CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 87/16

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	First Applicant
PERSONS REFERRED TO IN ANNEXURE "A" TO THE NOTICE OF MOTION	Second and Further Applicants

and

CHAMBER OF MINES OF SOUTH AFRICA	First Respondent
HARMONY GOLD MINING COMPANY LIMITED	Second Respondent
ANGLOGOLD ASHANTI LIMITED	Third Respondent
SIBANYE GOLD LIMITED	Fourth Respondent
NATIONAL UNION OF MINEWORKERS	Fifth Respondent
SOLIDARITY	Sixth Respondent
UNITED ASSOCIATION OF SOUTH AFRICA	Seventh Respondent
MINISTER OF LABOUR	Eighth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Ninth Respondent

Neutral citation: *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3

Coram: Nkabinde ACJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J

Judgments: Cameron J (unanimous)

Heard on: 24 November 2016

Decided on: 21 February 2017

Summary: section 23(1)(d) of the Labour Relations Act — collective agreement between the chamber of mines and unions — validity of extension of collective agreement to members of union not party to collective agreement — meaning of "workplace" in section 23(1)(d)

individual mining operations not separate workplaces — each mining organisation constitutes a "workplace" — collective agreement validly extended to members of union where union not party to the collective agreement

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ORDER

On appeal from the Labour Appeal Court (dismissing an appeal from the Labour Court):

The following order is made:

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

JUDGMENT

CAMERON J (Nkabinde ACJ, Froneman J, Jafta J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J concurring):

Introduction

[1] At issue is whether workers at five gold mines may exercise the right to strike while an agreement prohibiting strikes, to which they were not party, is in force.[1] The union representing the majority of workers at each of the mines is the first applicant, the Association of Mineworkers and Construction Union (AMCU). The second and further applicants are its members at those mines. But AMCU is not the majority union at any of the mining companies who own the mines. The question is whether an agreement concluded between mining companies and their collective representative, on the one hand, and unions representing a majority of workers of those companies, on the other, binds employees at individual mines where their own union, which is not party to the agreement, is the majority union.

[2] Behind that question, with its lawyerly remoteness, lies the grievous struggle for better wages and conditions for the generations of mineworkers who have laid the foundations for this country's wealth.[2] And at its fore is an increasingly intense

[1] Section 23(2) of the Constitution provides:

> "Every worker has the right—
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike."

[2] On the disease burden mineworkers have suffered over the past century, see, generally, *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) and the judgments in *Nkala v Harmony Gold Mining Company Ltd* 2016 (5) SA 240 (GJ). As a result of extended industrial action, the Miners' Phthisis Act of 1911 was enacted. This piece of legislation was "the first milestone in the field of statutorily enforceable compensation for mining-specific occupational diseases, and set the tone for future

contest between unions about which will represent the workers in that struggle now. This litigation is itself part of that contest.

[3] The legal issues arise from three provisions in the Labour Relations Act (LRA).[3] The first empowers employers and unions to make binding on non-parties a collective agreement they have concluded. Section 23(1)(d) enables employers to do so if (a) the employees are identified in the agreement; (b) the agreement expressly binds them; and (c) the trade unions party to the agreement "have as their members the majority of employees employed by the employer in the workplace".[4]

[4] "In the workplace". There's the rub. That brings to the fore the second pivotal provision. It is the LRA's definition of "workplace". This, in so far as it is relevant, stipulates that "workplace" means "the place or places where the employees of an employer work". But it adds a proviso:

> "If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".[5]

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legislation" (*Mankayi* at para 26). See also paras 26-58 of *Mankayi* for a discussion of the legislative history governing workers' compensation.

[3] 66 of 1995.

