Majoritarianism, consultation, fairness and dismissal: Are the courts confusing these principles?

MONRAY MARSELLUS BOTHA
BLC LLB LLM BCom (Hons) MCom LLD, Advanced Diploma in Insolvency Law and Practice, Advanced Diploma in Corporate Law, Advanced Diploma in Alternative Dispute Resolution
Professor, Department of Mercantile Law and Acting Deputy Dean, Faculty of Law, University of Pretoria

ELMARIE FOURIE
BProc LLM LLD Postgraduate Diploma in Labour Law
Senior Lecturer and Head, Department of Public Law, University of Johannesburg

OPSOMMING

Die meerderheidsbeginsel, raadpleging, billikheid en ontslag: Verwar die howe die beginsels?

Die werksverhouding tussen werkgewer en werknemer is 'n ongelyke een. Hierdie ongelyke magsverhouding tussen die partye word aangespreek deur die organisasie van werkers in vakbonde asook kollektiewe bedinging. Een van die doelstellings van die Wet op Arbeidsverhoudinge 66 van 1995 is om 'n raamwerk daar te stel waarbinne werknemers en hul vakbonde kollektief kan beding oor lone, werksomstandighede en onder andere diensvoorwaardes. Die artikel behels 'n bespreking van die beslissing van die Grondwetlike Hof in *Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Limited* (2020) 41 ILJ 555 (CC). Belangrike aangeleenthede wat bloot as *obiter dicta* in die uitsprake geopper is, word krities oorweeg. Die artikel ondersoek die rol van die meerderheidsbeginsel tydens kollektiewe bedinging vir byvoorbeeld hoër lone en tydens oorlegpleging wanneer die werkgewer beoog om werknemers te ontslaan. Die rol van vakbonde tydens hierdie onderhandelinge word ook ondersoek, veral ten opsigte van werknemers wat onverteenwoordig is of dié wat aan 'n vakbond behoort wat die minderheid van die werknemers verteenwoordig. Verder word die rol van artikel 36 oorweeg, sowel as die inperking van regte soos die reg op gelykheid en menswaardigheid van lede van minderheidsvakbonde. Die meerderheidsbeginsel vervul ongetwyfeld 'n rol ten tye van kollektiewe bedinging, maar tydens 'n konsultasieproses wat aanleiding kan gee tot die ontslag van werkers moet die billikheidsbeginsel voorkeur geniet.

1 Introduction

One of the aims of labour law is to address the inherent unequal relationship between the employer and employee, where the employer is in a position to determine the nature of the relationship and the employee is often unable to

bargain on an equal footing.[1] Thus, the main purpose of labour law may be described as follows:

> "The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of the bargaining power which is inherent and must be inherent in the employment relationship."[2]

The power imbalance between employees and employers can be addressed through trade unions by enabling workers to organise and bargain collectively.

Collective bargaining is widely accepted as the primary means of determining terms and conditions of employment in South Africa. Due to South Africa's particular history,[3] collective bargaining has been "underlined by the legacy of deep adversarialism" between employers and organised labour.[4] Various types of behaviour in the selection of representatives, the conduct of collective bargaining and the enforcement of collective agreements are prescribed and proscribed by labour laws.[5] The greatest net benefit from collective bargaining is achievable when a system is put in place that promotes good faith bargaining and efficient enforcement of collective agreements.[6] One of the purposes of the Labour Relations Act 66 of 1995[7] (the LRA) is to promote collective bargaining and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.[8] In this context, it is worth noting that South Africa has also ratified the core conventions of Freedom of Association, 1948 (No. 87)[9] and the Right to

---

1 Van Niekerk and Smit (eds) *Law@work* (2019) 10.

2 Davies and Freedland *Kahn-Freund's labour and the law* (1983) 18.

3 In the past, labour legislation in South Africa was based on racial categorisation and discrimination and trade unions reflected this racial divide. Parallel legislation (such as the Labour Relations Act 28 of 1956 and the Black Labour Relations Regulations Act 48 of 1953) was introduced for white and black workers and, initially, black workers were not allowed to join trade unions (see Manamela "Regulating Workplace Forums in South Africa" 2002 *SA Merc LJ* 729). Prior to 1994, trade unions in South Africa demanded greater democracy in the workplace; some employers had taken the initiative to involve employees in decision-making (see Du Toit "Democratising the Employment Relationship A Conceptual Approach to Labour Law and its Socio-economic Implications" 1993 *Stell LR* 325). Also consider 1956 which can be characterised as follows: "Collective bargaining over distributive issues and job security, seen by many as the embodiment of adversarialism, was the primary form of employee involvement in the exercise of managerial prerogative by employers. The system was characterised by low levels of trust between labour and management, disempowered and uncommitted employees, and workplaces ill-prepared to face the challenges of technological innovation" (Du Toit *et al* Labour Relations Law (2006) 21–22).

4 Du Toit "Collective bargaining and worker participation" 2000 *ILJ* 1544.

5 Dau-Schmidt, Harris and Lobel *Labour and employment law* (2009) 96; see also Botha and Germishuys "The promotion of orderly collective bargaining and effective dispute resolution, the dynamic labour market and the powers of the Labour Court" (Part 1) 2017 *THRHR* 351.

6 *Ibid.*

7 See s 1 of the Labour Relations Act 66 of 1995.

8 Preamble to and s 1 of LRA. Ch III of the LRA regulates collective bargaining in ss 11–63.

9 Art 2 provides that workers and employers without distinction shall have the right to establish organisations and join these organisations of their own choosing.

