA), then before Labour Court, the Labour Appeal Court and now in this Court. Their grievance is clear: they were not afforded the opportunity to consult with their employer prior to their dismissal. This was due to a collective agreement that excluded them from the consulting process. The agreement was concluded between the employer and the two other unions at the mine, the National Union of Mineworkers (NUM) and UASA.[1]

[5] NUM enjoyed a majority of support in the workplace, having around 75% of the workforce as its members. Both UASA and AMCU enjoyed minority support, with AMCU representing approximately 11% of employees. These figures are the source of AMCU's grievance. This is because the Labour Relations Act[2] (LRA) and our Labour

[1] Formerly known as the United Association of South Africa.

[2] 66 of 1995.

Courts have given lawful authority to the following: a majority union, after concluding the requisite collective agreement with an employer, enjoys the exclusive right to be consulted with during the retrenchment process.

[6] Of apparent greater inequity is that such a majority union can conclude a further collective agreement with the employer which sets out the terms of the retrenchment. This agreement, concerning who will be dismissed, what severance package they will receive, and the like, can be lawfully extended to minority unions and non-unionised employees who were never party to the agreement in the first place.

[7] The question before this Court is whether this process is constitutionally compliant. Specifically, does the right to fair labour practices in section 23(1) of the Constitution allow for this kind of exclusion?[3] Behind this question are complex issues concerning the primacy afforded to majority unions in labour disputes and whether this, in the case of retrenchments, is appropriate. But before these issues are traversed, the relevant facts must be understood.

Background facts

[8] The applicants contend that they were oblivious to their impending retrenchment. The respondents deny this, stating that they were issued with adequate notice of the retrenchment leading up to 30 September 2015. What is not in dispute is the nature of the process which led to the applicants' dismissal.

[9] The process was as follows. On 5 August 2015, the respondent began to consult with NUM and UASA in order to "find ways and means to avoid the negative impact of [the] poor market and economic conditions and the impact on employees". This was pursuant to an addendum to a recognition agreement that was concluded by the respondent, NUM and UASA earlier that year, on 30 March 2015. In that addendum

[3] Section 23(1) of the Constitution states that "[e]veryone has the right to fair labour practices."

the parties agreed to consult exclusively over any dismissals that were to occur for operational requirements.

[10] The consultation culminated in the signing of a retrenchment agreement on 18 September 2015. There were two notable aspects to this agreement. First, the agreement was extended in terms of section 23(1)(d) of the LRA to employees who were neither members of NUM nor UASA. Second, it contained a "full and final settlement clause" whereby all those party to the agreement waived their rights to challenge the lawfulness or fairness of their retrenchment.

[11] Pivotally, throughout the entire process, AMCU was excluded from the consultations with the respondent over the prospective retrenchment. AMCU, aggrieved by the way in which their members were dismissed, mounted a legal challenge against the substantive and procedural fairness of the retrenchment process.

Litigation history

CCMA

[12] AMCU first approached the CCMA. It later transpired that this was in error, as the challenge ought to have been mounted by way of application to the Labour Court in accordance with section 189A(13) of the LRA.[4] The respondent also raised a point in limine, that there existed a collective agreement which entitled the respondent to lawfully exclude AMCU from the consultation process. On 19 November 2015, the

[4] It was common cause that section 189A of the LRA applied given the size of the respondent's workforce and the number of employees it contemplated dismissing. Section 189A(13) provides:

> "If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
>
> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
>
> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

CCMA issued a jurisdictional ruling in that it lacked the requisite jurisdiction to conciliate the matter.

Labour Court

[13] In the Labour Court the applicants withdrew their section 189A(13) application. This was after the respondent, in its answering affidavit to the section 189A(13) application, showed that a valid collective agreement as contemplated in section 189(1)(a) was in place, which was validly extended in accordance with section 23(1)(d) of the LRA. Instead, the applicants opted to mount a constitutional challenge aimed at declaring section 189(1)(a)-(c) and 23(1)(d) of the LRA unconstitutional and invalid. Seemingly in the alternative, the applicants further sought the setting aside of the retrenchment agreement and/or its extension to themselves. The applicants ultimately requested that their dismissal be declared of no force and effect and that they be reinstated.

[14] The Labour Court dismissed each one of the applicants' claims. The impugned sections were found not to violate any constitutional rights. The Labour Court did not, however, pronounce on the relief sought in terms of the review and setting aside of the retrenchment agreement. The applicants then turned to the Labour Appeal Court and sought the same relief.

Labour Appeal Court

[15] In the Labour Appeal Court the applicants requested that section 189(1)(a)-(c) and section 23(1)(d) of the LRA be constitutionally interpreted so that an employer is obliged to consult with minority unions irrespective of whether there is a valid collective agreement between the majority union and the employer. The issue, on the applicants' submission, was not with the principle of majoritarianism per se. Instead, it was with the application of majoritarianism to the retrenchment process. This infringed their right to fair labour practices, expressed in their right not to be unfairly dismissed in the LRA, along with a number of other constitutional rights.

[16] The Labour Appeal Court dismissed the appeal in its entirety. Much of the judgment, written by Musi JA, concerned the pride of place that the LRA affords the principle of majoritarianism. The Labour Appeal Court held that the principle is not without purpose. It was a deliberate policy choice taken by the Legislature in order to facilitate orderly collective bargaining, minimise the proliferation of unions and democratise the workplace.

[17] This, the Labour Appeal Court remarked, loomed large in the way of any success the applicant might have, as they were required to displace a principle which already enjoyed this Court's imprimatur. The Labour Appeal Court also remarked that the philosophical underpinnings of the LRA favoured voluntarism and preferred the law to abstain from intervening in multimodal socio-economic labour disputes.

[18] Ultimately, the Labour Appeal Court found no merit in the applicants' contention that majoritarianism found no place in the retrenchment process. It allowed for the interests of minority unions to be expressed collectively through the conduit of a majority union. This ensured labour peace, as to require of an employer to consult with the entire workforce would allow obstinate minority unions to frustrate a mass retrenchment. This would lead to "bedlam and chaos at the workplace".[5] A greater fear, in granting an exception to the principle, was imaginatively expressed in that:

> "[T]ugging [at] the thread of majoritarianism with regard to consulting partners might unravel the entire sweater woven by the Legislature in the Act."[6]

[19] In terms of reviewing and setting aside the extension of the retrenchment agreement, the Labour Appeal Court affirmed what this Court said in *AMCU I*: that an

[5] *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* [2018] ZALAC 27; (2018) 39 ILJ 2205 (LAC) (Labour Appeal Court judgment) at para 42.

[6] Id at para 55.

extension pursuant to section 23(1)(d) involved the exercise of a public power.[7] The Labour Appeal Court did not accept the argument that the extension of retrenchment agreements, which were concluded without consulting minority unions or non-union members, was irrational. It found that procedural fairness was not a requirement of a rational decision per se and that "there was no general duty on a decision-maker to consult interested parties in order for a decision to be rational under the rule of law".[8]

In this Court

[20] In this Court the applicants persist with the relief sought in both the Labour Court and the Labour Appeal Court. Directions were issued by the Chief Justice to the parties on 7 November 2018 asking for submissions on the following two questions:

> "(a) Does the general principle on majoritarianism set out in *AMCU v Chamber of Mines* (3) SA 242 (CC) apply to retrenchment processes and, if not, why?
> (b) Are the benefits of the majoritarian principle in collective bargaining equally realisable in retrenchments and, if not, why?"

[21] The applicants' answer to both questions is unequivocally "no". The nub of their argument was, again, that section 189(1), by creating an exclusive consultation regime, impermissibly infringes minority union and non-unionised employees' rights to fair labour practices in circumstances where a collective agreement had been concluded with a majority union.[9] This is because it excludes them from the very process that determines their fate.

[22] The respondents with equal force answered "yes". Reliance was again placed on the primacy that collective bargaining is afforded in the LRA. This policy decision,

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[7] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC) (*AMCU I*).

[8] Id at para 67.

[9] In their application for leave to appeal the applicants made reference to numerous other rights in the Bill of Rights, including: the right to equality (section 9), the right to dignity (section 10), the right to freedom of association (section 18), the right to access to information (section 32), the right to just administrative action (section 33) and the right of access to courts (section 34).

so the respondents argue, should not be lightly overturned. In the retrenchment setting there is no need to meddle with the principle that the will of the majority should prevail over that of the minority. That, in essence, is because the retrenchment process is a collective one and so the rights in issue are collectively held. Minority interests are therefore best vindicated through the power-play between a strong majority union and the employer.

Jurisdiction and leave to appeal

[23] It is trite that an issue which involves the interpretation and application of the LRA gives rise to a constitutional issue.[10] This case not only involves the interpretation of the LRA but includes a direct challenge to the constitutionality of one of its provisions. This Court's jurisdiction is accordingly engaged.

[24] That leads to the next question: is it in the interests of justice to hear this matter?[11] The interests of justice criterion is a supple one. It is informed by a variety of factors. That a case has reasonable prospects of success has been regarded as an important, albeit not decisive, feature.[12] In my view the applicants, on this factor, have shown good cause why this matter should be heard. This will become apparent in the later portions of this judgment.

[25] But to my mind there is a factor of even greater significance in support of granting leave. That is the decisive importance of the issue raised and the interest in it being decided, which is held by a large sector of our society.[13] This matter concerns

[10] *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at paras 11-2.

[11] *NEHAWU* id at para 18 and paras 25-9.

[12] *Boesak* above n 10 at para 12 and fn 7.

[13] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2003 (2) SACR 445 (CC); 2003 (12) BCLR 1333 (CC) at para 3.

the principle of majoritarianism and its applicability or lack thereof to certain labour disputes.

[26] As a principle and practice, collective bargaining has enjoyed primacy in not only our own labour law, but in foreign jurisdictions and international law.[14] However, in recent times the foundation of this norm has begun to crack. Globalisation and the demise of mass, single-skilled assembly line production, has whittled away at centralised collective bargaining's status as best practice for settling labour disputes. Majoritarianism is no longer seen as the panacea it once was.[15] This Court, in *AMCU I*, remarked on the burden that recent instances of violent industrial strife have placed on the value of majoritarianism.[16]

[27] Academics and labour lawyers alike have pointed to these examples of industrial strike action as exposing the deficiencies that stem from a "winner-takes-all" approach to labour relations.[17] The rapidly changing labour relations landscape has drawn into focus the concerns of minority voices in the labour context. The present case speaks directly to this. The continued omnipotence of the principle of majoritarianism has been

[14] *AMCU I* above n 7 at fn 55 and the International Labour Organisation instruments cited there. See also Budlender "Industrial Relations and Collective Bargaining: Trends and Developments in South Africa" (2009) *International Labour Organisation* 1 and Hayter et al "Collective Bargaining for the 21st Century" (2011) 53 *Journal of Industrial Relations* 225, but compare with Katz "The Decentralisation of Collective Bargaining: A Literature Review and Comparative Analysis" (1993) 47 *Industrial and Labour Relations Review* 3.

[15] Du Toit "What Is the Future of Collective Bargaining (and Labour Law) in South Africa" (2007) 28 *Industrial Law Journal* 1405; Snyman "The Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions – is it Necessary for Stability in the Workplace or Simply a Recipe for Discord" (2016) 37 *Industrial Law Journal* 865; Du Toit "The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge" (2014) 34 *Industrial Law Journal* 2637 at 2640; and Brassey "Labour Law after Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 34 *Industrial Law Journal* 823.

[16] *AMCU I* above n 7 at para 42.

[17] Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *Industrial Law Journal* 836 at 852–8; Van Eck "In the Name of 'Workplace and Majoritarianism': Though Shalt Not Strike" (2017) 24 *Industrial Law Journal* 1486 at 1506 and Theron et al. "Organisational and Collective Bargaining Rights through the Lens of Marikana" (2015) 36 *Industrial Law Journal* 849. Theron et al remark at 867-8 that—

> "[a]n overemphasis on stability and maintaining a status quo that is perceived as beneficial to either or both parties, as we have seen at Marikana, can have the opposite effect."

called into question. It is incumbent on this Court to face this question head-on and decide what constraints, if any, should be put on this principle.

Issues

[28] The issue at the heart of this matter is: whether the right to fair labour practices requires an employer to consult with an employee who faces dismissal for operational requirements, or their representatives, when that employee or their representative is not party to a collective agreement governing consultation. To decide this issue, the following three questions must be answered:

(a) With whom is an employer obliged to consult when contemplating dismissals for operational reasons?

(b) What rights, if any, are limited when an employer consults with a majority union to the exclusion of a minority union or non-unionised members?

(c) If a right is limited, is such a limitation reasonable and justifiable?

Who must an employer consult when contemplating retrenchment?

[29] Section 189(1) provides:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—
>
> (a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation—
>
> (i) a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

> (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[30] Section 189(1) creates a cascading hierarchy of persons which an employer is obliged to consult once they contemplate dismissal for operational requirements. This means that they must first comply with subsection (a), whereas if subsection (a) does not apply then (b) and if (b) does not apply then (c). The 'or' in subsection (c) was introduced by way of amendment on 1 August 2002.[18] This sought to make explicit what had already been held by the Labour Courts, that an employer was not obliged to consult with an individual whose trade union was already consulting on their behalf. More on this below.