[4] Section 23(1) provides:

> "A collective agreement binds—
>
> . . .
>
> (d) employees who are not members of the registered trade union or trade unions party to the agreement if—
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees; and
>
> (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

[5] Section 213 defines "workplace" as—

> (a) in relation to the public service—
>
> (i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or

[5] So was each mine where AMCU had a majority an "independent operation" by reason of its "size, function or organisation"? Later. First, the third pertinent provision. This, when the previous two conjoin, bares the statute's teeth. It is the proscriptions on striking in section 65. It prohibits striking by anyone who "is bound by any arbitration award or collective agreement that regulates the issue in dispute".[6] It is this provision that lies at the core of the legal relief sought and granted in the courts below – and which is the focus of AMCU's keenest objection.

(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace;

(b) . . .

(c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".

[6] Section 65(1) provides:

"No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute".

Section 65(3) provides:

"Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—

(a) if that person is bound by—

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or

(b) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination."

Background and litigation history

[6] Now the facts. In 2013, the Chamber of Mines of South Africa (Chamber) (first respondent),[7] acting on behalf of its members in the gold mining sector including Harmony Gold Mining Company Limited (second respondent), AngloGold Ashanti Limited (third respondent) and Sibanye Gold Limited (fourth respondent), began negotiations about wages and working conditions. The unions with which it negotiated represented the majority of workers in the sector: National Union of Mineworkers (NUM) (fifth respondent), Solidarity (sixth respondent) and United Association of South Africa (UASA) (seventh respondent).

[7] AMCU, with its dramatically rising membership, was invited to join the negotiations and did – but on 9 September 2013 it rejected the offer in which they culminated. NUM, Solidarity and UASA accepted that offer. On 10 September 2013 the Chamber, acting on behalf of the mining companies, and these three unions concluded a collective agreement – the one at issue here. Though the collective agreement has expired, the same parties have concluded another that is materially identical. The agreement expressly made itself applicable to all the companies' employees – even those not members of the party unions.

[8] Because AMCU was not a party to the agreement, it did not regard itself as bound. On 20 January 2014, it notified the three companies that its members would strike from 23 January 2014. In response, the Chamber urgently applied to the Labour Court to interdict the strike. It succeeded. On 30 January 2014, the Labour Court (Cele J)[8] granted an interim interdict against AMCU and its members. On the return day, that Court (Van Niekerk J) confirmed the interdict.[9] AMCU,

[7] The Chamber is a registered employers' organisation and acts as the collective bargaining agent of its members. Collective bargaining, at least in respect of wages and other substantive conditions of employment, is conducted on a centralised basis, in a non-statutory bargaining forum. Since 2001, collective agreements concluded in this manner have been applied by the Chamber's members, party to the agreement, to those employees who are not members of the party unions, and also to non-union members.

[8] *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* [2014] ZALCJHB 13; (2014) 35 *ILJ* 1243 (LC).

[9] *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* [2014] ZALCJHB 223; (2014) 35 *ILJ* 3111 (LC) (Labour Court judgment).

having sought unsuccessfully to appeal direct to this Court,[10] then with the leave of the Labour Court[11] appealed to the Labour Appeal Court. Its appeal failed.[12]

[9] AMCU now seeks leave to appeal to this Court. Each judgment of the Labour Court and the Labour Appeal Court is detailed in setting out the facts, and is both nuanced and erudite in considering the law. It is not necessary to rehearse their findings or to try to emulate the quality of their reasoning.

[10] The question is whether the agreement bound AMCU members at the five mines where it was in the majority. If it did, the statute prohibited its members from striking. If it didn't, they were statutorily at liberty to strike. It all turns on what "workplace" means in the statute and, more specifically, in section 23(1)(d). Does it mean all the mines of the Chamber member companies overall – where AMCU was in the minority? Or the individual goldmines – where it had a majority? And if it was all the mines of the member companies overall, thus snatching away from AMCU members at the individual mines their right to strike, does the statutory provision withstand constitutional challenge?