Organise and Collective Bargaining Convention 1949 (No. 98). The framework that is provided for in the LRA complies with these two conventions.[10]

Representativeness plays an important role in the collective bargaining landscape in South Africa. Section 23(2) of the Constitution of the Republic of South Africa, 1996 grants workers not only the right to form and join trade unions, but also to take part in the activities and programmes of trade unions. Section 23(4) grants trade unions the right to organise whereas section 23(2) affords workers the right to strike. The majoritarianism principle is entrenched in the South African labour relations system. Chapter III of the LRA establishes various organisational rights[11] that may be enforced by sufficiently representative and majority representative trade unions. These rights include trade union access to the workplace, deduction of trade union subscriptions, election of trade union representatives, leave for union office bearers and time off from work for union-related purposes, and access to information.[12] Closed-shop and agency agreements unashamedly promote the principle of majoritarianism.[13] With reference to the extension of collective agreements supported by the majoritarian principle, the Labour Appeal Court states that:

> "The will of the majority should prevail over the minority. This is good for orderly collective bargaining as well as the democratization of the workplace and sector. A situation where the minority dictates to the majority is quite obviously, untenable. But also a proliferation of trade unions in one workplace or sector should be discouraged."[14]

The well-known case of *NUMSA v Bader Bop (Pty) Ltd*[15] was one of the first cases that dealt with the contentious issue of minority trade unions accessing organisational rights that are usually afforded to sufficiently representative and majority trade unions. The court in *Bader Bop* expressly notes that, although employers are not compelled to recognise minority unions, and even though minority trade unions do not meet the statutory thresholds that entitle them to

---

10 See s 1 of the LRA.

11 Ss 12–16 of the LRA.

12 *Ibid.* See, in this regard for example, s 18(1) of the LRA which provides as follows: "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."

13 Ss 25 and 26 of the LRA. The CC in *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* 2017 6 BCLR 700 (CC) (*AMCU I*) para 43 with reference to *Kem-Lin Fashions CC v Brunton* (2001) 22 ILJ 109 (LAC) and majoritarianism, states that various LRA provisions illustrate the legislative policy choice and that two of the most obtrusive suffice: "It is majoritarianism that underlies the statute's countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members), and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union). This is not to say that these provisions are invulnerable to constitutional attack. It is only to point to them as piquantly instancing the scheme of the statute as a whole."

14 *Kem-Lin Fashions CC* para 19. It must be noted that in *AMCU I* the court found that s 23(1)(d) promoted and served the goals of collective bargaining in line with the objectives of the LRA. In *Free Market Foundation v Minister of Labour* 2016 8 BLLR 805 (GP), the High Court also confirmed the constitutionality of s 32 of the LRA. In both instances, based on the majoritarian principle, collective agreements at workplace level and sectoral level could be extended.

15 2003 2 BLLR 103 (CC).

organisational rights, they may still embark on industrial action in order to secure their rights. The court proceeded to hold that employers, however, are not compelled to recognise minority trade unions. Van Niekerk and Smit note in this regard that "[t]he finding means nothing more than that the recognition of shop stewards is a legitimate subject for collective bargaining and industrial action".[16]

Against this backdrop, it should be noted that minority trade unions may be granted rights in terms of sections 14 and 16 of the LRA in specified circumstances. Minority trade unions, however, are granted access[17] to acquire organisational rights which ordinarily would have been reserved for majority unions.[18] An arbitrator is empowered to grant a registered trade union the rights to elect trade union representatives and the disclosure of information if the applicant union meets the following criteria: (i) the applicant trade union meets the "sufficiently representivity" threshold; and (ii) if there is no other union in the workplace that has been granted those rights.[19] Section 21(8C) of the LRA provides that a commissioner in an arbitration may grant organisational rights[20] to a registered trade union or two or more registered trade unions who act jointly if such a trade union does not meet the threshold of representativity established by a collective agreement to which the employer and other unions are party to. These rights will be granted if all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings and if the union represents a significant interest or substantial number of employees in the workplace.[21] These amendments illustrate that there are instances where the principle of majoritarianism can be weakened to accommodate minority unions and provide them with a foot in the door.[22] Participation in the arbitration proceedings

16 Van Niekerk and Smit (eds) 408; see also *South African Post Office v Commissioner Nowosenetz* 2013 2 BLLR 216 (LC).

17 Inserted by the Labour Relations Amendment Act 6 of 2014.

18 See also Van Niekerk and Smit (eds) 407.

19 S 21(8A) of the LRA.

20 Ss 12, 13, 15 of the LRA.

21 See also *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC); *Transnet SOC Ltd v National Transport Movement* 2014 1 BLLR 98 (LC); *UASA & AMCU v BHP Billiton Energy Cool South Africa* JS345/13 regarding granting organisational rights to minority trade unions who do not meet the required thresholds as well as Corazza and Fergus "Representativeness and the legitimacy of bargaining agents" in Hepple *et al Laws against strikes: The South African experience in an international and comparative perspective* (2015) 87.

22 Van Niekerk and Smit (eds) point out that there has been a decline in collective bargaining and trade union membership in most industrialised economies for some years. This downward trend is also exhibited in South Africa. Reasons for this decline include the changed nature of work and the decline of industries where union membership has traditionally been high. They add that collective bargaining is "no longer the significant social institution that it was" and that employees in these circumstances "are less likely to have their terms and conditions determined by collective agreements, and are less able to rely on trade unions as agents to monitor and enforce those agreements" (Van Niekerk and Smit (eds) 6 and 11). See also, in this regard, Du Toit who sums up these developments as follows: "If collective bargaining depends on effective worker organization, and trade unions have historically emerged as the main form of worker organization, it may seem to follow that the decline of trade union density, reflected in declining bargaining coverage, spells the demise of collective bargaining. If so, it might seem that labour law should shift its focus to new forms of worker organization and to new forms of collective interaction" (Du Toit "What is the future of collective bargaining (and labour law) in South Africa?" 2007 *ILJ* 1417). See, for example, Visser "Trade unions in the balance" (2019) ILO

continued on next page

allows minority unions a voice and supports the concept of fairness towards parties in the employment relationship.