[31] The section, in creating this hierarchy of obligations, gives primacy to collective agreements. The result being that, if there is a collective agreement which requires consultation with any persons, then an employer is required to consult with only those persons to the exclusion of everyone else.

[32] This originates from what the Labour Appeal Court held in *Aunde*. There the Court stated that—

> "[w]here an employer consults in terms of agreed procedures with the recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchment, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment."[19]

[33] However, it would be incorrect to think that this was always the case. Prior to *Aunde,* there existed a number of divergent views in the Labour Courts on whether

[18] Section 44 of the Labour Relations Amendment Act 12 of 2002.

[19] *Aunde SA (Pty) Ltd v National Union of Metalworkers of SA* [2011] ZALAC 12; (2011) 32 ILJ 2617 (LAC) at para 32.

section 189 envisaged the kind of inclusive consultation requirement that the applicants argue for in this matter.[20] It is necessary to provide a brief overview of this history. For it illustrates that our Labour Courts often grappled with the question of what is fair when it comes to consultation for the purposes of retrenchment dismissals. A good starting point is the judgment of the Labour Appeal Court in *Baloyi*.[21]

[34] In *Baloyi* a metalworker was dismissed for operational requirements. The employer had chosen the selection criteria of "last in first out" along with considering the skill level and disciplinary records of the employees. The metalworker in question was not the last to be employed, but possessed deficient skills compared to that of his peers. It was common cause that the employer had duly complied with section 189(1)(c) by consulting with the metalworker's trade union NUMSA. The metalworker argued that he should have nevertheless been consulted personally, as the employer had used a subjective criterion in coming to its decision. Failure to do so would amount to an unfair labour practice.[22]

[35] The Labour Appeal Court rejected this argument on the grounds that it ran counter to the express wording of section 189(1) and its purpose. The purpose being that "the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented."[23] The reliance on an alleged unfair labour practice was also misplaced as this pertained to the scheme under the previous Labour Relations Act[24] and found no present application under the LRA. In conclusion, the Labour Appeal Court held that to require an employer to consult with an employee

[20] The applicants relied specifically on *Oosthuizen v Telkom SA Ltd* [2007] ZALAC 6; (2007) 28 ILJ 2531 (LAC) and *United National Breweries (SA) Ltd v Khanyeza* [2005] ZALAC 6; (2006) 27 ILJ 150 (LAC) (*Khanyeza*) in support of such an inclusive interpretation.

[21] *Baloyi v M & P Manufacturing* [2000] ZALAC 28; (2001) 22 ILJ 391 (LAC).

[22] See *Brenner & Buchman (Pty) Ltd v SA Commercial Catering and Allied Workers Union* (1994) 15 ILJ 604 (LAC) at 609B-F.

[23] *Baloyi* above n 21 at para 23.

[24] 28 of 1956.

whom is already represented by a union would result in an undesirable "parallel process of consultation".[25]

[36] Two important principles arise out of *Baloyi*. The first is that there is no obligation on employers to consult with employees whose union representatives are already consulting parties. This principle is not directly important to the question at the heart of this matter. However, the second principle is. The Labour Appeal Court held that the right not to be unfairly dismissed was not a free-standing entitlement that could inform the content of the consultation process listed in section 189. Instead, it merely required an employer to comply with the substance and form of the section. Once this was achieved the dismissal would be procedurally fair.[26]

[37] The question "whether section 185 which provides that every employee has a right not to be unfairly dismissed imports a concept of fairness similar to an unfair labour practice into the LRA" was answered in the negative.[27] As a result, the Labour Appeal Court rejected the argument that the right to fair labour practices applied to the dismissal at hand.

[38] It is important to contrast the principle that emerged from *Baloyi* with the issue at hand. Here the question is not whether the content of the application of the section can cohere with the right in section 185 of the LRA in a particular retrenchment. Instead, the question is whether by affording those parties to a collective agreement the exclusive competency to consult, the right not to be unfairly dismissed is realised at all. And while this right is statutory in nature, it is given constitutional flavour by virtue of section 23 of the Constitution.[28] This is an important point to keep in mind, as the

[25] *Baloyi* above n 21 at para 23.

[26] Compare with *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) (*Johnson & Johnson*) at paras 26-9.

[27] *Baloyi* above n 21 at para 19.

[28] Section 1(a) of the LRA provides:

distinction informs whether or not the applicants have shown that they hold a right that has been infringed at all.

[39] *Baloyi* did, however, lay down a marker that proscribed parallel consultation with trade unions and their members who faced dismissal. A number of cases then followed which sought to define whom the obligatory consulting parties were in a particular factual setting.

[40] *Amalgamated Retailers* concerned a non-unionised employee who was dismissed for operational requirements.[29] The Labour Court distinguished the matter from *Baloyi*, where the employee's union had already been consulted. Instead, the Labour Court relied on the fact that the employer had elected to consult with non-unionised members. This election determined the consulting obligations of the employer, notwithstanding that section 189(1) had been complied with.[30] The employer was therefore obliged to consult with those non-unionised employees and the failure to do so resulted in their dismissals being procedurally unfair. The Labour Court remarked that although section 189 created a checklist of consulting parties "[t]he proper approach is to ascertain whether the purpose of that section (the occurrence of a joint consensus-seeking process) has been achieved."[31]

[41] The matter was also distinguished from *Sikhosana* whereby a claim to consult brought by a minority union was dismissed, as there was already a collective agreement in place with the three other unions that represented a majority of the workforce.[32] The

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> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
>
> (a) To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996."

[29] *SA Commercial Catering & Allied Workers Union v Amalgamated Retailers (Pty) Ltd* (2002) 23 ILJ 165 (LC) (*Amalgamated Retailers*).

[30] Id at para 26.

[31] Id at para 28.

[32] *Sikhosana v Sasol Synthetic Fuels* (2000) 21 ILJ 649 (LC).

present matter falls squarely within the bounds of *Sikhosana*. But as *Amalgamated Retailers* shows, the position prior to *Aunde* was not without exception. It was even suggested that in cases whereby consultation with a union had reached a deadlock, it would be permissible for the employer to consult with individual employees. The Labour Court acknowledged that "this may well be what is fair and appropriate" in the circumstances.[33]

[42] The applicants relied heavily on *Khanyeza* as authority for the proposition that section 189(1) envisaged an inclusive consultation process for all employees under threat of retrenchment. But it is important to note what the Labour Appeal Court in *Khanyeza* did and did not say. There the issue was whether the employer, having consulted with the employee, was obliged to consult with their union with whom the employer had a collective agreement governing retrenchment processes.

[43] In deciding this question, the Court held:

> "Section 189(1)(a) does not and cannot mean that, as long as there is a collective agreement applicable in a workplace that has a provision requiring consultation, section 189(1)(a) applies irrespective of whether or not the consultation required by the collective agreement relates to the contemplation of the dismissal of the employee sought to be dismissed."[34]

[44] What this means is that a collective agreement is not a "trumping" consideration when it comes to consultation. If a minority union has concluded a collective agreement regulating dismissals for operational requirements, and the employer contemplates dismissing non-union employees whom are not part of that agreement, then the employer is under no obligation to consult the union. The Labour Appeal Court stressed

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[33] *SA Commercial Catering & Allied Workers Union v Sun International SA Ltd (A Division of Kersaf Investments Ltd)* (2003) 24 ILJ 594 (LC) at para 66, with Freund AJ stating that he saw—

> "no reason why fairness precluded consultation with affected individuals after deadlock had been reached with the union provided, of course, that the employer had properly discharged its legal obligations vis-á-vis the union."

[34] *Khanyeza* above n 20 at para 15.

that section 189(1), purposively understood, is aimed at ensuring consultation with those who are to be affected by the retrenchment.

[45] On this reading, regardless of the presence of the requisite collective agreement, the employer must consult with any affected employee. At the same time this does not, without more, support the converse: that an employer must still consult non-unionised members who face retrenchment, when there exists a collective agreement with a majority union whose members face a similar misfortune.[35] Ultimately, the Court in *Khanyeza* reiterated that section 189(1) eschews a parallel process of consultation and found that the employer was nevertheless bound to consult with the union in terms of section 189(1)(c). In doing so, the primacy of collective agreements concluded by a majority union was implicitly reaffirmed.

[46] Importantly, what the above illustrates is that, prior to the unequivocal statement in *Aunde*, our Labour Courts engaged with, and in certain circumstances supported, the notion that what was "fair" required consultation with all employees that were to be affected by retrenchment process, or their representatives. It is evident that there was a reluctance to exclude affected parties from the consulting process wholesale. It is against this background that I now assess the merit of the constitutional attack on the procedure provided for by section 189(1).

What right is at stake when an employer consults exclusively?

[47] The applicants invoke the right to fair labour practices as enshrined in section 23(1) of the Constitution as their primary challenge to section 189 of the LRA. On their submission, section 23(1) of the Constitution can only be realised if there is an inclusive consultation process wherein all employees have the opportunity to participate

[35] Id at para 16 and the example given by the Labour Appeal Court where it held:

> "If the minority union had a collective agreement with a provision that required consultation but the majority union did not have a collective agreement . . . section 189(1) does not mean and cannot mean that, if the employer contemplated the dismissal of employees who are members of the majority union, the employer would be obliged to consult the minority union and not the majority union".

through a representative body, such as a trade union, of which they are members. At the hearing the applicants readily accepted that such a process should also apply to individual employees who are not members of a trade union or another representative body.

[48] There is an immediate difficulty with this challenge, as the Constitution contains no self-standing right not to be unfairly dismissed. It is true that section 185(1) of the LRA explicitly provides for the right not to be unfairly dismissed, but it regulates the exercise and adjudication of that right in a number of ways. The question then turns to whether the applicants hold any right that creates a duty on an employer to consult, when dismissal for operational requirements is contemplated.

[49] I think they do. That is because the focus of the applicants' challenge is not on the fairness or otherwise of their dismissal per se. Instead, it is on whether the consultative process that led to their dismissal was fair in the constitutional sense. At first blush these two statements might seem identical. However, there is a pivotal yet fine distinction between them. This is evident from the discussion of *Baloyi* above.[36] The Labour Appeal Court definitively stated that section 189 is a codification of what constitutes a fair procedure for dismissals based on operational requirements. What is at stake in this matter is whether this procedure is truly fair, in light of the Constitution and the object and purpose of the LRA.[37] In other words: has the Legislature given adequate expression to the right itself? Such a determination can only be made with reference to the constitutional right to fair labour practices.[38] The applicants have therefore correctly invoked section 23(1) to directly challenge the constitutionality of section 189(1).

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[36] At [38].

[37] Section 1 of the LRA above n 28.

[38] *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para 51. This Court endorsed the approach taken by the High Court in *NAPTOSA v Minister of Education, Western Cape* 2001 (2) SA 112 (C), stating at para 51 that—

> "a litigant may not bypass the provisions of the LRA, and rely directly on the Constitution without challenging the provisions of the LRA on constitutional grounds."

[50] The right to fair labour practices comprises three elements: the scope of the right itself, the concept of a labour practice and the concept of fairness.[39] It is now trite that the scope of the right includes the interests of both employers and employees.[40] The definition of a labour practice is broad, having been formulated first by the jurisprudence of the Industrial Court and subsequently the Labour Courts, covering, inter alia, security of employment and the right not to be unfairly dismissed.[41] Of greater significance is what constitutes "fairness" in section 23(1).

[51] The right, as with any other, must be given content. But the nature and history of the right to fair labour practices shows that what is required is a flexible definition. That is exactly what this Court did in *NEHAWU*. There Ngcobo J stated that—

> "[o]ur Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept."[42]

[52] I think, notwithstanding the passage above, a few general principles can be distilled when testing legislation against the right in section 23(1). This Court in *NEHAWU* seemed to suggest that what fairness dictates would always be dependent on

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[39] Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" (2006) 27 *Industrial Law Journal* 663 at 672.

[40] *Johnson and Johnson* above n 26 at para 23 where the Labour Appeal Court held that—

> "[e]very person has a fundamental right to fair labour practices. In the present context expression is given to this in the LRA by affording an employee the right not to be unfairly dismissed and an employer the right to dismiss an employee for a fair reason based on the employer's operational requirements and in accordance with a fair procedure."

[41] *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited* [2018] ZACC 44; 2019 (3) SA 362 (CC); 2019 (3) BCLR 412 (CC) at para 1.

[42] *NEHAWU* above n 10 at para 33. It is worth noting that the Constitution of the Republic of Malawi similarly has a right to fair labour practices, though this is said to have been drawn from our own. See Cheadle above n 39 at 672.

the facts of a particular case. This strikes me as inappropriate in the case of a direct constitutional challenge. The facts will undoubtedly inform the enquiry, but at the end of the day what matters is the adjudication of the norms and values of the Constitution in light of the various interests at play.