Parties' contentions

[11] AMCU contends that the definition of workplace does not apply to the reference in section 23(1)(d)(iii) to "the majority of employees employed by the employer in the workplace". This is because the statute's definitions apply only "unless the context otherwise indicates". It also contends that, if the definition does apply, it can be interpreted in what it calls a "broad" way – with the effect that "workplace" means an individual mine and not all an employer's operations taken together.

[10] This Court on 23 September 2014 dismissed AMCU's application for leave to appeal directly to it on the ground that it was not in the interests of justice to hear the appeal "at this stage".

[11] The Labour Court granted leave on 7 October 2014.

[12] *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* [2016] ZALAC 11; (2016) 37 *ILJ* 1333 (LAC); [2016] 9 BLLR 872 (LAC) (Coppin JA; Tlaletsi DJP and Musi JA concurring) (LAC judgment).

[12] AMCU also argues that the Chamber and the unions who concluded the collective agreement ought to have extended it, if at all, under section 32.[13] This provision requires the Minister of Labour (Minister) to extend a collective agreement concluded in a bargaining council where the majority-unions and majority-employers vote in favour of the extension.[14] The Minister may not extend the agreement unless satisfied that specified preconditions exist.[15] None of these preconditions is required for a section 23 extension.[16]

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[13] Section 32(1) provides:

> "A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council—
>
> (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
>
> (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension."

[14] Section 32(2) provides:

> "Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice."

[15] Section 32(3) provides:

> "A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that—
>
> (a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);
>
> (b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council;
>
> (c) the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement;
>
> (d) the non-parties specified in the request fall within the bargaining council's registered scope;
>
> (dA) the bargaining council has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the collective agreement and is able to decide an application for an exemption within 30 days;
>
> (e) provision is made in the collective agreement for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against—

[13] AMCU appreciates, of course, that the Chamber is not a bargaining council. Nor have the Chamber and the unions negotiated in a bargaining council incorporated as the LRA requires.[17] AMCU says that, although not a statutory bargaining council, the forum in which the Chamber and unions negotiate in effect operates as one. By using section 23(1)(d), the Chamber circumvented section 32's legislative obligations and requirements. That should not be permitted.

[14] Hence the Labour Appeal Court erred in not finding that the collective agreement is in substance a sectoral level collective agreement. It ought to have found that the use of section 23(1) circumvents the safeguards in section 32 and defeats the design of section 23(1)(d), which ought not to apply here. As a result, AMCU argues that the purported extension under section 23(1)(d) is invalid and of no force and effect.

[15] AMCU further argues that, if its interpretative and substantive arguments do not prevail, then section 23(1)(d) is constitutionally invalid. This is so for interrelated reasons.

[16] Centrally, AMCU contends, section 23(1)(d) unjustifiably limits its members' rights to fair labour practices, including the right to bargain collectively through AMCU,[18] the right to strike[19] and the right to freedom of association.[20]

(i) the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement;

(ii) the withdrawal of such an exemption by the bargaining council;

(f) the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act; and

(g) the terms of the collective agreement do not discriminate against non-parties."

[16] Section 32(5) permits the Minister to extend an agreement even where the employer and unions party to the bargaining council do not hold a sectoral majority, provided they are "sufficiently representative" within the registered scope of the bargaining council.

[17] The establishment, power and functions, registration and constitution of bargaining councils is set out in sections 27, 28, 29 and 30 of the LRA.

[18] Section 23(5) of the Constitution provides:

[17] The Chamber concedes that section 23(1)(d) limits the right to strike. The Minister denies that but argues that, if it does, the limitation is justifiable. NUM submits that section 23(1)(d) does not limit the right to strike at all, at least not directly. And any indirect limitation is reasonable and justifiable. AMCU says the limitation cannot be justified under section 36 of the Constitution.[21] The Chamber, the Minister and NUM say it can. The other unions party to the agreement at issue did not participate in the proceedings and abided the outcome.