This brings us to the recent case of *Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Limited* (2020) 41 ILJ 555 (CC)[23] where the Constitutional Court (CC) handed down judgment in an application for leave to appeal against the judgment and order of the Labour Appeal Court (LAC). The application concerned the constitutionality of sections 23(1)(d) and 189(1) of the LRA. Several issues were raised, including whom the employer must consult with when contemplating dismissal for operational requirements, whether the current hierarchy created in section 189(1) limits the rights of minority unions and non-unionised employees and, if so, whether the limitation is reasonable and justifiable.[24]

The facts and analysis of the majority (second judgment) and minority judgments (first, third and fourth judgments) are canvassed below. The article briefly touches on the main points of each of the four judgments, and proceeds to juxtapose these issues and to critically analyse principles that arise in the case. Certain issues that were mentioned by the court in passing and that were not explored, such as the question whether the scope of the right to fair labour practices in section 23(1) of the Constitution should be interpreted widely and the effect on the principle of majoritarianism of the legislature's introduction of the section 21(8) amendments to the LRA, are considered. The article further explores whether a difference exists between majoritarianism during negotiations and in instances of retrenchments; whether a "no-fault" dismissal for operational reasons grants employees, particularly those belonging to minority trade unions, the same or less protection than in instances where an employee is, for example, dismissed for misconduct or incapacity. It is recommended that trade unions must work together and embrace the principles of responsible unionism. This entails not only furthering and protecting the rights of their members, but also the rights of vulnerable and under-represented workers in the workplace, including employees who are members of minority trade unions. Whether a limitation in terms of the section 36 of the Constitution has the effect of extending lesser rights to members of minority trade unions than those enjoyed by members of majority trade unions, and if so whether it would constitute discrimination and an infringement of their right to dignity, are considered.

ACTRAV Working Paper. He points out that "[a] 'new instability of work' has come to characterize labour relations in the twenty-first century and this has important implications for trade unions worldwide" and that the decline of jobs in manufacturing and the rise of various forms of non-standard and flexible work, through subcontracting and outsourcing in much of the developed world and the persistence and growth of the informal economy in developing countries, "have caused union density rates to fall in nearly all countries worldwide" which resulted in collective bargaining coverage in many parts of the world being "perilously low and on a downward trend" (Visser 7, 10). Further, he points out that trade unions in the developed countries lost 14 million members between 2000 and 2008 and another 10 million between 2008 and 2017, whereas their counterparts in developing countries (whilst still declining until 2008) have gained an estimated 11 million members since 2008 with the result that in developed countries membership has fallen to 50 per cent of the world's total in 2017, down from 57 per cent in 2000 (Visser 15).

23 Hereafter *AMCU v Royal Bafokeng 2020.*

24 Para 28.

It should be noted that since this judgment was handed down the world of work and the world economy have been affected by the COVID-19 pandemic. The pandemic has had a severe impact on the livelihoods of not only workers, but also on business owners.[25] South Africa has been placed under compulsory lockdown since midnight of 26 March 2020 in order to prevent the rapid spread of COVID-19 and to attempt to contain the virus. The initial 21-day lockdown was extended.[26] Although lockdown measures are gradually being relaxed from a total lockdown at level 5, to no lockdown at level 1,[27] the likelihood of further job losses and retrenchments is lurking in the background. The South African Reserve Bank (SARB) points out in their *Monetary Policy Review* (April 2020) that the COVID-19 pandemic "is the biggest disruption to the global economy since the bankruptcy of Lehman Brothers in 2008"[28] and that the COVID-19 shock, in the near term, has put large portions of the economy into a policy-induced coma.[29] The SARB adds that this "is a supply shock, in the sense that no amount of demand can be satisfied if industries are closed"[30] and, thus, preliminary estimates suggest that South Africa could lose about 370 000 jobs in 2020, on a net basis.[31] The SARB further points out that business insolvencies could be increasing by roughly 1 600 firms as the economy contracts. Thus, the core macroeconomic problem, "is how best to support the economy, to mitigate these losses, while remaining cognisant of South Africa's pre-existing macroeconomic vulnerabilities, which make it unrealistic to implement stimulus on the scale seen in the strongest advanced economies".[32] It is therefore evident that the South African economy and labour market would be hit hard by further large retrenchments as envisaged in section 189A of the LRA.[33] Evidently, the issues that are highlighted here are of increased importance for the most vulnerable workers whose positions are already precarious, and who stand to be the hardest hit.

---

25 See for example https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25843&LangID=E (accessed 17-06-2020).

26 See for more detail https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar (accessed 17-06-2020).

27 Refer to relevant source/s.

28 SARB *Monetary Policy Review* (April 2020) 1.

29 *Idem* 39.

30 *Ibid.*

31 *ibid.* Some economists are of the view that these estimates (especially in light of an extended lockdown period) might be conservative. Dawie Roodt (Efficient Group chief economist) expects more than one million jobs would be lost following the 21-day lockdown whereas economist Mike Schussler adds that if the lockdown is extended by another 10 days, that the formal sector will lose about 1.6 million jobs by the end of the second quarter ("Coronavirus shock could lead to over 370 000 job losses in South Africa: Reserve Bank" available at https://businesstech.co.za/news/business/387987/coronavirus-shock-could-lead-to-over-370000-job-losses-in-south-africa-reserve-bank/ (accessed 07-04-2020).