[53] This requires this Court to look at the right to fair labour practices in its constitutional setting and bring this understanding to bear on section 189(1) in its statutory context. This means striking a balance between the interests of employers and employees in light of their constitutional obligations. Properly understood, these are the "circumstances" envisaged in *NEHAWU* that are relevant.[43] I am also open to the possibility that other factors not strictly tied to the employer-employee relationship might be relevant to the fair labour practice determination. These include societal interests, environmental concerns and the economy.[44]

[54] Outlining the interests at play in the retrenchment context is of relative ease. On the employer's side, they have an interest in effectively and efficiently restructuring their business in order to satisfy an economic, technological or structural need.[45] On the employee's side they have an interest in, first and foremost, avoiding retrenchment entirely. This might include taking a different position in the company at the cost of a lower salary. If an employee is to be retrenched, she would certainly be interested in knowing when and how this would happen, what benefits – such as severance pay – might be available and why in fact the retrenchment is happening.

[55] The duty to consult over retrenchment dismissals in the LRA provides a useful statutory context to these interests. Importantly, section 189(2) explicitly provides a

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[43] See *NEHAWU* id at para 52, where this Court stated:

> "What lies at the heart of disputes on transfers of businesses is a clash between, on the one hand, the employer's interest in the profitability, efficiency or survival of the business, or if need be its effective disposal of it, and the worker's interest in job security and the right to freely choose an employer on the other hand."

[44] See Cheadle above n 39 and Le Roux "The New Unfair Labour Practice" in Le Roux and Rycroft (eds) *Reinventing Labour Law* (Juta, Cape Town 2012).

[45] *Food and Allied Workers Union v South African Breweries Limited* (2004) 25 ILJ 1979 (LC).

number of issues that the consulting parties must attempt to reach consensus on. These include appropriate measures to—

(a) avoid dismissals;

(b) minimise the number of dismissals;

(c) change the timing of the dismissals; and

(d) mitigate the adverse effects of the dismissals.

There must also be an attempt to reach consensus on the method for selecting the employees to be dismissed and the severance pay for those employees who are dismissed.

[56] It is apparent from section 189(2) that the consulting process is intended to protect the individual interests of employees in the retrenchment context.[46] This brings to the fore an issue that lies at the heart of this matter: whether section 189 is concerned with rights that are individually or collectively held. There is good reason for why the bulk of the argument placed before this Court sought to address this issue. What is fair will be determined largely by whether retrenchment dismissals are a collective or individual labour practice.

[57] The respondents made much of the fact that retrenchment dismissals are "no-fault dismissals" and so should be measured not against an individual fairness standard but rather a collective one. On their submission, the retrenchment process is a wholly collective endeavour and so should be resolved by collective means. The fairness, or otherwise, is to be gauged by whether there was a meaningful joint consensus-seeking process at a collective level. As in this matter, a fair collective consultation process occurred and so there can be no claim to the infringement of the right to fair labour practices. I think this overstates the collective nature of retrenchments. In fact, the individual / collective distinction is a red herring.

[46] The economic, technological and structural needs are obviously served by reaching consensus on these issues, such as mitigating the adverse effects of the dismissals; however, such benefits are at most only indirectly realised.

[58] It is true, retrenchments do occur on a "collective" scale, in that every employee is potentially effected, but this in no way makes the process singularly a collective one. It makes little sense to tag the right as either "individual" or "collective", and so suggest that a group of individuals could come together and, by virtue of that process, have a right conferred upon them de novo (anew).[47] Instead, section 23 vests in each individual employee the right to fair labour practices.[48] So while the right might be expressed individually or collectively, this does not detract from the fact that individuals are themselves right-bearers. And that leads us to the question at the heart of this matter: whether the legislative choice to regulate the right to fair labour practices through the hierarchy in section 189 is reasonable.

[59] An employee has a powerful interest not to be dismissed arbitrarily and so the right not to be dismissed unfairly. The objectives listed in section 189(2) are geared towards supporting this right. It cannot be said that collective action will necessarily vindicate this right. The sometimes inapposite role centralised collective bargaining has begun to play in modern labour relations has already been highlighted.[49] I only add the following as a matter of logic. It is entirely plausible that a minority union or a grouping of non-unionised employees might comprise a specialised or special interest group within a workplace.[50] It might be impossible for the majority union to provide the employer with any meaningful information on whether the dismissal of these employees could be avoided or the effects of their dismissal mitigated. This would render the objectives in section 189(2) nugatory. In turn, those employees' right to fair labour practices would fail to be vindicated.

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[47] Or by the converse, if the group were to disperse, would it be now said that the right is extinguished? And so in this instance the debate on whether a "group-right" exists which gives rise to a claim does not arise. For an example of the appropriate setting, see Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford 1995) at 340-48.

[48] In fact, the right is more broadly enjoyed with section 23(1)(a) of the Constitution enshrining that "[e]very person has a fundamental right to fair labour practices". See *Johnson & Johnson* above n 26 at para 23.

[49] At [26] to [27].

[50] Grogan *Dismissal* 2 ed (Juta, Cape Town 2014) at 445.

[60] The discussion in the preceding section illustrates that our Labour Courts were alive to the fact that in certain circumstances the dictates of fairness required inclusive consultation. This was notwithstanding the fact that a collective agreement existed or that the employee had union representation.

[61] The exclusion of those who are not party to a collective agreement or are not members of a majority union is drastic. As put by the Labour Appeal Court in *Polymer Holdings*:

> "The position of the first, sixth and seventh respondents is, however, different. They were not members of NUMSA and were owed no allegiance by NUMSA. The issue at stake was not working conditions, nor wages or salaries where ordinary majoritarian procedures would suffice. The issue at stake was the very livelihood of the employees. As has been stated before termination of service in labour law is akin to capital punishment in criminal law."[51]

[62] The Labour Appeal Court went on to say that "before a final decision was taken to retrench them they should have been given notice and afforded an opportunity to make whatever special representations could have been made on their behalf to avert the final decree".[52]

[63] Can it be that only specialised employees are afforded the opportunity to consult over their prospective retrenchment? Or that, in line with *Amalgamated Breweries,* the obligation to consult with employees outside of the section 189(1) hierarchy is created on the employer's election? I think not. This would mean that the right to fair labour practices is, peculiarly, held either discriminately or arbitrarily.

[64] The facts of this case show such iniquity in action. Of the 103 employees that were retrenched, one was on a fixed-term contract. The Labour Appeal Court has held

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[51] *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale* (1994) 15 ILJ 277 (LAC) (*Polymer Holdings)* at 281I-J.

[52] Id at 282A-B.

that employees on fixed-term contracts cannot be dismissed prematurely for operational requirements.[53] Doing so will result in an unfair dismissal.[54] But given that a collective agreement was in place, and that the respondent elected not to consult exclusively, this employee has been denied a legal remedy that would have otherwise been available.

[65] Consultation in the context of a retrenchment dismissal implicates the right to fair labour practices in section 23(1) of the Constitution. Section 189(1) limits that right by creating a statutory regime which excludes certain employees from that consultation process. It now remains to be seen whether this legislative choice is reasonable and justifiable.

Justification analysis

[66] The factors listed in section 36 of the Constitution provide a non-exhaustive list of factors that a court ought to take into account.[55] When it comes to an unfair labour practice, the listed factors intersect with a number of important aspects in the labour setting. These, amongst others, include—

(a) the rights of the employee;

(b) the rights of the employer;

(c) collective bargaining and the principle of majoritarianism; and

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[53] *Buthelezi v Municipal Demarcation Board* [2004] ZALAC 15; (2004) 25 ILJ 2317 (LAC).

[54] Id at para 16.

[55] Section 36(1) of the Constitution provides that:

> "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."

(d) the purpose of the LRA, namely to advance economic development, social justice, labour peace and the democratisation of the workplace.

[67] I have already discussed the nature of the right and the extent of the limitation imposed by section 189(1). The focal point here is the importance and purpose of the limitation. The aspects listed above all fall neatly into this factor. Indeed, much of the respondent's argument was that, if a right is infringed, then such an infringement is nevertheless justified. This is because this limitation upholds the employers' right to fair labour practices which gives an employer an absolute right to dismiss for operational reasons.[56] Moreover, it is justified as it gives expression to the principle of majoritarianism, a policy decision and grundnorm (grounding value) of the LRA.

[68] I am unpersuaded by these arguments. The problem with the respondent's submission is that it conflates consultation with collective bargaining. The right to consultation and the statutory imperative of collective bargaining must be separated out. Three things become quite clear. First, the limitation does not serve the purpose of promoting an employer's right to dismiss for operational reasons. Second, the obligation on an employer to consult inclusively does not negate collective bargaining. Third and finally, the limitation does not promote labour peace and the democratisation of the workplace. In fact, it negates it.

The limitation does not promote the employer's fair labour practice rights

[69] This is for the simple reason that the obligation to consult inclusively does not of necessity affect an employer's right to dismiss for operational requirements. To see that this is so, one need only look at what consultation requires for a dismissal to be procedurally fair.

[56] Albeit that the dismissal must be for a valid operational reason and the procedure which is taken is fair.

[70] Section 189(2) states that the consulting parties must "engage in a meaningful joint consensus-seeking process and attempt to reach consensus." Our Labour Courts have developed a rich jurisprudence on the content and scope of the consultation processes, which it is not necessary to deal with here.[57] However, a few notable points deserve mentioning. Importantly, consensus-seeking is neither collective bargaining nor negotiation.[58] There is no duty on the consulting parties to reach consensus and the employer need not accept the employees' proposals.[59]

[71] This is not to say that an employer can "go through the motions" in the consulting process. Instead all that is required is a bona fide (good faith) attempt to reach consensus on the part of the employer. This determination, as seen throughout the law reports, is in many respects fact-sensitive.[60] Ultimately, the employer retains the discretion to press on with the proposed retrenchment or not.

[72] How then does an exclusive consultation regime further the purpose of promoting the employer's right to dismiss for operational requirements? The argument put forward by the respondent, and endorsed by the Labour Appeal Court, is that it would be impractical to require an employer to consult with every employee who faces retrenchment.[61] The Labour Appeal Court stated that—

> "[t]o require the employer to consult with a multiplicity of individual parties rather than the representative union at the workplace has the potential to result in a wide and irreconcilable range of outcomes depending on the consulting party's preferences."[62]

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[57] *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* [1994] ZASCA 183; 1995 (3) SA 22 (AD); [1995] 1 BLLR 1 (AD); *Wanda v Toyota SA Marketing (A division of Toyota SA Motors Ltd)* [2003] 2 BLLR 224 (LAC); and *Karachi v Porter Motor Group* (2000) 21 ILJ 2043 (LC). See further *Johnson & Johnson* above n 26 at paras 26-30 where the Labour Appeal Court specifically rejected a "mechanical checklist kind of approach" to determine compliance with section 189.

[58] *Karachi* id at paras 36-7.

[59] *Wanda* above n 57 at para 52.

[60] *Atlantis Diesel Engines* above n 57 at 1253H.

[61] Labour Appeal Court judgment above n 5 at paras 39-43.

[62] Id at para 41.

[73] This is mistaken in light of what has already been said about the scope of the consultation obligation. There is a further fundamental flaw in this approach. It incorrectly assumes that the fair labour practice rights of employees need necessarily be limited in certain instances, such as large-scale retrenchments, to avoid a "wide and irreconcilable" range of outcomes. This worry is misplaced. This is because the benefits of collective bargaining can still be realised when the fair labour practice rights of the individual employees are taken into account, as shall be seen.

The obligation to consult inclusively does not negate collective bargaining

[74] There is no reason in logic or principle why an employer cannot consult inclusively with all employees at risk of retrenchment, or their representatives, and still conclude a valid collective agreement that is extended throughout the workplace. That is because the consulting process is anterior to, and independent of, collective bargaining. In fact, this is exactly what happened in *SAA Limited*.[63]

[75] In *SAA Limited* the employer decided on a single-facilitation process whereby the consultation process was undertaken with the seven registered unions in the workplace. This included NUMSA whose members made up less than 2% of the workforce and were unrecognised. NUMSA, towards the end of the consultation, demanded that the employer disclose information relating to the commercial rationale for the retrenchment and alternatives to dismissals.[64] The employer responded that this had already been disclosed and that the demand was nothing more than a delaying tactic.[65]

[76] The employer subsequently concluded a collective agreement with the four unions that jointly represented 80% of the employees at the workplace. This was then extended to non-parties in terms of section 23(1)(d) of the LRA. NUMSA then mounted

[63] *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways Soc Limited* [2017] ZALAC 32; [2017] 9 BLLR 867 (LAC) (*SAA Limited*).

[64] This was after at least 31 consultation meetings had taken place.

[65] The facts largely supported this contention, see *SAA Limited* above n 63 at paras 10-3.

an unsuccessful challenge to the extension of the retrenchment agreement. The Labour Appeal Court held that—

> "[t]o allow a situation where a minority party would, right at the end of the consultation process, not be bound by a product of a legitimate and fair process, particularly where it was part of that process, would lead to chaotic situations."[66]

[77] To my mind this is the correct position in so far as what is understood by a "legitimate and fair process" is one that includes consultation with the representatives of minority unions and non-unionised employees. What *SAA Limited* illustrates is that there is no inherent tension between consultation and collective bargaining. This is particularly so when each is understood, in light of the discussion above, to serve different purposes. It is particularly illuminating that both the Labour Court and Labour Appeal Court in *SAA Limited* endorsed the proposition that once the employer elected an "all-comers" consultation process, they were bound to consult with those affected, but that this had no consequence to the section 23(1)(d) right of extension.[67] This correctly understands that consultation and collective bargaining serve different purposes and vindicate different rights.