[18] AMCU builds on these propositions to contend that the extension of the agreement in terms of section 23 is also offensive to the rule of law. First, it says, although the extension did not by itself constitute an exercise of public power, the extension was tantamount to one. This violates the rule of law because (a) the rule of law requires that public power be exercised by state actors; and (b) permitting private actors to effectively exercise public power without independent public authority oversight violates the principle of legality. There is no remedy under the LRA to review section 23(1)(d) extensions, AMCU says. Also, section 32 has explicit safeguards. Section 23(1)(d) has no comparable legislative and regulatory checks and

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> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[19] Section 23(2)(c) of the Constitution.

[20] Section 18 of the Constitution provides: "Everyone has the right to freedom of association."

[21] Section 36 of the Constitution provides:

> "(1) 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.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

balances. The Labour Appeal Court ought to have found the provisions of section 23(1)(d) incompatible with the Constitution.

[19] Second, AMCU argues that section 23(1)(d) places no duty on private actors extending collective agreements to act in the public interest or in the interest of non-parties who may be bound. They are neither accountable nor bound by the duties of public administration and public interest under section 195 of the Constitution.

[20] Third, while it is possible to review the decisions of a public authority, this is not possible with private actors. There is no access to a court of law if their decisions are prejudicial to non-parties or do not cater for their interests. Fourth, AMCU contends that the provisions of section 23(1)(d) read with section 65(1)(a) permit private parties to conclude agreements that deny non-parties the right to exercise fundamental constitutional rights, including the principle that encapsulates the right to be heard before the extension of any collective agreement (*audi alteram partem*).

[21] The parties to the agreement dispute AMCU's interpretive and constitutional contentions.

Issues

[22] The issues are accordingly:

(a) jurisdiction and leave to appeal;

(b) "workplace"; and

(c) constitutional challenge.

Jurisdiction and leave to appeal

[23] This Court has jurisdiction. Constitutional rights are at issue. And the legal questions concerning the interpretation of "workplace" and the extension of collective agreements raise arguable points of law of patent public significance. AMCU's contentions are considerable. Leave to appeal must be granted.

"Workplace"

[24] Two things are immediately notable about the way the statute defines "workplace". The first is its focus on employees as a collectivity. The second is the relative immateriality of location. Both signal that "workplace" has a special statutory meaning.

[25] First, "workplace" is not the place where any single employee works – like that individual's workshop or assembly line or field or desk or office. It is where "the employees of an employer", collectively, work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term "workplace" plays in the LRA. This sees workers as a collectivity, rather than as isolated individuals. And that in turn squares with the statute's objects. The promotion of orderly bargaining by workers, collectively, is one of the statute's express primary objects.[22] That the focus of the definition of "workplace" is on workers as a collectivity rather than as separate individuals fits.

[26] The second point follows. It is that location is not primary: functional organisation is. The definition encompasses one or more "place or places where employees of an employer work". This means that "the place or places" where workers work may constitute a single workplace. That entails the intrinsic possibility of locational multiplicity for a single "workplace". Right at the outset this eliminates any notion, which the ordinary meaning of "workplace" might encourage, that each single place where a worker works is a separate "workplace".

[27] The first part of the definition creates a default rule that, regardless of the places, one or more, where employees of an employer work, they are all part of the same workplace. The second part superimposes a proviso in the form of an exception – regardless of how many places where employees work, different "operations" may

[22] Section 1(d)(i) and (ii) of the LRA.

be different workplaces only if they meet the criteria the definition specifies. The key is whether an operation is independent – not where it is located. Yet again, no significance is attached to the "places" where employees work, since the term features in both parts of the definition. Each independent operation, which constitutes a separate "workplace", may itself be at one or more separate locations.

[28] Hence the proviso determines not so much whether separate physical places of work are separate workplaces, but rather whether independent "operations", however geographically dispersed, are separate workplaces. The pivotal concept is independence. If there are two or more operations and they are "independent of one another by reason of their size, function or organisation" then "the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation". This is a test of functional organisation, and not geography or location.