32 SARB *Monetary Policy Review* 39.

33 South African Airways is currently under compulsory business rescue and has proposed a draft collective agreement to trade unions which, *inter alia*, deals with retrenchments of some of its workers. Comair recently also filed for voluntary business rescue and might also have to retrench some of its workers. See, in this regard, Mahlaka "Comair submits itself for business rescue" 6 May 2020 *Business Maverick* available at https://www.dailymaverick.co.za/article/2020-05-06-comair-submits-itself-for-business-rescue (accessed 06-05-2020).

From this, it is clear that economic, social and political partners, including trade unions, should make a concerted effort to counteract the negative effects of the economic downturn by applying creative and innovative methods in order to curb the possibility of more retrenchments.

2 *ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION V ROYAL BAFOKENG PLATINUM LIMITED* (2020) 41 ILJ 555 (CC)

2 1 Facts

On 18 September 2015, the Association of Mineworkers and Construction Union (the AMCU) along with some of its members, sought the reinstatement of 103 of its members who were retrenched by Royal Bafokeng Platinum Limited following a retrenchment agreement that was concluded between Royal Bafokeng and two other unions at the mine, the National Union of Mines (the NUM) and the United Association of South Africa (the UASA). The NUM was recognised by Royal Bafokeng as the majority trade union. The AMCU and the UASA were minority unions. The AMCU, unlike the UASA and the NUM, was not recognised for bargaining purposes and not granted organisational and bargaining rights by Royal Bafokeng. The retrenchment agreement in terms of section 23(1)(d) of the LRA was extended to the retrenched employees who were members of the AMCU members. It contained a full and final settlement clause which provided that all those who were bound by it, including the members of the AMCU, agreed to waive all claims and rights that they have against Royal Bafokeng. The members of the AMCU maintained that they were unaware of the agreement until 30 September 2015 when they were issued with a notice of retrenchment dated 18 September 2015. The AMCU subsequently challenged the dismissals of its members in the CCMA,[34] the Labour Court[35] and the Labour Appeal Court.[36] The CCMA refused to conciliate the matter for lack of jurisdiction, whereupon AMCU argued in the Labour Court[37] and Labour Appeal Court[38] that the collective agreement as well as the extension thereof were constitutionally objectionable, as they allowed for a majority union to conclude a collective agreement concerning a retrenchment process to the exclusion of minority unions in the workplace.

2 2 Labour Court and Labour Appeal Court judgments

The AMCU approached the Labour Court in terms of section 189A(13) of the LRA, but the application was later withdrawn when Royal Bafokeng, in its answering affidavit, showed that a valid collective agreement had been concluded with the NUM. The AMCU then mounted a constitutional challenge to sections 189(1)(a)–(c) and 23(1)(d) of the LRA, seeking to have these sections declared unconstitutional and for the setting aside of the collective agreement and/or the extension of the agreement to its members. The Labour Court (LC) dismissed the AMCU's claims and found that the impugned sections did not

34 See para 12.
35 See paras 13–14.
36 See paras 15–19.
37 See paras 13–14.
38 See paras 15–19.

violate any constitutional rights. The AMCU turned to the Labour Appeal Court (LAC) seeking the same relief.[39]

The LAC dismissed the appeal in its entirety, stressing that principle of majoritarianism which is afforded by the LRA "is not without purpose" and that it was a deliberate policy choice taken by the legislature in order to facilitate orderly collective bargaining, to minimise the proliferation of unions and to democratise the workplace.[40] The LAC further remarked that the philosophical underpinnings of the LRA favoured voluntarism and preferred the law to abstain from intervening in multimodal socio-economic labour disputes. Consequently, the LAC held that there was no merit to the AMCU's contention that majoritarianism had no place in the retrenchment process as it allowed for the interests of minority unions to be expressed collectively through the conduit of a majority union which in return ensured labour peace.[41] The LAC further held that if a requirement is set that will force an employer to consult with the entire workforce it would allow obstinate minority unions to frustrate a mass retrenchment which would lead to "bedlam and chaos at the workplace".[42] The LAC proceeded to hold 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".[43]

2 3 Constitutional Court judgments

2 3 1 Minority (First) Judgment

The minority judgment (first judgment, penned by Ledwaba AJ, with Mogoeng CJ, Jafta and Madlanga JJ concurring) held that section 189(1) of the LRA was unconstitutional as it unjustifiably limited the right to fair labour practices as guaranteed in section 23(1) of the Constitution.[44] The judges reasoned that section 189(1) of the LRA is a codification of the fair procedure for retrenchment dismissals. 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

39 Paras 14–15.

40 Para 16; see also s 21(8)(a)(i) and (ii) of the LRA; *cf* Du Toit *et al Labour Relations Law* (2006) 246 and Van Niekerk and Smit (eds) 406.

41 Para 18.

42 Paras 17–18; *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* 2018 39 ILJ 2205 (LAC) para 42.

43 Para 19; see also *AMCU I* para 67.

44 Para 85.

(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."

As the court stated: "Section 189(1) creates a cascading hierarchy which an employer is obliged to consult . . .".[45] It is clear from this section that collective agreements are afforded primacy. In this judgment the court refers to *Baloyi v M&P Manufacturing*[46] where the LAC confirmed that the consultation process in section 189 only requires of an employer to comply with substance and form and that this then renders the dismissal procedurally fair. The court also stated that the right to fair labour practices did not apply to this judgment.[47] The judgment was premised on the notion that the contents of section 189 constitute a codification of the fair procedure prescribed for a dismissal for operational requirements.