[78] Properly characterised in terms of the right to fair labour practices, consultation is a process that is antecedent to collective bargaining. This allows for the vindication of the individual right not to be unfairly dismissed whilst maintaining the correct balance between the rights of the employer and the various organisational rights at play. The argument that the obligation to consult exclusively lies in competition with collective bargaining is therefore misplaced.

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[66] Id at para 39.

[67] The Court did say that such a right could be waived, but that there was no evidence that such an election had been made. See *Aviation Union of Southern Africa v SA Airways SOC Ltd* (2015) 36 ILJ 3030 (LC) at para 34.

The limitation does not promote the objectives of the LRA

[79] The final disconnect is between the limitation and its purpose. The respondent argued with much force that the limitation was necessary to achieve the objects of the LRA, which include labour peace and the democratisation of the workplace.

[80] I disagree that labour peace is promoted by the exclusion of minority unions and non-unionised employees from the consulting process. Recent instances of industrial strike action signal the potential dangers of excluding minority voices in the labour context, which cannot, and must not, be ignored.[68] It is also difficult to see how exclusion chimes with labour peace given the facts of this very matter. Here we have unionised employees who are aggrieved for the very fact that they were excluded from the process that would determine their fate. This runs counter to the reasons, both pragmatic and principled, for requiring consultation before a final decision on retrenchment is made.[69]

[81] It is further unclear that the limitation allows for one to meaningfully exercise the right to join a trade union of one's choice. This is because it leaves a minority union powerless when it comes to protecting a fundamental interest of the employee, i.e. not to be retrenched. In effect this will force employees to join the majority union, as minority unions will very rarely be granted consulting rights. The result is that the right to freedom of association is limited. In contrast with wage-work disputes, such as in

[68] At [24] to [27] and the articles cited there. See also *Atlantis Diesel Engines* above n 57 at 1253A-B where the implications of retrenchment were warned of by the then Appellate Division, in that:

> "Where retrenchment looms employees face the daunting prospect of losing their employment through no fault of their own. This can have serious consequences and threaten industrial peace. Proper consultation minimises resentment and promotes greater harmony in the workplace"

[69] In *Atlantis Diesel Engines* above n 57 at 1252J-1253A the Court explained that such a requirement—

> "is rooted in pragmatism because the main objective must be to avoid retrenchments altogether, alternatively, to reduce the number of dismissal and mitigate their consequences. Consultation provides employees or their union(s) with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or, if such need is accepted, the extent and implementation of the retrenchment process."

AMCU I, the majority union here secures the right to be consulted absent any necessary benefit to a non-unionised employee or a member of a minority union.

[82] The applicants argued that a failure to consult violated their right to dignity as well as the audi alteram partem principle.[70] I accept, without deciding, that there is some merit to this. Consulting in the statutory context is aimed at achieving labour peace by requiring that there is meaningful engagement over the very outcomes that will impact individual employees.[71] It should be now clear that collective bargaining is not the only means with which to achieve labour peace. In my considered view, failing to impose a legal duty on an employer to consult with all those who will be affected by the retrenchment elevates collective bargaining from a means to an end in of itself. This is not what the Constitution nor the LRA envisages.

[83] It cannot be gainsaid that the principle of majoritarianism plays a vital role in ensuring the democratisation of the workplace. The real question is whether the limitation placed on consulting parties supports this role. I think not. If anything, the obligation of an employer to consult inclusively adds legitimacy to the principle of majoritarianism. This is because minority voices will be given an opportunity to raise their concerns to both the employer and the majority union.

[84] This Court has already said that the exercise of power under section 23(1)(d) is public in nature.[72] Therefore, any extension of an agreement concluded between an employer and a union or unions that represent a majority of the workforce is reviewable. The courts themselves will benefit from adjudicating a review in which all the affected parties were consulted. An inclusive consultation regime will empower minority voices to challenge the extension of collective agreements that have been concluded

[70] This is the principle of natural justice that prescribes that nobody should be judged without the benefit of a fair hearing.

[71] The objectives being those listed in section 189(2) of the LRA, above at [55].

[72] *AMCU I* above n 7.

specifically to their detriment.[73] Conversely, it will be difficult for a minority union to claim that a bona fide majority union has colluded with an employer to conclude a retrenchment agreement to their detriment when they were privy to the consultation process. This is exactly what happened in *SAA Limited*. This, to my mind, is rational, reasonable and illustrative of democracy in action.

[85] Certainly, allowing for an inclusive consultation regime is a less restrictive means to achieve labour peace and the democratisation of the workplace. There is therefore no justified reason why the right to fair labour practices should be limited. Section 189(1) stands to be declared unconstitutional.

The constitutionality of section 23(1)(d) of the LRA

[86] The preceding section foretells my position on the constitutional challenge to section 23(1)(d). In my view it should fail. To be clear, this challenge concerns not the initial collective agreement governing consultation but the subsequent agreement (the retrenchment agreement) which sets out the terms of the retrenchment itself.

[87] The applicants did not mount a direct challenge to the constitutionality of section 23(1)(d) per se. Rather, they sought to have the section interpreted narrowly so as to exclude retrenchment agreements as being "collective agreements" under section 23(1)(d). There are two reasons why this interpretation is unnecessary.

[88] The first is that, as is the case with a direct constitutional challenge, the applicants need to show that a right of theirs has been infringed which compels this Court to adopt a constitutionally compliant interpretation of the impugned section. The applicants submit that their right to fair labour practices is infringed by the extension of the retrenchment agreement throughout the workplace. But that right is tied to the inclusive

[73] The applicants alleged that these were the circumstances here. The Labour Appeal Court, however, found that there was no such collusion between the employer and the majority union to the detriment of the applicants, see Labour Appeal Court judgment above n 5 at para 34. This Court is bound by this factual finding.

consultation that the applicants have already, successfully in my view, argued for. Instead, the extension of the retrenchment agreement has the effect of denying the applicants the opportunity to strike or litigate their retrenchment in terms of the LRA.[74]

[89] This signposts the second reason why a constitutional interpretation is unnecessary. This Court has already endorsed section 23(1)(d) as a constitutionally compliant infringement of the right to strike.[75] The reasoning there applies to the issue at hand mutatis mutandis (the point, all things considered, remains the same). Similarly, in *SAA Limited* the Labour Appeal Court dismissed a constitutional challenge to the extension of a collective agreement after consultation was conducted with all affected employees. The reasoning of the Labour Appeal Court cannot be faulted.

[90] There is a final reason why the applicants have failed to show, by virtue of a section 23(1)(d) extension, that their rights have been infringed. The applicants are not

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[74] Section 189(A)(11) concerns industrial action and reads:

> "The following provisions of Chapter IV apply to any strike or lockout in terms of this section:
>
> (a) Section 64(1) and (3)(a) to (d), except that—
>
> (i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;
>
> (ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;
>
> (b) subsection (2)(a), section 65 (1) and (3);
>
> (c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;
>
> (d) sections 67, 68, 69 and 76."

Section 189(A)(13) concerns approaching the Labour Court for appropriate relief and reads:

> "If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
>
> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
>
> (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate."

[75] *AMCU I* above n 7.

without a remedy, notwithstanding the fact that it might include a "full and final settlement" clause, as in this case.

[91] First, the applicants may approach the Labour Court and request that the Court exercise its wide-ranging power in terms of section 158(1)(a) of the LRA to set the agreement aside.[76] A Labour Court would be competent to do so even in the face of a full and final settlement clause, due to the fact that a retrenchment agreement is a contract like any other. It is open to the applicant to directly challenge the fairness of the contract and so attack the enforceability of the full and final settlement clause. This is clearly a dispute that a court is competent to hear.

[92] Second, the extension of the retrenchment can be taken on review. This Court, in *AMCU I*, stated that section 23(1)(d) concerns the exercise of public power.[77] The extension of the agreement will therefore be set aside if it is shown to be irrational.

[93] The applicants' concern with the fairness of their dismissal was directed at their exclusion from the consultation process. Once it is understood that consultation is a constitutional obligation that lies antecedent to the conclusion of a retrenchment agreement, the challenge to section 23(1)(d) falls away.

Remedy

[94] The applicants requested that section 189(1) be interpreted in a manner that obliges an employer to consult with all affected employees or their representatives. This is not possible given the clear wording of the section. It follows that the impugned provision must be declared invalid. However, if the declaration of invalidity were to come into effect immediately, there would be a lacuna in the LRA. There would be no provision imposing a duty on employers to consult workers' representatives before

[76] In the retrenchment context, section 189(A)(13) of the LRA states:

> "Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a)"

[77] *AMCU I* above n 7 at para 59 onward.

retrenching them in cases where the workforce falls below 50 employees. To avoid this, the declaration of invalidity must be suspended to enable Parliament to remedy the defect. But that suspension must be coupled with an interim relief which protects the workers' interests pending the amendment of section 189(1) by Parliament. Such relief has been granted by this Court in the past.[78]

[95] In the result, I would have ordered that section 189(1) of the LRA should read as follows:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's *operational requirements*, the employer must consult—
>
> (a) a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (b) any registered trade union whose members are likely to be affected by the proposed dismissals; or
>
> (c) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[96] This would have left the Legislature free to craft the exact parameters of the consultation requirement, as long as such parameters accord with the constitutional imperative of inclusivity in the consultation process.

[97] That leaves the applicants' unfair dismissal claim and their alternative review of the extension of the retrenchment agreement. It is not for this Court to adjudicate the merits of the applicants' unfair dismissal claim. Nor is it appropriate to decide whether the retrenchment agreement concluded between the first, second and third respondents should be set aside.

[78] *Nandutu v Minister of Home Affairs* [2019] ZACC 24; 2019 (5) SA 325 (CC); 2019 (8) BCLR 938 (CC) at paras 90-1.

[98] This is because such an order would require a determination of whether there was adequate consultation between the first respondent and the applicants. In this Court, there was a dispute of fact as to whether the applicants were afforded adequate notice of their retrenchment. The Labour Court is best placed to determine these matters of fact and what relevance they bear on deciding an appropriate remedy, should the unfair dismissal claim or review succeed

Order

[99] In the result, I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld in part:
   2.1 Section 189(1) of the Labour Relations Act 66 of 1995 (LRA) is declared unconstitutional and invalid.
   2.2 The declaration of invalidity is suspended for 24 months with effect from the date of this order.
   2.3. During the period of suspension, section 189(1) is to read as follows:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's *operational requirements*, the employer must consult—
>
> (a) a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (b) any registered trade union whose members are likely to be affected by the proposed dismissals; or

(c) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

3. Should the Legislature fail to amend section 189(1) in accordance with this judgment, the interim severance shall become final.
4. The constitutional challenge to section 23(1)(d) of the LRA is dismissed.
5. The applicants' unfair dismissal claim and review of the retrenchment agreement is remitted to the Labour Court for adjudication.
6. There is no order as to costs.

FRONEMAN J (Cameron J, Khampepe J, Mhlantla J and Theron J concurring):

[100] I have had the pleasure of reading the judgment of Ledwaba AJ (first judgment). While I agree that the constitutional challenge to section 23(1)(d) of the LRA should be dismissed, I cannot agree that section 189(1) of the LRA is constitutionally invalid. Thus, although I agree that leave to appeal should be granted, this judgment holds that the appeal should be dismissed.

[101] In overview, my disagreement with the first judgment in relation to section 189(1) of the LRA stems from the following:

(i) Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. This provision does not expressly or impliedly guarantee a right to be individually consulted in the retrenchment process.

(ii) One of the objects of the LRA is to give effect to, and regulate, the fundamental rights conferred by section 23. That is done in relation to unfair dismissals and unfair labour practices in chapter VIII of the LRA.

(iii) The right not to be unfairly dismissed or subjected to unfair labour practices is given effect to in section 185 of the LRA and its content and application are regulated by the further provisions in the chapter.

(iv) The procedure for dismissals based on operational requirements is exhaustively set out in section 189 of the LRA.

(v) Our jurisprudence since the introduction of the LRA has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy section 189(1) itself creates.

(vi) The consultation process section 189 prescribes is procedurally fair and accords with international standards.

(vii) Compliance with section 189(1) procedural fairness does not mean that the outcome may not be challenged on the basis of substantive unfairness.

Constitutional and legal framework

[102] Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. Apart from the specific fundamental rights set out in section 23(2), (3), (4) and (5) of the Constitution, this general provision provides the source for fleshing out the right to fair labour practices in legislation and by the courts.

[103] The LRA was enacted to change the pre-constitutional law governing labour relations and, according to its long title, for the purpose of giving effect to section 23 of the Constitution. This is reiterated in section 1(a) which states that one of the statute's primary objects is "to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution".