[29] Both features of the definition – its approach to workers as a collectivity, and its de-emphasis of geography – have a practical bite. They signal that for purposes of the LRA "workplace" doesn't have its ordinary meaning: the legislature has assigned a special meaning to the term.[23] It follows that AMCU's contention that the ordinary meaning of "workplace" applies, namely the geographical places of work of its members, at their individual mines, faces into a conceptual windstorm. It must battle against not only the specified statutory wording, but the entire statutory context that supports that meaning and in which it is embedded.

[30] It is this statutory definition the Labour Court and the Labour Appeal Court applied. Was each AMCU-majority mine a separate "workplace"? That depends not on the mines' geographic location or where the individual workers worked, but on the functional signifiers of independence the definition lists. It requires one to determine

[23] The existence of a statutory definition indicates that the legislature has assigned a specific meaning to the word and not an ordinary meaning. See *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); 2015 (10) BCLR 1172 (CC) at para 20, adopted in *Liesching v S* [2016] ZACC 41 at para 33.

whether the employer companies conduct two or more operations "that are independent of one another by reason of their size, function or organisation".

[31] On this question, the facts before the Labour Court and the Labour Appeal Court were not in dispute.[24] They related to the organisational methodology and practicalities of each mining company. The Labour Court and the Labour Appeal Court both found, in conclusory terms, that the individual AMCU-majority mines did not constitute independent operations. They were not swayed by the fact that, at some of the individual mines, the companies had concluded separate recognition agreements with AMCU.[25] Each mining company constituted a single industry-wide workplace.[26]

[32] In the face of these findings, AMCU contended that the statute's definition of "workplace" did not apply to section 23. After all, AMCU pointed out, the definitions apply only "unless the context otherwise indicates". And of course AMCU is right that "context" should be construed broadly.[27] Nevertheless, its argument requires contextual indicators that negate the application of the definition. Counsel for AMCU was invited in oral argument to give these but didn't. He simply said that the statutory definition cannot apply to a particular provision if it unreasonably limits a constitutional right. This squared with AMCU's argument overall that constitutional principles of interpretation pointed to a different result – namely that each individual mine was a "workplace" for purposes of section 23(1)(d).

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[24] The Labour Court and the Labour Appeal Court refused to admit further evidence AMCU sought to tender. Though AMCU's written argument complained about this, the application for leave to appeal itself did not specifically address the lower courts' adverse orders on this score, and counsel did not raise the issue in oral argument.

[25] LAC judgment above n 12 at para 69.

[26] Labour Court judgment above n 9 at paras 29-35 and LAC judgment above n 12 at paras 61-8.

[27] See *Liesching* above n 23 at para 34, where this Court stated that—

> "[w]here the definition section provides that the definition should be applied 'unless the context otherwise indicates', 'context' should be given a wide and not a narrow meaning."

See also *Hoban v ABSA Bank Ltd t/a United Bank* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at para 20: "'Context' includes the entire enactment in which the word or words in contention appear".

[33] So the argument that the statutory definition does not apply did not turn on independent interpretive indications. It invoked constitutional considerations. But constitutional principle and the statute's objectives don't point away from the definition's focus on workers as a collective, wherever they may work. They point towards it. Differently put, AMCU cannot plausibly argue that the statutory definition shouldn't apply to section 23 because of constitutional principle or purpose-related statutory considerations. Those in truth negative its argument.