The first judgment emphasised that consultation in the context of a retrenchment as envisaged in section 189(1) restricts the right to fair labour practices by creating a statutory regime which excludes certain employees from that consultation process.[48] The first judgment proceeds to hold that no logical reason exists for why it would be impossible for an employer to consult inclusively with all employees who are at risk of being retrenched or their representatives, and still conclude a valid collective agreement that is extended throughout the workplace. The judges based this finding on the fact that "the consulting process is anterior to, and independent of, collective bargaining".[49] This argument supports the concept of fairness and allows all employees faced with the prospect of dismissal with an opportunity to make representations. Even if a collective agreement is then concluded and extended, employees at the very least had a chance to make their voices heard. There should not be "any inherent tension between collective bargaining and consultation".[50] The first judgment further stresses that consultation, properly characterised in terms of the right to fair labour practices, is a process that is "antecedent" to collective bargaining which 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" and thus the argument that the "obligation to consult exclusively lies in competition with collective bargaining is therefore misplaced".[51] The notion of exclusion of parties to the consultation process during dismissals for operational requirements does not support the objectives of the LRA of labour peace and democratisation of the workplace.[52] The first judgment further states that it "cannot be gainsaid" that the principle of majoritarianism plays a vital role in ensuring the democratisation of the workplace. The first judgment further stresses the fact that the obligation of an employer to consult inclusively adds legitimacy to the principle of majoritarianism as minority voices are provided with an opportunity to raise their concerns to both the employer and the majority union.[53]

---

45 Para 30.
46 (2001) 22 ILJ 391 (LAC).
47 Paras 36–37.
48 Para 65.
49 Para 74.
50 Para 77.
51 Para 78.
52 Para 79.
53 Para 83.

In this judgment, the court declared section 189(1) of the LRA unconstitutional and invalid.[54]

2 3 2 Majority (Second) Judgment

The majority judgment (second judgment) was penned by Froneman J and concurred in by Cameron J, Khampepe J, Mhlantla J and Theron J. These judges agreed with the first judgment that the constitutional challenge to section 23(1)(d) should be dismissed.[55] The majority, however, disagreed with the minority's view that section 189(1) of the LRA is constitutionally invalid, and held that the provision does not limit the right to fair labour practices.[56] The majority further found that section 23 of the Constitution does not expressly or impliedly guarantee a right to be individually consulted in a retrenchment process.[57] The court stressed that a dismissal based on operational reasons is not dependent on individual conduct or capacity but on objective factors.[58] The court iterated that the procedural requirements for a fair consultative process are set out and codified in section 189 of the LRA, and stressed that since the introduction of the LRA 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).[59] In light of this, Van Niekerk and Smit remark as follows:

> "Retrenchments are often effected across the board. Collective agreements that require consultation more often than not apply to only some employees, be they members of the union party to the agreement or employees engaged in a bargaining unit to which the agreement applies. What is clear is that the hierarchy is one in which a potential consulting partner with a primary claim displaces all others, certainly in the event of directly competing claims. So, for example, a minority union has no claim to be consulted in circumstances where the employer is required to consult a majority union in terms of a retrenchment agreement concluded with that union (unless, of course, the agreement itself extends that right to minority unions – an unlikely event)."[60]

The court confirmed that legislation embodies what is fair for retrenchments in the form of a consultation requirement and emphasised that this was further refined to embody the policy principle of majoritarianism.[61] The LAC held that no reason existed why this should not apply to the extension of a collective agreement that regulated the right to be consulted in the event of a proposed retrenchment. As a result the court rejected the constitutional challenge against

---

54 Para 99.
55 Para 100.
56 *Ibid.*
57 Paras 100–104.
58 Para 107. See also *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2019 8 BCLR 966 (CC) para 31 where the court stressed that dismissal for operational reasons "involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits".
59 Paras 108 and 116.
60 Van Niekerk and Smit (eds) 351.
61 Paras 116 and 119. See, for example, *AMCU I* para 57 where it affirmed "the constitutional warrant for majoritarianism in the service of collective bargaining". See also *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* (2018) 39 ILJ 2205 (LAC) where the LAC reaffirmed the principle of majoritarianism.

the extension of a collective agreement to non-parties.[62] The court in *Kem-Lin Fashions*[63] confirmed the principle of majoritarianism:

> "The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism."

In *Association of Mineworkers and Construction Union v Chamber of Mines of SA* acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd (*AMCU v COM*),[64] for example, the LAC held with reference to section 23(1)(d) that it is a manifestation of the principle of majoritarianism:

> "Section 23(1)(*d*) of the LRA is but one instance in the LRA where the legislature had chosen to apply the principle of majoritarianism. There is nothing unconstitutional about the principle itself. It is a useful and essential principle applied in all modern democracies, including the Republic of South Africa. It has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace and the different sectors."

In light of this, the majority judgment stresses that whilst an individual might have been a consulting partner, it will still be the majority union's implication in the agreement that is decisive. Therefore, an employer is not under any duty to reflect minority representations in the agreement.[65] Moreover, the court held that individual employees, or even a group of employees, enjoy 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 threats of industrial action. It should be noted that it is this power of a majority union that may sway an employer to agree to benefits on retrenchment, or better yet, fewer or no dismissals.[66] The court further confirms that the choice made for the "pre-eminence of collective bargaining" in section 189 is not only rational but is sound, fair and aligned with international practice and standards.[67] In *Bafokeng Rasimone Management Services*[68] the court held:

> "Retrenchment is indeed a collective process and this is supported by the provisions of section 189 of the LRA where the legislature explicitly selected a hierarchical structure for retrenchment consultations and the primary one is through a collective agreement, which can only be the result of collective bargaining. Even if I am wrong to find that retrenchment is a collective process, where a collective agreement is concluded to regulate the retrenchment of employees, the forces of collective bargaining come into play and the principle of majoritarianism cannot be ignored."