[104] The Constitution contains neither a right not to be unfairly dismissed, nor a right to the procedural or substantive safeguards that would ensure a fair dismissal. For that one has to go to Chapter VIII of the LRA.

[105] Section 185(a) provides explicitly what is in express terms absent from the Constitution – namely, that every employee has the right not to be unfairly dismissed.[79] Dismissals and unfair labour practices are defined in section 186. Automatically unfair dismissals are dealt with in section 187 and other unfair dismissals in section 188.

[106] The latter provides:

> "(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
>
> (a) that the reason for dismissal is a fair reason—
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> (i) related to the employee's conduct or capacity; or
>
> (ii) based on the employer's operational requirements; and
>
> (b) that the dismissal was effected in accordance with a fair procedure.
>
> (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

[107] Although not always watertight in practice, the LRA thus distinguishes, first, between dismissals for misconduct, incapacity and operational requirements; and, second, between procedural and substantive fairness in relation to these dismissals.[80] It has been accepted that the adjudication of fairness in relation to misconduct and incapacity involves an inquiry into individual conduct and capacity. By contrast, dismissal based on operational reasons is not dependent on individual conduct or capacity but on objective factors. In *NUMSA*[81] this Court recently observed:

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[79] And section 185(b) provides that every employee has a right not to be subjected to an unfair labour practice.

[80] Le Roux *Retrenchment Law in South Africa* (Lexis Nexis, Durban 2016) (Le Roux) at 13.

[81] *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* [2019] ZACC 25; 2019 (5) SA 354 (CC); 2019 (8) BCLR 966 (CC).

> "Misconduct, incapacity and operational requirements are the gateways to fair dismissal under the LRA. For an employer, each has its own difficulties of proof and process. Dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. Dismissal for incapacity requires proof that performance standards deal with the alleged incapacity and that alternative ways, short of dismissal, were unsuccessfully pursued before dismissal can take place. Dismissal for misconduct in circumstances where the primary misconduct is committed by one or more of a group of employees and the exact perpetrators cannot be identified, is complicated by the accepted principle that the misconduct must be proved against each individual employee."[82]

[108] The procedural requirements for a fair consultative process are set out in section 189 of the LRA. Since the introduction of the LRA, as will be shown below, our jurisprudence has consistently interpreted section 189 to exclude any requirement of individual or parallel consultation in the retrenchment process outside the confines of the hierarchy created in section 189(1).

Case law

[109] In contrast with this clear doctrinal history, the first judgment asserts that—

> "prior to the unequivocal statement in *Aunde*,[83] our Labour Courts engaged with, and in certain circumstances supported, the notion that what was 'fair' required consultation with all employees that were to be affected by retrenchment process, or their representatives. It is evident that there was a reluctance to exclude affected parties from the consulting process wholesale."[84]

I disagree.

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[82] Id at para 31. This must be viewed in light of the definition of operational requirements in section 213 of the LRA as "requirements based on the economic, technological, structural or similar needs of an employer."

[83] *Aunde* above n 19.

[84] First judgment at [46].

[110] The tone was set in the Labour Court twenty years ago in *Sikhosana*.[85] Commenting on section 189, Brassey AJ stated:

> "It is impossible to believe that this hierarchy of obligations is anything but intentional: care has too obviously been taken in the choice of language to permit the conditional clauses to be dismissed as mere rhetorical flourishes. The interpreter is driven to the conclusion, therefore, that an employer, to satisfy [its] obligations under the subsection, need only consult the employees likely to be affected by the proposed dismissals (or their representatives) if there is no registered union whose members are likely to be effected by the dismissal, no workplace forum in the workplace in which the dismissal might occur and no collective agreement governing consultation. The union, in turn, need be consulted only if there is no such workplace forum and no such collective agreement, and so on up the ladder. Under the unfair labour practice jurisdiction of the previous Act, there were suggestions that the employer had a duty to consult at two levels: first with the collective bargaining representative on matters such as the need to retrench and the criteria for retrenchment, then with the prospective retrenchees over matters specific to their individual future and fate. Section 189(1) quite deliberately renounces dual consultation in favour of the single level of consultation for which it provides. The change evinces, I take it, more than just a concern to make the process of consultation simple and speedy: it embodies a desire, evident elsewhere in the Act too, that bargaining and consultation should be collective rather than individual and that the legitimacy of the representative with the best claim to be consulted should not be undermined by the claims to consult made by lesser interests. The effect of the section, thus, is to vest the appropriate collective representative with sole power of representation; if others claim the right to be consulted, they must look beyond the section, indeed beyond the Act, and point to some juristic act an agreement, undertaking or commitment of some sort in terms of which the employer concedes that [it] will engage in such consultation."[86]

[111] An example of looking "beyond the Act" occurred in *Amalgamated Retailers*,[87] where the employer elected to also consult with non-union members. In this regard, Van Niekerk AJ held:

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[85] *Sikhosana* above n 32.

[86] Id at 656C-I.

[87] *Amalgamated Retailers* above n 29.

> "Section 189 of the LRA requires consultation with a defined consulting partner. The hierarchy established by section 189(1) establishes the identity of that partner. It is entirely possible, in the discharge of an obligation under section 189, that an individual employee is never directly advised that his or her continued employment is in jeopardy. This is the consequence of a deliberate recognition by the Act of the primacy of the rights accorded to trade unions, workplace forums, and ad hoc employee representatives in the consultation process.
>
> . . .
>
> However, in this instance, the respondent decided to initiate and conduct a separate consultation with non-union members, and to meet with these employees on an individual basis to discuss with matters relating to the proposed restructuring and their security of employment. Having elected to do so, it was incumbent on the respondent to interact with each employee with a view to reaching consensus on his or her proposed retrenchment, and the fairness of the respondent's actions must accordingly be determined on the basis of its stated intentions.
>
> . . .
>
> *I wish to emphasize that I reach this conclusion on the facts of this case and in the light of the respondent's stated intentions. It is not a general proposition concerning the rights of individual employees in a consultation process. Given the primacy accorded to collective engagement with a trade union, a workplace forum or the representatives of employees accorded by section 189(1) and to which I have referred above, it is entirely feasible that an employer may discharge its obligations in terms of that section without engaging in separate consultation with affected individual employees. Baloyi's case is an example of such an instance."*[88]

[112] The reference to *Baloyi*[89] is to another judgment of Brassey AJ. There, he reiterated the change brought about by section 189 of the LRA. Dealing with an argument that individual consultation is required even after general consultation with worker representatives, he stated:

[88] Id at paras 25-27.

[89] *Baloyi* above n 21.

"The difficulty with applying this . . . to the facts of the present case is that it was predicated upon the concept of an unfair labour practice which was central to the legal dispensation regulated in terms of the Labour Relations Act 28 of 1956 (as amended). Under the LRA the concept of an unfair labour practice is only directly relevant to the transitional arrangements regulated in terms of schedule 7 to the Act. Accordingly the premise upon which Joffe J's judgment is based in *Brenner*'s case is not applicable to the present dispute which stands to be decided in terms of the LRA."[90]

[113] The judgment concludes:

"In short, section 189(1) provides for the identity of the parties to be involved in the process of consultation with the employer. Section 189(2) sets out the agenda and objectives of the process to be adopted by an employer when the latter contemplates dismissing employees for reasons based upon operational requirements.

Read together, the two subsections represent the codification of the standards which had previously been developed by way of the principle of fairness as contained in the concept of an unfair labour practice. Section 185 may well require that an employer must comply with both the substance and the form of the requirements as contained in section 189, but it adds nothing to the content of the process to be followed. Given the nature of the detailed codification of the procedure to be adopted for such dismissals, it cannot be said that some residual test remains, notwithstanding that the employer has complied meticulously with the requirements as laid out in section 189(1) and (2).

It was not contended that respondent did not follow the proper procedures in dealing with NUMSA nor, in the light of the meetings to which reference has already been made, could such an argument have been justified. The argument that the appellant should have been afforded a hearing in person in circumstances where the union which represented him had properly been consulted runs counter to the express terms of the section.

In keeping with a premise of the Act, section 189(1) envisages that the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To

[90] Id at para 18.

> interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section."[91]

[114] In *Khanyeza*,[92] Labour Appeal Court confirmed the substance of this as sound doctrine. There, Zondo JP held that consultation with an individual union member, rather than with the union, was not a requirement under section 189 of the LRA:

> "[T]he collective agreement in this case seek to give union members covered by the agreement additional or better rights than those that they may already have in terms of the Act or some other legislation. The aim of the collective agreement is not to deprive union members who fall outside the collective agreement of the statutory rights that they already have such as their right to have their union consulted by the appellant in terms of section 189 of the Act when the appellant contemplates their dismissal for operational requirements. The purpose is not to disadvantage such employees and let them face the prospect of their dismissal due to no fault of their own without the benefit of the assistance and representation of their union. The purpose was to give the union members who fall within the collective agreement better rights and benefits in the knowledge that those union members not covered by the collective agreement would still be covered by the Act and not that they would be left to struggle on their own without union assistance and representation. In the light of the above I conclude that there is no person or body that in terms of the collective agreement that the appellant was required to consult when contemplating the dismissal of the first respondent. However, there is a person or body that in terms of the Act the appellant was required to consult."[93]

[115] All this was established before *Aunde*.[94] So what the applicant seeks is to invalidate a statutory scheme clearly emergent from the LRA – one that has been consistently interpreted and applied in our labour jurisprudence without constitutional challenge for at least twenty years.

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[91] Id at paras 20-3.

[92] *Khanyeza* above n 20.

[93] Id at para 25.

[94] *Aunde* above n 19.

[116] To this must now be added the recent judgment of this Court in *AMCU I*.[95] The first judgment does not seek to disturb the central finding of *AMCU I*. This affirmed "the constitutional warrant for majoritarianism in the service of collective bargaining".[96] The first judgment is thus obliged to proceed from the premise that a majority-driven collective bargaining process passes constitutional muster in the context of retrenchment. But from where does a right to further individual or dual consultation outside section 189 arise? And what does it add to the consultation process?

From where an individual right to consultation?

[117] The first judgment concludes:

> "Consultation in the context of a retrenchment dismissal implicates the right to fair labour practices in section 23(1) of the Constitution. Section 189(1) limits that right by creating a statutory regime which excludes certain employees from that consultation process."[97]

[118] From what we have seen thus far neither the Constitution nor the LRA provides textual or contextual support for any individual right in the consultation process outside the provisions of section 189. Even if this right exists, it does little to advance AMCU's case. The first judgment accepts that a right to consult does not expressly emanate from section 23(1) of the Constitution. Instead, it propounds that a consultation entitlement flows indirectly from that right. But this is unpersuasive. Section 189(1), as has been authoritatively held, is a codification of fair procedure for dismissal on the basis of operational requirements. Consultation is a statutory entitlement, flowing from the LRA, not a fundamental right enshrined in the Bill of Rights.

[95] *AMCU I* above n 7.

[96] Id at para 57.

[97] First judgment at [65].

[119] The legislation embodies what is fair for retrenchments in the form of a consultation requirement. This was further refined to embody the policy principle of majoritarianism.[98] To find that the statutory provision *limits* the right to consultation is in my view to get things back-to-front.[99] It upends the very source of the entitlement and, in effect, begs the question at issue. The question is not whether section 189(1) limits an individual's right to be consulted, but whether the way in which the legislation embodies the right to a fair procedure in the retrenchment process passes the constitutional test of rationality.[100]

[120] Thus approached, it is hard to see how the option the legislation embodies is anything but rational. This emerges from the very benefits that the inclusive approach that the first judgment argues for. All an individual employee gains is a right to be heard, notwithstanding the fact that retrenchment may be inevitable. The first judgment – in proper accord with our jurisprudence – emphasises that this process is not a negotiation or anything akin to bargaining.[101] An employer is bound to hear and respond, but not to accept or comply. What then would be the substance of the right? It is difficult to imagine that an employee would find satisfaction in making representations that can, in effect, be brushed aside. Here, the retrenchment process differs fundamentally from a misconduct dismissal, a criminal trial or any similar process, such as a commission of enquiry, where the audi alteram partem principle

[98] The concurring judgment by Jafta J argues that section 189(1) does not express the principle of majoritarianism. This is due to the possibility of a collective agreement being concluded with a minority trade union to the exclusion of a majority union. But no such possibility exists, unless the interpretation given by the Labour Appeal Court in *Khanyeza* is overruled, as the first judgment correctly notes at [45] read with fn 35.

[99] Or more appropriately, to bite the hand that feeds.

[100] For an analogous enquiry, albeit in an altogether different setting, see *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*). See also *Ronald Bobroff & Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC) at paras 6-9, where this Court clearly explained the distinction between the rationality review and reasonableness review in terms of section 36 of the Constitution. More specifically, this Court explained that the former is not grounded or based on the infringement of fundamental rights but is a mere threshold enquiry to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. For that reason, it is viewed as being less stringent than reasonableness, which is the standard to determine whether a legislative provision that limits a constitutional right passes constitutional muster.