[34] AMCU contended that both the Labour Court and the Labour Appeal Court erred in approaching the meaning of "workplace" as solely a question of fact, to the exclusion of any interpretive analysis in which AMCU's constitutional rights featured. AMCU has a point. Well, sort of. It is this. Applying a statutory definition to the facts is seldom purely "a question of fact". It is not as though a definition displays a colour and you hold a garment up against it and ask whether it matches. Rather, applying a definition is itself a question of verbal construction, in which constitutional values and statutory objectives remain ever-present. Interpretation and application are coequal tasks.[28] Establishing whether each mine is a "workplace" involves elements of both fact and law. What is more, the LRA does not define either "independent" or "operation".[29] Each of these words is spongy with meaning. AMCU is right that, when we apply the facts to these terms, we must keep the statute's objectives in mind, and the constitutional principles underpinning them.[30] The process is both evaluative and interpretive.[31]

[28] All interpretations of law are themselves in a sense "factual": certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually "law", in contradiction to non-law. But this process itself involves a contextual analysis of those sources. See in this regard *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. Indeed, interpretation and application are simultaneous and intricated. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin *Law's Empire* (Harvard University Press, Cambridge 1986) at vii: "legal reasoning is an exercise in constructive interpretation", in which we advance "the best justification of our legal practices as a whole".

[29] Section 213 of the LRA defines "operational requirements" but for entirely different purposes and in an entirely different context, which does not help here.

[30] This accords with this Court's approach to statutory interpretation. See *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28, where this Court said:

[35] Why is AMCU's point only sort of? Because AMCU conflates the Labour Appeal Court's application of the statutory definition with the threshold question whether that definition applies at all. AMCU contends that the Labour Appeal Court was wrong to find that the meaning of "workplace" in the context of section 23(1)(d) was solely a question of fact. But its argument does that Court's approach less than justice. The Labour Appeal Court first concluded that the statutory definition of "workplace" applied to section 23(1)(d)[32] – and indicated, correctly, that *this* determination was a matter of interpretation.[33] Its factual enquiry followed after.

[36] So while AMCU is correct that the Labour Appeal Court found that determining whether the AMCU-majority mines constituted independent operations

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> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

See also *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at paras 19-28; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18; and *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 105.

[31] It is notable that Annexure A to the impugned agreement itself ends with this asseveration:

> "It is agreed that the Mines and Operations of each Employer as described above constitutes a single workplace in respect of that Employer, for the purposes of section 23(1)(d) of the Labour Relations Act 66 of 1995."

The point is that the application of the statutory definition here cannot occur by stipulation.

[32] LAC judgment above n 12 at para 83.

[33] Id at para 51, where the Labour Appeal Court explained:

> "Section 213 of the LRA is unequivocal that the defined meaning will apply throughout the LRA, unless the context in which the term is used in the LRA indicates otherwise. This is not an unusual provision. It is an established principle of interpretation of statutes that where a statute contains definitions, the defined meanings must be applied throughout the statute, unless the court is satisfied that the defined meaning does not fit in the context and that another meaning is to be given to the word."

was a question of fact, this is not the same as saying that the *meaning* of "workplace" in the context of section 23(1)(d) was determined solely as a question of fact.

[37] The question is not whether a single mine can constitute a "workplace". It obviously can. The definition expressly provides for that. Instead, the critical issue is whether any of the five AMCU-majority mines was an independent operation by reason of size, function or organisation. Both the Labour Court and the Labour Appeal Court determined that each mining house operated integrally as a single workplace, and that each AMCU-majority mine was not an independent operation.[34] Even upholding AMCU's argument that the application of the statutory definition is not a purely factual enquiry does not lead to a different finding. No reason in constitutional principle, legal analysis or factual assessment provides a reason for this Court to overturn those findings.[35] To this one should add that the findings of the Labour Court and the Labour Appeal Court are owed special consideration since they operate as specialist tribunals.

[38] Nor is there any reason why this Court should intervene, against the grain of the statutory language, to impose what AMCU calls "the broad interpretation" of workplace. This would hold that each AMCU-majority mine is a workplace. AMCU advances this "broad interpretation" on the basis that it is reasonably consistent with the wording of the statute and does not result in a limitation of constitutional rights.

[34] Labour Court judgment above n 9 at para 35 and LAC judgment above n 12 at para 69.