---

62 See also *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services (Pty) Ltd* (2017) 38 ILJ 931 (LC) para 181 in this regard.
63 Para 19.
64 (2016) 37 ILJ 1333 (LAC).
65 Para 121.
66 Para 122.
67 Para 126.
68 Para 121.

The majority accordingly concluded that there is no fundamental right to individual consultation in dismissals based on operational requirements, and that any limitation of section 189 would nevertheless have to be subjected to a limitation analysis under section 36 of the Constitution. Accordingly, the leave for appeal was granted but the appeal was dismissed.

2 3 3 Third Judgment

Jafta J penned a separate third judgment. He agreed with the first judgment, but deviated by holding that section 189(1) of the LRA implicates a number of rights: the right to equality; the right to freedom of association; 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.[69] The judge further points out that it "cannot be gainsaid" that employees who belong to a minority union were denied the protections afforded to workers before the implementation of a retrenchment for only being members of a minority trade union.[70] Jafta J further points out that it is evident from the list of issues that the consulting parties must attempt to reach consensus on – avoiding dismissals, reducing their number and 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[71] – that "the temptation for a union to protect its own members and sacrifice non-members is a real risk" and that it would be "foolhardy for any union to protect non-members in such consultation and support the retrenchment of its own members".[72] Jafta J further adds that the latter scenario "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".[73] Jafta J further points out that members of AMCU in the case under scrutiny were denied equal protection and benefit of the law which is guaranteed by section 9(1) of the Constitution, whereas those who had chosen to join NUM and UASA were provided protection in terms of section 189 and 189(1) of the LRA.[74] In the result he held that the differentiation "does not constitute a reasonable and justifiable limitation" of members of AMCU's right to equality in terms of section 9(1) of the Constitution.[75] Jafta J further held that the limitation to the right of freedom of association arises because section 189(1) of the LRA[76] inhibits employees from joining the union of their choice. Therefore, it cannot be disputed that the impugned provision obliged members of the AMCU to be represented at consultation by the NUM and the UASA, the two unions they had not chosen to join.[77] This impaired also their right to form and to join a trade union of their choice as 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".[78]

---

69 Ss 9, 18, 23 and 32 of the Constitution. See para 145 of the judgment.
70 Para 151.
71 S 189(2) of the LRA. Para 152 of the judgment.
72 Para 153.
73 *Ibid.*
74 Para 154.
75 Para 155.
76 See discussion of this section under para 2.3.1 above.
77 Para 189.
78 *Ibid.*

2 3 4 Fourth Judgment

A fourth judgment handed down by Theron J agreed with the second judgment's reasoning and order.[79] Theron J in his separate judgment points out, from a separation of powers perspective, that it is appropriate to test section 189(1) of the LRA against a standard of rationality rather than one of reasonableness.[80] Theron J held that "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".[81] Theron J supplemented the explanation given in the second judgment as to why the court should refrain from adjudicating the alleged limitations of the rights in sections 9(1) and 18 of the Constitution by section 189 of the LRA.[82] He held that it would be inappropriate for the court to adjudicate on these issues as the applicants had failed to make any submissions in this regard.[83]

3 DISCUSSION

The discussion that follows highlights not only various principles that stem from the four judgments highlighted above, it also places under the spotlight the broader role of trade unions in society and possible incongruences that exist in the current labour law framework. The closure of South Africa's borders, the lockdown and the economy coming to a literal standstill and the possibility of more large retrenchments and job losses are a stark reality that we must face.[84]

It is clear from a reading of the first judgment that, in the court's view, no reason exists in logic or principle why an employer upon contemplating retrenchment cannot consult inclusively with all employees or with their representatives. In the context of what transpired in *AMCU v Royal Bafokeng 2020* we support the notion that consultation in this instance should at least have been extended to all workers and not only workers whose trade unions represent the majority. It is further argued that a majority trade union will as a result of this process still be in a position to conclude a valid collective agreement that could be extended throughout the workplace. This line of thinking supports the principle of fairness and allows all employees an opportunity to at least make representations when they are faced with possible dismissals. Even if a collective agreement is subsequently concluded and extended, employees would at least have had a chance to make their voices heard. The authors in no way argue that the principal of majoritarianism that is entrenched in our labour relations should be abandoned. A policy choice was made by the legislature when the LRA was drafted that the will of the majority should prevail over that of the minority. We acknowledge that embracing such a system is not only good for orderly collective bargaining[85] and the democratisation

79 Para 204.
80 Para 205.
81 *Ibid.*
82 See also para 125 in this regard.
83 Para 210.
84 Dondo Mogajane (the National Treasury's director-general) warned in an interview with Radio 702 that South Africa's unemployment rate could reach as high as 40%. "New retrenchment data shows the start of South Africa's jobs bloodbath" https://businesstech.co.za/news/business/397423/new-retrenchment-data-shows-the-start-of-south-africas-jobs-bloodbath (accessed 19-06-2020).
85 S 1(d)(i) of the LRA.