[101] First judgment at [70] to [71].

operates. There, the right to a hearing arises from the very possibility that the representations might affect the final outcome.[102]

[121] By contrast, it can only be near-futile to afford individual consultation. This emerges from the very benefits of the inclusive approach that the first judgment argues for and accepts – a necessary acceptance – that a retrenchment agreement can lawfully be extended across the workplace, affecting even unconsulted employees. So whilst an individual might have been a consulting partner, it will still be the majority union's implication in the agreement that is decisive. An employer has no obligation to reflect minority representations in the agreement.

[122] And this is for good reason. An individual employee, or even a group of individual employees, has or have scant bargaining clout, particularly where the employer is preoccupied with processing dismissal for operational requirements. A majority union, by contrast, wields coercive power, by immediate or future threat of industrial action. It is this power that may sway an employer to agree to benefits on retrenchment, or better yet, fewer or no dismissals. The first judgment does not seek to unsettle this age-old labour reality. Instead, it creates a burden with very little boon.

[123] Are other rights implicated, as the concurrence contends? I think not. And whilst the applicant's leave to appeal application raised a panoply of rights, only the section 23 infringement was canvassed in the written submissions and during oral argument. That is why the Minister responded to only the section 23 issues, both in countering infringement and advancing justification. It is hard to expect government to justify the possible infringement of a panoply of seven rights, merely because their infringement is alluded to.[103]

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[102] Section 189(6)(a) requires that an employer give reasons for disagreeing with the representations made by an employee. Importantly, these reasons need not be persuasive and perform a minimal explanatory function. See *Johnson & Johnson* above n 26 at para 26-7; *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at para 24; and *Robbertze v Marsh SA (Pty) Ltd* (2002) 23 ILJ 1448 (LC) at para 62.

[103] And that such a response should fit into this Court's 50-page limit on legal submissions.

[124] But even the freedom of association challenge fails to assist AMCU's case. AMCU can succeed only if we adopt this proposition: that the right to freely associate means that every union must be truly equal, and enjoy each and every statutory entitlement, regardless of size. This cannot be correct. An employee has a right to join a trade union of their preference. That does not entail the right that the preferred union be empowered in every way they desire. Neither *Bader Bop*[104] nor *POPCRU*[105] support this.

[125] Absent any other source for an individual right, the only basis for attacking the constitutional validity of section 189(1) would be that the provision is irrational, in conflict with section 9(1) of the Bill of Rights, and not any limitation of a right. But that was not advanced as a ground on the papers, nor could it have been advanced with any seriousness.

[126] There is no procedural unfairness in the consultation process under section 189. We have seen that dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits.[106] The process involves a shared attempt at arriving at an agreed outcome that gives joint consideration to the interests of employer and employees.[107] Because it is not dependent on individual conduct and requires objective selection criteria, it is pre-eminently the kind of process where union assistance to employee members will be

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[104] *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) (*Bader Bop*).

[105] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) (*POPCRU*).

[106] See [107].

[107] In *NEHAWU* above n 10 at para 40, this Court held:

> "In my view, the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship *on terms that are fair to both*. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. *Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices*. It is in this context that the LRA must be construed."

See also *Johnson and Johnson* above n 26 at paras 26-31.

invaluable.[108] The choice made for the pre-eminence of collective bargaining in section 189 is not only rational: it is sound, it is fair and it is based on international practice and standards.[109]

Substantive fairness

[127] Compliance with section 189 does not necessarily mean that a dismissal that ensued after proper consultation will be held to be substantively fair.[110] This was already recognised in *Sikhosana*:

> "Cases can arise in which consultation, though strictly in terms of the hierarchy, nevertheless falls short of what fairness requires. I think, for example, of a case in which the collective representative that is entitled to consult under the section discriminates against non-members in its dealings with the employer or of the problems that can arise when the collective agreement contemplated in the first paragraph of the subsection is the product of collusion between the employer and a minority or 'sweetheart' union."[111]

[128] Where collective agreements are extended to non-parties in terms of section 23(1)(d) of the LRA, *AMCU I* makes it clear that the extension is subject to legality review. This is an extra safeguard:

> "If the invocation of the powers section 23(1)(d) confers is public, then its exercise must comply with the principle of legality – and from there a range of review mechanisms is available to a party claiming to be unfairly affected. The actual exercise of the power the provision confers on private parties can never occur lawlessly. It is

[108] Compare *Commercial Workers Union of SA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 56, where it was held:

> "The right to engage in collective bargaining and to enforce the provisions of the collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. *The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched*. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law."

[109] Le Roux above n 80 at 7-9.

[110] Id at 70. See also *National Union of Mineworkers v Alexkor Ltd* (2004) 25 ILJ 2034 (LC) at para 101.

[111] *Sikhosana* above n 32 at 656I-657A.

> subject to review under the principle of legality and, if it is administrative action, under PAJA. So AMCU's submission that section 23(1)(d) – in contrast to section 32 – does not allow for judicial checks on extensions of collective agreements is wrong.
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> . . .
>
> This typology has the important consequence that the conclusion of an agreement under section 23(1)(d) is subject to judicial scrutiny. An agreement concluded under the provision is reviewable under the principle of legality. The principle requires that all exercises of public power – including non-administrative action – conform to minimum standards of lawfulness and non-arbitrariness. Invoking the statute's enormous clout by using a statutory power may not occur irrationally or arbitrarily.
>
> . . .
>
> One might ask how, if the statutory provision itself is not irrational, and indeed passes limitations analysis, there can be scope for irrationality review in its application. But a provision can rationally grant a power that may be irrationally exercised. That is a matter for practical enforcement."[112]

[129] An individual who considers that the consultation process under section 189 has led to a substantively unfair dismissal is thus far from being without remedy.

[130] Even if I am wrong in holding that there is no fundamental right to individual consultation in dismissals based on operational requirements, any limitation of section 189 would nevertheless have to be subjected to a limitation analysis under section 36 of the Constitution. In my view, for substantially the same reasons as set out in this judgment, with appropriate adjustment, any limitation, if it existed, would be justified.

Conclusion

[131] I would thus grant leave to appeal, but dismiss the appeal.

[112] *AMCU I* above n 7 at paras 73, 84 and 86.

Order

[132] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JAFTA J:

[133] I have had the benefit of reading the judgment written by Ledwaba AJ (first judgment) and the judgment of Froneman J (second judgment). They disagree on the validity of section 189(1) of the LRA. The first judgment concludes that the impugned provision is invalid whereas the second judgment holds that the provision concerned is consistent with the Constitution. Both judgments test the validity of that provision against the right to fair labour practices entrenched in section 23(1) of the Constitution.[113]

[134] By denying workers who are affected by a retrenchment an opportunity to be consulted if they do not belong to the union with which the employer had concluded a collective agreement, the first judgment concludes that the impugned provision unreasonably and unjustifiably infringes the workers' right to fair labour practices. On the contrary, the second judgment holds that the right to fair labour practices in section 23(1) of the Constitution does not include a fair consultation process for individual workers and the LRA too does not confer that right.

[135] In this regard the second judgment declares:

[113] Section 23(1) of the Constitution provides:

> "Everyone has the right to fair labour practices."

> "From what we have seen thus far neither the Constitution nor the LRA provides textual or contextual support for any individual right in the consultation process outside the provisions of section 189."[114]

And later says:

> "Absent any other source for an individual right, the only basis for attacking the constitutional validity of section 189(1) would be that the provision is irrational, in conflict with section 9(1) of the Bill of Rights, and not any limitation of a right. But that was not advanced as a ground on the papers, nor could it have been advanced with any seriousness."[115]

[136] I am unable to agree with these conclusions. First, the case advanced by the applicants does not seek to have workers consulted individually. The complaint is that AMCU was left out of the consultation process undertaken in terms of section 189 simply because the collective agreement had identified other unions as parties to be consulted. In the pleaded case AMCU did not seek that its individual members be consulted. Instead, it sought that AMCU as their union of choice be consulted on behalf of its members who were to be affected by the retrenchment.

[137] Plainly section 189(1) excludes consultation with any trade union not mentioned in the collective agreement where one has been concluded. And here the relevant collective agreement, in line with the section, identified the majority union and a minority union as parties to be consulted to the exclusion of other unions with membership among the affected workers.

[138] Second, the assertion that in the absence of an individual right to consultation the only ground on which section 189(1) could be challenged was irrationality is incorrect. In their papers the applicants relied on a number of constitutional rights which they claimed the provision infringed. This is how they pleaded their challenge:

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[114] See second judgment at [118].

[115] See second judgment at [125].

> "The Applicants aver that sections 189(1)(a) to (c) (as interpreted in the manner alluded to above) are unconstitutional because they violate one or more of the following provisions, principles and/or individual rights:
> The rule of law alluded to in section 1 of the Constitution of the Republic of South Africa of 1996; the right to equality set out in section 9(1) of the Constitution of the Republic of South Africa of 1996; the right to dignity set out in section 10 of the Constitution of the Republic of South Africa of 1996; the right to freedom of association set out in section 18 of the Constitution of the Republic of South Africa of 1996; the right to fair labour practices set out in section 23 of the Constitution of the Republic of South Africa of 1996; the right to access to information set out in section 32 of the Constitution of the Republic of South Africa of 1996; and the right to access to courts set out in section 34 of the Constitution of the Republic of South Africa of 1996."

[139] It is also not true that the ground of irrationality was not pleaded. It was. The applicants pleaded:

> "Private parties are permitted, in terms of the section, to take away an employee's individual right to be heard (through his/her trade union) before a dismissal. When this happens by virtue of sections 189(1)(a) to (c), the employee has no recourse to assert that right in a court of law or at another impartial or independent forum. This fundamentally undermines the principle of legality and the rule of law, and is irrational."

[140] It may well be that at the end of the day the applicants may not succeed on the ground of irrationality. That is not the point. The issue is that they have expressly pleaded it.

[141] It is not necessary to test the validity of section 189(1) against all the rights on which AMCU relied. An examination of few rights suffices. But before determining whether the impugned provision violates some of those rights it is necessary to interpret section 189(1) to establish what it means. For it is what it actually means and the purpose it seeks to achieve which may violate guaranteed rights.

Meaning of section 189(1)

[142] Section 189(1) provides:

> "When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—
>
> (a) any person whom the employer is required to consult in terms of a collective agreement;
>
> (b) if there is no collective agreement that requires consultation—
>
> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
>
> (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
>
> (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
>
> (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[143] Textually the section creates different levels of consultation. But notably consultation at other levels may not be undertaken if there was consultation at the first level, regardless of the fact that not all affected workers were represented at that level. Under the section the first level of consultation relates to where a collective agreement exists and that agreement requires the employer to consult an identified person. The section stipulates that consultation at the next level may occur only if there is no collective agreement.

[144] In effect this means that where there is a collective agreement, all affected workers who are not affiliated to the union which concluded the agreement with the employer are excluded from consultation under the section. This occurs even in circumstances where the union, which is not a party to the collective agreement, was

not afforded the opportunity to enter into such agreement with the employer before a consultation process begins.

[145] This exclusion implicates a number of constitutional rights, some of which were relied on by the applicants in attacking the validity of section 189(1). These include the right of equality before the law; the right to equal protection and benefit of the law; the right to freedom of association; the right of access to information for purposes of consulting; and the right to fair labour practices which has, as its component, the right to employment security.[116]

[146] Section 189(1) authorises parties to a collective agreement to limit constitutional rights through terms of a collective agreement. The purpose for the intrusion into a number of guaranteed rights is not apparent from the provision. The belief that the impugned provision promotes majoritarianism is misplaced. The text of the provision does not support this. Notionally the section permits the conclusion of a collective agreement with any union irrespective of its representativeness. Where a collective agreement is between a minority union and the employer and that union is identified as the person with whom the employer must consult, the majority union may not be consulted. This is absurd.

[147] Unlike section 18 of the LRA[117] the impugned provision does not require that the conclusion of the relevant collective agreement be between employers and majority unions only. Evidently there is no manifest link between the provision and the principle of majoritarianism. In fact, as illustrated, the section has the potential to undermine majoritarianism by excluding a majority union from consultation where a collective agreement was concluded with a minority union.

[116] See sections 9, 18, 23 and 32 of the Constitution.

[117] Section 18(1) of the LRA provides:

> "An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15."

[148] It is now convenient to consider some of the rights relied on in challenging the validity of section 189(1).

Section 9(1) rights

[149] The applicants asserted that the impugned provision is inconsistent with section 9(1) of the Constitution in that the procedural fairness afforded by section 189(1) to workers who are members of a union which is party to a collective agreement is not available to workers who belong to other unions. They alleged that section 189 promotes a number of workers' rights like the right to employment security; the right not to be unfairly dismissed; the right to fair labour practices and the right to dignity. But when it comes to consultation which seeks to secure those rights, the section excludes some of the affected workers.