[35] As noted in [34], applying the statutory definition involves elements of both fact and law. AMCU raised certain factual arguments in their written submissions about the level of integration at the respondent mining businesses, but did not challenge the meaning of "independent" or "operation" in the statutory definition – nor did it raise other legal arguments concerning its application. In *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39, the Court confirmed that—

> "this being the highest court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this [C]ourt must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily, an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this [C]ourt on appeal, they are adjudicated on the facts as found by the lower courts. Of course this principle does not apply to matters that come directly to this [C]ourt."

[39] That's not right. First, to adopt AMCU's argument, the Court would have to ignore entirely the colour the statute and the rights it implements give to the interpretive process. As NUM persuasively counters, adopting this "broad interpretation" effectively involves jettisoning the statutory definition and adopting a new, independently created, meaning of "workplace", one that flows from the facts of this case. But, as already said, there is no sound reason to depart from the statutory definition.

[40] It follows that the agreement was validly extended to AMCU members at the five AMCU-majority mines. The question now is whether the statutory provision that allowed this withstands constitutional scrutiny.

Constitutional challenge

Infringement of rights

[41] AMCU contends that section 23(1)(d) infringes upon the right to freedom of association, the right to collective bargaining and the right to strike. Its argument both on the papers and at the hearing focused on the right to strike. But the constitutional right to freedom of association is also of considerable importance.

[42] At the core of AMCU's challenge is the statute's application of the principle of majoritarianism. The challenge is freighted with history, and burdened by recent clashes between unions in many workplaces, including in the mining industry.[36]

[43] Majoritarianism is both a premise of and recurrent theme throughout the LRA. Our case law has long recognised this, from at least the judgment in *Kem-Lin,*[37] but probably earlier.[38] In *Kem-Lin,* Zondo JP said:

[36] See Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *ILJ* 836 at 856, who expresses the view that "[i]f unions are to survive in this new atmosphere of union rivalry and general trade union hostility, they themselves must broaden their mandate to address the effects of the current inequalities in the mining sector and attempt not only to increase wages but to encourage fair working conditions, expanded social benefits and the standardisation of wages."

> "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."[39]

Zondo JP instanced various LRA provisions that illustrate the legislative policy choice.[40] 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),[41] and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union).[42] 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.

[44] It may be posited that if there is to be orderly and productive collective bargaining, some form of majority rule in the workplace has to apply. What section 23(1)(d) does is to give enhanced power within a workplace, as defined, to a majority union: and it does so for powerful reasons that are functional to enhancing employees' bargaining power through a single representative bargaining agent. NUM in fact contended that the major warrant for extending agreements under

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[37] *Kem-Lin Fashions CC v Brunton* [2000] ZALAC 25; (2001) 22 *ILJ* 109 (LAC); [2001] JOL 7711 (LAC) (*Kem-Lin*).

[38] Counsel referred us to the first-instance judgment of Zondo AJ in *Specialty Stores v SA Commercial Catering & Allied Workers Union* (1997) 18 *ILJ* 992 (LC); [1997] 8 BLLR 1099 (LC) (reversed on grounds not material to this point: *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 *ILJ* 557 (LAC); [1998] JOL 2102 (LAC); [1998] 4 BLLR 352 (LAC)).

[39] *Kem-Lin* above n 37 at para 19.

[40] These included sections 14(1), 16(1), 18(1), 32(1)(a) and (b), 32(3)(a), (b), (c) and (d); 32(5) and 78(b).

[41] Section 25.

[42] Section 26.

section 23(1)(d) was to promote collective bargaining. There was, counsel said, merely a "knock on" effect on the right to strike.

[45] Counsel for NUM rightly noted that to object to section 23(1)(d) purely on the basis that it applies majoritarianism is something of a phantom. This is because AMCU itself seeks to enforce a form of majoritarianism. AMCU complains about the constitutional propriety of applying majoritarianism to a sector-wide agreement under section 23. But what it wants instead is for majoritarianism to apply at each individual mine – with the result that its majority at five of them can prevail.