of the workplace,[86] but that it also assists in preventing the proliferation of trade unions in the workplace or in a sector.[87] The importance of the prevention of proliferation of trade unions is clear. However, the argument in favour of the prevention of proliferation loses its credibility in the consensus seeking process as an aim during section 189 consultations. Certainly, the rules of natural justice included in the rights of employees to have a voice in their fate during a dismissal for operational requirements trump the interests of employers to avoid the administrative burden resulting from proliferations.[88] The words of the first judgment that there should not be "any inherent tension between collective bargaining and consultation"[89] reinforce this argument. If an employer follows an inclusive approach and also consults with minority voices, such a gesture would add legitimacy to the principles of fairness with reference to dismissals. Moreover, the minority voices will be afforded an opportunity to raise their concerns both to the employer and the majority trade union.[90] If a majority trade union embraces the spirit of inclusivity in the consultation process it will strengthen one of the objectives of the LRA, which is the promotion of social justice.[91] From a social justice perspective, trade unions – especially majority (big) trade unions – are regarded as the primary vehicles through which social justice is achieved.[92] They can drive not only the interests of their members in the consultation process, but also the interests of the vulnerable minority trade union members in the bargaining process and also the outcomes thereof.[93] At this time the support for the principle of majoritarianism could be motivated by union stability and a clear commitment to social dialogue by role players.[94]

This, in essence, calls for trade unions to be more socially responsible and embrace the concept of responsible unionism as trade unions are not only

---

86 See also *Kem-Lin Fashions CC* para 19.

87 *Ibid.*

88 *In Kem-Lin Fashions CC* the LAC endorsed the will of the majority over the minority and highlighted that proliferation of trade unions in a workplace or sector should be discouraged, It must be highlighted that the decisions dealt with the extension of collective agreements. The approach of support for the majoritarian principle should however not deny members of minority unions individual employees the right to be heard during a dismissal process. Proliferation is also mentioned in s 21(8) as a factor that commissioner must consider during a dispute about the acquisition of organisational rights. Once again support for this approach with reference to organisational rights can be supported, specifically when one consider the financial and administrative burden on the employer. In *Free Market Foundation*, the court recognised that the majoritarian principle in regard to s 32 was a legislative policy choice and promotes orderly collective bargaining. If we consider these judgments, it is clear that the majoritarian principle has an important role to play in instances such as the acquisition of organisational rights and the extension of collective agreements at workplace level and sectoral level. However the right not to be unfairly dismissed in s 185 of the LRA and the purpose of social justice must be balanced with reference to the principle of majoritarianism and its extension to s 189(1). The inclusion of minority trade unions and individual employees in the consultation process will not cause the same negative effect of proliferation as for example in the granting or organisational rights and administrative and financial burdens on the employer.

89 Para 77.

90 Para 83.

91 S 1(d)(i) of the LRA.

92 Van Niekerk and Smit (eds) 11.

93 *Ibid.*

94 *AMCU I* para 47.

"important and influential bodies'[95] in the political, economic, and social spheres but, as pressure groups can influence government or politics and business "in favour of labour, principally and accessorily to promote the interests of society at large". [96] In the context of responsible unionism, Botha articulates that elements of responsible corporate citizenship should be applied to trade unions in evaluating whether or not they act in a responsible manner.[97] Trade unions, especially majority trade unions, "are equipped with huge amounts of social, economic and political power and need to be responsible when negotiating with employers, and other important role players and social partners, about the livelihoods of the most vulnerable workers".[98] Trade unions are not only "entrusted with a huge responsibility to care about the terms and conditions of employment but also to bargain from a sustainability perspective".[99] It is thus clear that in the case under scrutiny, NUM with UASA as majority trade unions would not only have applied the principles of accountable leadership, but they would have promoted participatory democracy which would normally fall outside the confines and restrictions of collective bargaining (and the framework of majoritarianism) if they had included the AMCU as a minority trade union in the consultation process. This gesture would have embraced the underlying spirit and principles of *ubuntu*.[100]

The second judgment correctly points out that, whilst an individual might have been a consulting partner, it remains the majority union's inclusion in the agreement that is decisive. An employer is under no obligation to reflect the minority representations in the collective agreement.[101] A minority trade union, like

---

95 Budeli "Trade unionism and politics in Africa: The South African experience" 2012 *CILSA* 479.

96 *Ibid.*

97 Botha "Responsible unionism during collective bargaining and industrial action: Are we ready yet?" 2015 *De Jure* 336.

98 *Ibid.*

99 *Idem* 341.

100 *Ubuntu* can be defined as "that condition which goes beyond mere friendship and proceeds to a willing and unselfish cooperation between individuals in society, with due regard for the feelings of others and not taking into account incidental social differences. *Ubuntu* exhibits the following discernible components: (i) individual-centered – (a) internal, namely human dignity, steadfastness; (b) external, namely compassion, honesty, humaneness, respectfulness; (ii) community-centred, namely adhering to familial obligations, charitableness, cooperation, group solidarity, social consciousness" (De Kock and Labuschagne "*Ubuntu* as a conceptual directive in realising a culture of effective human Rights" 1996 *THRHR* 120). See also Institute of Directors in Southern Africa King report on Governance for South Africa – 2009 (2009) (King III) 60 where *ubuntu* is defined as follows: "A concept which is captured in the expression '*uMuntu ngumuntu ngabantu*', 'I am because you are; you are because we are'. *Ubuntu* means humaneness and the philosophy of *ubuntu* includes mutual support and respect, interdependence, unity, collective work and responsibility." See also *S v Makwanyane* 1995 3 SA 391 (CC) at para 308 and *Dikoko v Mokhatla* 2006 6 235 (CC) at para 113 in this regard. It should be noted that rules of natural justice such as *audi alteram partem* in the context of employment generally can be made. *Ubuntu* is the constitutional value and principles such as *audi alteram partem* give more specific expression to values. It should, however, be noted that this link between the latter value and principle is based in philosophical underpinnings and is a topic that goes beyond the current discussion and should be explored in a separate article.