[150] The claim was formulated in these terms:

> "The provisions (so interpreted) deprive employees who are members of a trade union other than the trade union(s) party to a collective agreement in terms of section 189(1)(a), of the right to procedural fairness and the right to be heard, in circumstances where their individual rights and interests, including their right to fair labour practices, their right not to be unfairly dismissed, and their employment security and dignity, are at stake. This occurred in this instance in relation to AMCU and the second to further applicants. In the result, the employees' rights inter alia to fair labour practices and dignity are infringed.
>
> The provisions (so interpreted) discriminate unfairly between employees based on their chosen trade union affiliation, and deprive employees who elect to be affiliated to trade unions which are not party to a collective agreement in terms of section 189(1)(a), of the aforementioned rights and/or unduly encroach upon such rights, without doing so in relation to employees who elect to be affiliated to trade unions which are party to a collective agreement in terms of section 189(1)(a). This also occurred in this instance in relation to AMCU and the second to further applicants."

[151] A closer reading of this statement reveals that the complaint is not only that the applicants were not treated equally before the law but also that they were denied equal protection and benefit of section 189(1) only because they belonged to a union which was not party to the collective agreement. It cannot be gainsaid that for that reason alone, the applicants were denied the protections afforded to workers before the implementation of a retrenchment.

[152] The importance of consultation under section 189 is apparent from the other provisions of the section. An employer who contemplates retrenching workers is obliged to seek consensus from their representatives on issues like avoiding dismissals, reducing the number of dismissals, their timing and mitigating the effects of dismissals, the selection criteria for workers to be dismissed and the determination of the severance pay for workers who are dismissed.[118]

[153] It is evident from the list of issues over which the consulting parties must attempt to reach consensus that the temptation for a union to protect its own members and sacrifice non-members is a real risk. It would be foolhardy for any union to protect non-members in such consultation and support the retrenchment of its own members. This is unlikely to happen whilst the converse may easily occur because no union bears a duty to protect workers who chose not to join it.

[154] The facts of this case manifestly illustrate that members of AMCU were denied the protections afforded to members of both NUM and UASA by section 189 and that denial was mandated by section 189(1). This clearly proves that some workers were afforded the protection and benefit of section 189 whereas others were not. Those who were denied equal protection and benefit of the law were those who chose to join AMCU and that was the sole reason for denying them equal protection and benefit of the law, which is guaranteed by section 9(1) of the Constitution. There can be no denying that this differentiation serves no legitimate government purpose.

[118] Section 189(2) of the LRA.

[155] I have already demonstrated that the impugned provision does not promote the principle of majoritarianism and that the purpose of the differentiation in section 189(1) is obscure. But whatever that purpose might be, it is not a legitimate government purpose. Consequently the differentiation does not constitute a reasonable and justifiable limitation of the applicants' rights contained in section 9(1) of the Constitution.

[156] Section 9(1) guarantees equality before the law in these terms:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[157] Lucidly, section 9(2) proclaims that the equality guaranteed by section 9 "includes the full and equal enjoyment of all rights and freedoms". This brings me to the next right relied on by the applicants in impugning section 189(1).

Freedom of association

[158] The other right on which the applicants relied was the right to freedom of association. Section 18 of the Constitution confers upon every person the right to freedom of association. In the context of labour relations this right enables workers to join unions of their own choice. This right is fortified by the right to form or join a trade union of one's choice guaranteed by section 23(2)(a) of the Constitution.[119]

[159] Relying on the International Labour Organization (ILO) jurisprudence, this Court in *Bader Bop* said:

[119] Section 23(2)(a) provides:

> "(2) Every worker has the right—
>
> (a) to form and join a trade union."

> "Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join."[120]

[160] This statement demonstrates the interconnectedness between the right to freedom of association and the right to form and join a trade union together with the rights of trade unions to organise and engage in collective bargaining. In *Bader Bop* this Court declared that these rights are impaired if workers are not allowed to be represented by a union of their choice and are forced to be represented by a union they have chosen not to join. This is exactly what happened here. The applicants, as members of AMCU, were not permitted to be represented by their own union at the consultation process. Instead, they were forced to accept representation by NUM and UASA, after the collective agreement was extended to cover workers who were not members of those two unions.

[161] But of more importance is the recognition by this Court in *Bader Bop* that majoritarianism is compatible with the existence of minority unions and allowing those unions to organise and represent their own members in competition with the majority union. With reference to the ILO Convention this Court observed:

> "An important principle of freedom of association is enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

[120] *Bader Bop* above n 104 at para 34.

> 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.'
>
> Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time."[121]

[162] On that occasion this Court did not endorse the use of majoritarianism to trump the rights of minority unions. The right balance was struck between the exercise of constitutional rights by minority unions and the principle of majoritarianism which was on that occasion advanced by section 18 of the LRA. Here the impugned provision does not even promote the majoritarian system. But even if it did, there would have been no justification for placing majoritarianism above the rights guaranteed by the Constitution. Nor could it be said that majoritarianism constitutes a reasonable and justifiable limitation of those rights, including the right to freedom of association.

[163] The statement in *Bader Bop* was reaffirmed in *POPCRU* where this Court stated:

> "Significantly, it emerges from this statement that the principle of majoritarianism which is embraced by our labour law is not incompatible with the principle of freedom of association which finds expression in the right to form and join a union of one's choice. Workers form and join trade unions for protecting their rights and advancing their interests at the workplace. Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary

[121] Id at para 31.

> hearings seriously undermines their right to freedom of association described earlier."[122]

[164] Therefore I conclude that the limitation of the applicants' right to freedom of association here is neither reasonable nor justifiable. This is because no other reasons were advanced for that limitation.

Right to fair labour practices

[165] The divergence between the first and second judgment flows primarily from the interpretation and giving context to the right to fair labour practices enshrined in section 23 of the Constitution.[123] The first judgment holds that consultation required by section 189(1) is a component of that right. Whereas the second judgment concludes that the text of section 23(1) of the Constitution does not guarantee a right to be individually consulted in the retrenchment process.

[166] It is apparent from the two judgments that both accept that the right to fair labour practice is not defined in the Constitution and that its content should be gathered from the LRA which was enacted to give effect to rights enshrined in section 23 of the Constitution. This is undoubtedly correct. For this Court in *NEHAWU*[124] recognised that the content of a fair labour practice is to be sourced from the LRA and international law. The Court said:

> "The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the Labour Appeal Court and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to section 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and

[122] *POPCRU* above n 105 at para 90.

[123] Section 23(1) of the Constitution provides:

> "Everyone has the right to fair labour practices."

[124] *NEHAWU* above n 10.

> international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance."[125]

[167] But what is of more significance is the link that *NEHAWU* draws between the right to fair labour practices and Chapter VIII of the LRA which carries the heading "Unfair Dismissal and Unfair Labour Practice". *NEHAWU* tells us in unequivocal terms that provisions of this chapter give effect to the right to fair labour practices and that at the heart of this right lies the value of job security. The right ensures the continuation of the employment relationship between an employee and an employer.

[168] *NEHAWU* puts it thus:

> "Security of employment is a core value of the LRA and is dealt with in Chapter VIII. The chapter is headed "Unfair Dismissals". The opening section, section 185, provides that '[e]very employee has the right not to be unfairly dismissed.' This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the employer on terms that are fair to both."[126]

[169] However, it is significant to note that the scope of the right to fair labour practices is not limited to protection from unfair dismissals. It is broader and includes protection against all unfair conduct regardless of whether the source of such conduct is the employer or the employee. In other words the security against unfair conduct is afforded both to the employer and employee. In *NEHAWU* this Court rejected the contention that the right to fair labour practices was conferred on workers only.[127]

[125] Id at para 34.

[126] Id at para 42.

[127] Id at para 39.

[170] The main pillar on which the second judgment rests is that the right to fair labour practices does not include an entitlement for workers to be consulted individually and that section 189 has not been construed to require parallel individual consultation. While this is correct to a degree, it is not accurate. Section 189(1) does not prohibit consultation with individual workers. On the contrary, the section recognises the need for such consultation where there is no registered trade union with membership among those who are earmarked for retrenchment; no workplace forum and no representatives of those workers. If any of these is present, the section does not require consultation with individual workers, over and above consultation with their representatives. For that would serve no useful purpose.

[171] But here as mentioned, the complaint is not that the applicants required to be consulted individually. Instead, they demanded to be represented in the consultation process by a union of their choice and not those they had chosen not to join.

[172] Moreover, there is nothing inherently objectionable to individual consultation where representative consultation is not available. This is because the focus of the right to fair labour practices is fairness in the employment relationship between an employer and an employee. In *NEHAWU* it was stated:

> "In my view the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and *the continuation of that relationship on terms that are fair to both.* In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."[128]

[173] The question that arises is whether it is procedurally fair to terminate employment of workers in circumstances where they were not to blame and without

[128] Id at para 40.

affording them the opportunity to make representations and where that opportunity was given to other workers. With regard to dismissals, a pre-dismissal hearing is core to procedural fairness. Whether the reason for the dismissal is misconduct on the part of the dismissed workers or operational requirements makes no difference. The baseline is that procedural fairness requires an employer to afford an employee a chance to make representations against dismissal before the guillotine falls on him or her.

[174] It cannot be denied that retrenchment is a species of dismissal and as such it should be held to the standard of procedural fairness applicable to other forms of dismissal. In retrenchments the need for fairness is heightened by the fact that the affected workers are not guilty of any breach of their contracts of employment. Yet they are confronted with termination of their employment. By allowing employers to dismiss workers without consulting them or their preferred union, section 189(1) plainly limits their right to fair labour practices.

[175] What remains for consideration is whether the limitation in question is reasonable and justifiable in an open democracy based on human dignity, equality and freedom. I have already pointed out that the impugned provision infringes the equality clause and the right to freedom of association. There can be no justification for a limitation that impermissibly violates other rights in the Bill of Rights. Nor can it be said that such a limitation is reasonable.

[176] It is not necessary to determine whether the impugned provision violates the right to dignity and the right of access to information on which the applicants also relied. The conclusions reached in respect of the other rights are sufficient to ground a declaration of invalidity.

Differences

[177] The second judgment holds that AMCU's challenge based on the freedom of association could succeed only if the right means that "every union must be truly equal,

and enjoy each and every statutory entitlement, regardless of size."[129] Without analysing decisions of this Court in *Bader Bop* and *POPCRU*, the second judgment concludes that the employee's right to join a trade union of her choice does not mean that the union of choice may represent her in the section 189(1) consultation. While it is true that the right to consult is a statutory right, it is restricting the enjoyment of that right to certain trade unions which limits the constitutional right relied on by AMCU.

[178] It is in this context that the conclusion reached in the second judgment is at variance with *Bader Bop* and *POPCRU*. Both these decisions dealt with the question of whether a minority union could conclude a collective agreement with an employer in breach of an earlier agreement between the same employer and a majority union which set conditions for minority unions to enjoy statutory organisational rights.

[179] In *Bader Bop* NUMSA, a registered trade union without sufficient representativeness, demanded to be accorded organisational rights such as recognition of its shop stewards and representing its members in disciplinary and grievance proceedings. Bader Bop which had a collective agreement with a majority union refused to allow NUMSA to exercise those rights on the ground that it was not representative of a majority of its workforce. Bader Bop also refused to bargain with NUMSA for the same reason. The union declared a dispute and gave notice that it will go on strike.

[180] Bader Bop approached the Labour Court for an interdict, contending that NUMSA, as a non-representative union was not entitled to have its shop stewards recognised and that it could not strike to make such demand. The Labour Court dismissed the application and on appeal to the Labour Appeal Court, Bader Bop succeeded. The Labour Appeal Court held that the LRA confers the right of shop steward recognition on unions representing a majority of the workforce and that NUMSA could not demand such a right or lawfully strike to make the demand.

[129] Second judgment at [124].

[181] Unhappy with the outcome, NUMSA appealed to this Court. Two issues relevant to the present matter were identified. The first was whether workers who are members of a minority union are entitled to be represented by that union in disciplinary and grievance proceedings. This Court answered the question in the affirmative. The Court held that members of a minority union are entitled to be represented by their own union in disciplinary and grievance proceedings. The Court observed that the right to freedom of association and the right to form and join a trade union are breached if members of a minority union are forced to be represented by a rival union they have chosen not to join.[130]

[182] On this authority, obliging members of AMCU here to be represented by the rival unions, NUM and UASA at the section 189(1) consultation must equally limit the right to freedom of association in section 18 of the Constitution and the right to form and join a trade union in section 23(2)(a) of the Constitution. The fact that here the representation required was at consultation and not a disciplinary or grievance proceeding should make no difference. The risk of termination of employment is present in both instances.

[183] Significantly the second judgment does not address the important point made in *Bader Bop*. That is, that majoritarianism does not exclude the existence and operation of minority unions. The two are not mutually exclusive. In *Bader Bop* this Court noted that international law permits majoritarianism to the extent that it allows minority unions "to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time."[131] This does not mean, as the second judgment suggests, that "every union must be truly equal". Instead it means that minority unions must be given space to operate and even "seek to challenge majority unions".

[130] *Bader Bop* above n 104 at para 34.
[131] *Bader Bop* above n 104 at para 31.

[184] *POPCRU* too dealt with a dispute about allowing a minority union to bargain and conclude a collective agreement with an employer for purposes of affording it statutory rights similar to those *Bader Bop* was concerned with. SACOSWU, a minority union, did not meet the threshold requirement set in a collective agreement between the employer and POPCRU, the majority union, which sought to bargain with the employer with a view to agree on organisational rights. POPCRU opposed SACOSWU's attempts on the ground that the employer was bound by the agreement between it and POPCRU which regulated the enjoyment of organisational rights. POPCRU contended that SACOSWU should meet the threshold requirement in that agreement if it wanted to enjoy those rights.[132]

[185] But contrary to the collective agreement between it and POPCRU, the employer granted SACOSWU organisational rights, including the right to represent its members at disciplinary and grievance proceedings. POPCRU declared a dispute which was referred to conciliation and later to arbitration. The arbitrator ruled that the collective agreement between the employer and POPCRU did not preclude SACOSWU and the employer from concluding a separate agreement.

[186] Dissatisfied with the arbitration award, POPCRU instituted a review application in the Labour Court which set aside the award on the ground that the conclusion of the second collective agreement was prohibited. An appeal to the Labour Appeal Court was successful and the decision of the Labour Court was reversed. POPCRU approached this Court for leave to appeal.

[187] One of the issues that arose before this Court was whether workers who belong to a minority union are entitled to be represented by that union in disciplinary and grievance proceedings if the union does not meet the threshold requirement set in the agreement between the employer and a majority union. This Court held that there is nothing in the LRA which precludes a minority union and an employer from concluding

[132] *POPCRU* above n 105 at paras 1 and 4.

a further collective agreement which regulates the exercise of organisational rights. Therefore, the second agreement between SACOSWU and the employer was valid. The fact that POPCRU was a majority union and had concluded a collective agreement with the employer which set threshold requirements was not an obstacle. This is because both unions are bearers of the constitutional right to bargain and had a right to represent their members.

[188] The right to represent members flows primarily from the members' constitutional rights to freedom of association and the right to form and join a trade union. These rights, guaranteed as they are by the Constitution, would be rendered worthless if workers having joined a union of their choice are forced to be represented by a rival union, even if it is a majority union. That is why in *POPCRU* this Court observed:

> "Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier."[133]

[189] In this matter it cannot be disputed that the impugned provision obliged members of AMCU to be represented at consultation by NUM and UASA, the two unions they had not chosen to join. That impaired also their right to form and join a trade union of their choice. For there would be no point in joining a minority union if it cannot represent its members at a process which may result in them losing their jobs.

[190] The fourth judgment holds that for two additional reasons, AMCU's attack should fail. First, it is said that AMCU failed to establish the limitation of the rights it relied on. One has to refer to the undisputed facts to conclude that this is not correct. Briefly those facts are that once Royal Bafokeng (employer) contemplated retrenching

[133] *POPCRU* above n 105 at para 90.

some of its employees, it commenced consultation with NUM and UASA with whom it had a collective agreement which identified those two unions as the only parties to be consulted in terms of the impugned provision.

[191] Attempts by AMCU to join the consultation process on behalf of its members were rebuffed. Royal Bafokeng cited the collective agreement and the impugned provision as the grounds for AMCU's exclusion from the consultation process. It is common cause that some of the workers who were eventually retrenched were members of AMCU. It is also common cause that UASA was a minority union that was allowed to participate in the consultation process purely because it was identified as one of the parties to be consulted in the collective agreement. NUM was the majority union.

[192] These facts show beyond doubt that in relation to the relevant consultation, AMCU was treated differently from both NUM and UASA. And the impugned provision authorised that differentiation. It is also plain from the facts that workers who chose to join AMCU were denied representation by a union of their choice and the union with which they had elected to associate.

[193] The second judgment suggests that government could not have been in a position to justify the "infringement of a panoply of seven rights, merely because their infringement is alluded to."[134] This is not borne out by the record. The record reveals that the Minister has responded fully to allegations made in the founding affidavit in support of each right in the High Court. For example, with regard to the section 9(1) claim the Minister stated:

> "I further submit that the fact that AMCU and the second to further applicants were not consulted does not entail that the second to further applicants were not considered or were not equally treated as employees of the first respondent during the consultation process and the ensuing retrenchment agreement."

[134] Second judgment at [123].

[194] And with regard to the claim based on freedom of association, the Minister said:

> "Furthermore, the right to freedom of association of the second to further applicants was not disturbed to the extent that their choice of whether they preferred to join AMCU, [NUM] or [UASA] was not in the main infringed by the recognition agreement.
>
> It is further important that one distinguishes between the freedom of association as well as the duty and / or right to bargain. The freedom to associate is a collective freedom of the individual in association with others who have similar goals to be free from unwarranted interference to achieve the common goal.
>
> However the freedom to bargain is earned by representivity which is pertinent to collective bargaining and further the prevention of proliferation of trade unions as well as to orderly collective bargaining and labour peace."

[195] The question is whether these defences should succeed to ward off the claims based on equal protection of the law and equal benefit of the law, as well as freedom of association. With regard to the first claim, whilst the Minister admits that AMCU was not consulted she contended that its members were treated equally as employees of Royal Bafokeng. This contention is devoid of any merit. Among the employees of Royal Bafokeng were members of NUM, UASA and AMCU which had 382 members. But only NUM and UASA were consulted, owing to the restrictions in the impugned provision. The provision differentiated AMCU members from other employees with regard to consultation. The other employees were represented by their own unions whilst AMCU members were not. Yet section 189 of the LRA affords workers facing retrenchment, the right to have their union consulted.

[196] The nub of the complaint was that the impugned provision afforded some workers representation by their own union whilst other workers were denied the same right. And according to the jurisprudence of this Court AMCU needed to show differentiation in relation to consultation with unions. On the facts this it has succeeded

to prove.[135] Once this was established it fell on the Minister to establish that the differentiation had a rational connection to a legitimate government purpose. In this regard the Minister stated:

> "[I]n the event that the Honourable Court finds that any of the rights have been infringed, I submit that the limitation of those rights in the circumstances serves an important purpose. More particularly that of ensuring that there is a speedy resolution of any disputes concerning the dismissal of employees for operational requirements."

[197] There is simply no rational connection between the differentiation in question and the speedy resolution of dismissal disputes. Dismissals for operational requirements occur at the conclusion of the process and not during consultation. It follows that the differentiation breaches section 9(1) of the Constitution. In *Van der Merwe* Moseneke DCJ said:

> "It is so that laws rarely prescribe the same treatment for everyone. Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality, if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under section 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be, an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by section 9(1) thereof."[136]

[198] Both the second and fourth judgment conclude that section 9(1) and 18 claims cannot be determined because the parties did not present argument on those claims. While it is true that it is undesirable for this Court to determine issues without the benefit

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[135] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54.

[136] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 49.

of argument from the parties, there is no rule that prohibits the Court from doing so. In fact on a number of occasions this Court proceeded to decide issues that were not considered by the courts below and where there was no argument presented in this Court.

[199] In *Gavric*[137] for example, the High Court against whose decision an appeal was pursued had not considered the meaning of a non-political offence used in section 4 of the Refugees Act[138]. And none of the parties before this Court had presented argument on that point and the minority had drawn this to the attention of the majority.[139] The majority went ahead and determined what a non-political offence envisaged in the section means.[140]

[200] *KwaZulu-Natal Joint Liaison Committee*[141] went a step further by not only deciding issues in respect of which there was no argument presented by the parties but disposed of the matter on the basis of a claim that was not pleaded. The applicant there had pleaded a contractual claim which during the hearing its senior counsel repeatedly made it clear that the applicant "stood or fell" by the contractual claim. In that case, having found that a contractual claim could not succeed,[142] the majority proceeded to determine whether the applicant could succeed on the basis of an administrative law claim even though such a claim was not brought in terms of the Promotion of Administrative Justice Act[143]. The majority concluded that the administrative law claim was partially successful and ordered the Department to pay "the approximate amounts specified" in a particular departmental notice.[144]

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[137] *Gavric v Refugee Status Determination Officer, Cape Town* [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC).
[138] 130 of 1998.
[139] *Gavric* above n 137 at para 128.
[140] Id at para 89-115.
[141] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).
[142] Id at paras 35-6.
[143] 3 of 2000.
[144] *KwaZulu-Natal Joint Liaison Committee* above n 141 at para 78.

[201] The present is not such a matter. All the claims have been pleaded and were established in evidence. The only thing that was missing was argument in the written and oral submissions. However, counsel for AMCU had made it plain at the hearing that those claims were not abandoned.

[202] In view of the principle of objective invalidity, it seems to me that this is one of those matters where it becomes necessary for the Court to determine the issues even though no argument was advanced. This is because a statute cannot have "limping validity, valid one day, invalid the next, depending upon changing circumstances."[145] Moreover, the invalidity of the impugned provision does not depend on the parties' argument. If it infringes one of the rights relied on it became invalid the day it came into operation. This is the position regardless of the fact that it is challenged now.[146]

[203] For these additional reasons I support the order proposed in the first judgment.

THERON J:

[204] I have had the pleasure of reading the judgments of my brothers Ledwaba AJ (first judgment), Froneman J (second judgment) and Jafta J (third judgment). I agree with the second judgment's reasoning and order. The primary reason for this concurrence is simple: the ambit of section 23(1) of the Constitution, properly interpreted, does not include a right for an employee to be individually consulted in the context of a retrenchment dismissal.

[205] This brief concurrence will deal with why, from a separation of powers perspective, it is appropriate to test section 189(1) of the LRA against a standard of rationality rather than one of reasonableness, and the importance of the proper interpretation of the Bill of Rights in this regard. It will also add to and supplement the

[145] *New National Party* above n 100 at para 22.
[146] Id.

explanation given in the second judgment as to why this Court should refrain from adjudicating the alleged limitations of the rights in sections 9(1) and 18 of the Constitution by section 189(1) of the LRA.

Review standards of rationality and reasonableness

[206] The doctrine of the separation of powers permits competent courts to intervene in legislation in limited circumstances – only when the evidence and arguments compel them to conclude that in terms of the Constitution, the Legislature has done wrong, or has not done enough.[147] Courts must ensure that the Legislature acts in a constitutionally compliant manner. Where a legislative provision has the effect of limiting a right in the Bill of Rights, a competent court must determine whether the limitation is justifiable in terms of section 36 of the Constitution. Here, reasonableness is relevant to the judicial review of legislation.[148]

[207] Where, as in this case, no limitation of a right in the Bill of Rights has been established, a competent court may only review legislation on the basis that the impugned provision is not rationally connected to a legitimate purpose.[149] This lower standard of rationality is "fundamental to the doctrine of separation of powers and to the role of courts in a democratic society".[150] A court would usurp the functions of the Legislature and violate the doctrine of the separation of powers if it were to apply a reasonableness standard of review to legislation in the absence of a limitation of a right in the Bill of Rights.

[208] In my view, the proper interpretation of the ambit of rights in the Bill of Rights is crucial to ensuring that the Judiciary remains sensitive to the need to refrain from

[147] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 53.

[148] *New National Party* above n 100 at para 24.

[149] Id.

[150] Id.

undue interference with the functional independence of the Legislature.[151] An unduly narrow interpretation of a right would inhibit a competent court from fulfilling its constitutionally mandated function of declaring any law that is inconsistent with the Constitution invalid to the extent of its inconsistency.[152] An unduly expansive approach to the ambit of a right would, however, trigger a reasonableness review of an Act of Parliament beyond the constitutional limits of judicial authority.

Alleged infringements of the rights in sections 9(1) and 18 of the Constitution

[209] The third judgment finds that section 189 of the LRA unjustifiably limits the rights in sections 9(1) and 18 of the Constitution, in addition to those in section 23 of the Constitution. The second judgment points out that the parties canvassed only the section 23 infringement in their written submissions and during oral argument. This Court has repeatedly recognised that even when deciding a constitutional matter within its power, it may decline to decide the matter because the challenge is not warranted in the particular proceedings.[153]

[210] Section 34 of the Constitution guarantees the rights of the parties to have their dispute resolved in a fair hearing before a court.[154] In my view, the key questions are

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[151] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 92.

[152] Section 172 of the Constitution provides that:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[153] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at paras 245-8 and *Merafong City v AngloGold Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at para 37.

[154] Section 34 of the Constitution provides that:

whether the respondents have been granted sufficient opportunity to address the alleged violations of sections 9(1) and 18 of the Constitution in these proceedings and whether this Court has had the benefit of full argument on this issue. The answers to these questions are pivotal in determining whether this Court should make a finding on this issue. And they stand to be answered in the negative. The third judgment correctly points out that these alleged violations were pleaded by the applicants. That being said, and despite their onus to prove their case, the applicants did not put up any facts or make any submissions to substantiate the bare allegations in their pleadings that section 189 unjustifiably limited sections 9(1) and 18 of the Constitution. In the circumstances, it would be inappropriate for this Court to adjudicate these issues in these proceedings.[155]

Conclusion

[211] For these reasons, I agree with the second judgment that the appeal must be dismissed.

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[155] This matter is wholly distinguishable from the decisions of this Court referred to in the third judgment in support of its proposed adjudication of the alleged infringements of sections 9(1) and 18 of the Constitution.

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For the Fourth Respondent:	G Malindi SC, S Nhlapo instructed by the State Attorney, Pretoria.
Second, Third and Fifth Respondents:	Unrepresented.