101 Para 121.

AMCU in this case or an individual employee or even a group of individual employees, have scant bargaining clout. Thus, the pursuance of an argument as to why the AMCU as a minority trade union was not included at least in the consultation process if they would have had little impact on the outcome falls flat and does not carry any weight. This is bolstered even further by the fact that the NUM and the UASA represented the majority of the workers. The benefits of majoritarianism favoured them. The employer would be preoccupied by the threat of potential industrial action in particular in a case of large retrenchments – and therefore pay more regard to the majority union which wields coercive power. It should be noted that it is this very power that may sway an employer to agree to benefits on retrenchment, or better yet, fewer or no dismissals.[102] Therefore, a minority trade union's voice during the consultation process would in essence have very little impact. This calls into question whether choice made for the "pre-eminence of collective bargaining" in section 189 of the LRA is irrational, unfair and thus makes section 189(1) of the LRA unconstitutional and invalid,[103] especially in light of the fact that "no-fault" dismissals (such as retrenchments) grant employees, especially those belonging to minority trade unions, less protection, for example, in cases where an employee is dismissed for misconduct and has the opportunity to make representations regardless of whether they were at fault or not. In light of this, the authors support the view,[104] that members of AMCU had been denied equal protection and benefit of the law which is guaranteed by section 9(1) of the Constitution, whereas those who chose to join NUM and UASA were provided protections in terms of section 189 and 189(1)[105] and thus, the differentiation "does not constitute a reasonable and justifiable" limitation. See, for example, *National Union of Mineworkers v Black Mountain Mining (Pty) Ltd*[106] where the court states that:

> "A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons. The selection of an employee for retrenchment can only be fair if regard is had to the employee's personal circumstances and the effect that the dismissal will have on him or her compared to the benefit to the employer. This takes into account the principles that dismissal for an employee constitutes the proverbial 'death sentence'."

This highlights the need for procedural fairness in dismissals, even more so in cases of retrenchments that are categorised as "no-fault dismissals". Poor judgment in the exercise of the right to freedom of association – the right of workers to join a trade union of their choice – poses the risk that their union will not be consulted during the retrenchment process, leaving these workers extremely vulnerable.

Lastly, it should be noted that if AMCU had argued and provided proof that their rights in terms of sections 9(1) and 18 of the Constitution were violated (and thus were entitled to a resolution in terms of section 34 of the Constitution which guarantees the rights of the parties to have their dispute resolved in a fair hearing before a court), [107] the outcome of the case might have been different,

---

102 Para 122.
103 Para 99.
104 See para 154 as per Jafta J judgment.
105 See also para 154.
106 2015 JOL 33457 (LAC) para 37.
107 See also para 210.

and could possibly have tipped the scales in their favour. A difference in treatment of non-union members and members of a minority union, not party to the retrenchment agreement, can be seen as an infringement of the right to equality.[108] This can create a situation where parties to the agreement negotiate better retrenchment packages, including more than the statutory severance for their members. This certainly cannot be an objective of the extension of the majoritarian principle to a joint consensus-seeking process within a retrenchment framework.

4 CONCLUDING REMARKS

COVID-19 not only affects economies, but it places concerns regarding retrenchments – particularly large-scale retrenchments – in the spotlight. The discussion above highlights the fact that the law only governs so much and that it creates a framework for parties to manoeuvre in; it does not prescribe all avenues of behaviour of parties during consultations and negotiations. There is room for economic and social partners within the domain of labour relations to dictate deviations that will ensure that the most vulnerable workers are not left outside in the cold. Multiple readings and analyses of *AMCU v Royal Bafokeng 2020* bring one to this conclusion. Although the principle of majoritarianism is entrenched in the South African labour relations system, the 2019 amendments to the LRA illustrate that there are instances where the principle of majoritarianism is capable of relaxation so as to accommodate minority unions and to provide them with a foot in the door in arbitration proceedings. This provides minority unions with a voice and supports the concept of fairness to parties in the employment relationship. This approach allows minority trade unions to make inroads into rights that were previously reserved for majority trade unions only, and further serves as an illustration of interference by the legislature in the majoritarian principle.

It should be noted that when employers contemplate retrenching workers, whether pre- or post-COVID-19, it would be good industrial relations policy to include all affected workers in the consultation process, and not only those who are members of majority trade unions. The majority trade union would as a result of the consultation in any case enter into a collective agreement that could be extended in terms of section 23(1)(d) of the LRA.

It is apparent from the majority judgment that employees dismissed for operational requirements ("a no fault-dismissal") enjoy less protection than do employees dismissed for misconduct or incapacity.[109] Whereas employees dismissed for misconduct and incapacity are granted the opportunity to make representations and to be heard, the consultation regime created by section 189(1) by contrast excludes members of minority unions and non-unionised employees from a process that directly impacts on their fate.

In conclusion, we argue that *AMCU v Royal Bafokeng 2020* brought underlying issues to the fore, illustrating the potential flaws in the system where majoritarianism is used without flexibility, and that it further provides us with potential opportunities where trade unions regardless of their size are encouraged to work together and give context to the notion of solidarity. The ripple-effect of

---

108 See, in this regard, *AMCU v Royal Bafokeng 2020* paras 145, 149, 154, 155, 156 and 157.
109 See paras 120–122 in this regard.

this is that majority trade unions and unions identified as consultation parties now bear a collective responsibility not only to consider the needs of their members, but also to consider the needs of individual workers and members of minority unions not identified as consulting parties. This will require a shift in thinking which embraces the spirit of *ubuntu*, fairness and social responsibility and cultivates a culture of responsible unionism. The latter would be especially important when due cognisance is taken of the recent downgrades of the South African economy by ratings agencies, as well as the possibility of more large-scale retrenchments as a result of this and the COVID-19 pandemic.