[46] So AMCU's complaints lack the rigour of logical principle. Even so, they have practical force and some ethical appeal. If its claim to be the majority union at the five mines fails, it suffers relegation to being a minority in the sector as a whole. That's tough for a union that has fought laboriously, against the odds, mine-by-mine, to establish itself. Hence it contends that the "principle of majoritarianism does not achieve social justice for minority workers whose social circumstances may not be the same as those workers who have mandated the majority". This is a scarcely-veiled claim that AMCU represents the poorest and least-empowered workers in the sector, and therefore that the Court should intervene to impose mine-by-mine majoritarianism.

[47] This plays into a rich social debate. Nearly 23 years into democracy, and over two decades since the adoption of the LRA, it has been suggested that the statute's embrace of majoritarianism is no longer appropriate. This is because it enforces a "winner-takes-all approach". This was—

> "developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society."[43]

[43] Kahn "A Chance to Reassess our System of Industrial Relations" *Business Day* (1 October 2012), available at http://www.businesslive.co.za/bd/opinion/2012-10-01-a-chance-to-reassess-our-system-of-industrial-relations/

[48] Those conditions have avowedly changed: but the statute has not. And from there springs AMCU's complaints. For the statute's current formulation provides a specified way in which to ascertain the constituency within which the majority rules. This is strictly by workplace, determined from the point of view of collectivity, subject only to functionally-determined independence of operation.

[49] Once majoritarianism is recognised as a founding principle of the LRA, the statute must unavoidably determine some practical way in which the principle operates. Without a constituency that defines it, there cannot be a collectivity. AMCU's complaint is not that the majority counts, but how to define the constituency within which the majority counts. And thence flows its constitutional grievance.

[50] AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation. Both the Labour Court and the Labour Appeal Court gave detailed and extensive consideration to this.[44] I do not seek to improve their reasoning. In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.

[51] Perhaps a different definition of "workplace" might have worked equally well, or maybe even better, or been fairer to smaller or emergent unions. AMCU makes a

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quoted in Cohen "Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" (2014) 17 *Potchefstroom Electronic Law Journal* 60. Professor Cohen adds:

> "Abject poverty, a loss of confidence in existing bargaining structures, and disappointed expectations have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees – that have tired of the 'co-dependent comfort zone' that majoritarianism has engendered. The Marikana experience has largely been attributed to the unsuitability of the current collective bargaining model within the South African socio-economic and political landscape. As Brassey notes:
>
> > 'Majoritarianism, the leitmotif of both industry bargaining and plant-level organisational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, who may simply be acting on behalf of workers who feel alienated from the majority union.'"

[44] Labour Court judgment above n 9 at paras 56-74 and LAC judgment above n 12 at paras 101-27.

plangent case for saying so. But that is not the question before us. Our task as judges is not to pick and choose between the rights and wrongs, advantages and disadvantages, of different constituency models. Our responsibility is much narrower. It is to determine whether the model Parliament has in fact chosen passes scrutiny under the Bill of Rights.

[52] Is the legislative determination of the constituency within which the majority counts, namely the workplace as defined, constitutionally objectionable? Here freedom of association comes to the fore. In *Bader Bop*,[45] this Court interpreted the provisions of the LRA to protect the organisational rights of minority unions.[46] The Court underscored the importance of freedom of association as it emerged from international instruments that were pertinent to interpreting the LRA.[47] It noted that, although these instruments and the values they embody do not require trade union pluralism, in contradistinction to majoritarianism, a majoritarian system can operate fairly only in accordance with certain conditions. It must allow minority unions to co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions.[48]

[45] *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*).

[46] Id at para 36:

> "[I]t can be said that the jurisprudence of the enforcement committees of the ILO would suggest that a reading of the Act which permitted minority unions the right to strike over the issue of shop steward recognition, particularly for the purposes of the representation of union members in grievance and disciplinary procedures, would be more in accordance with the principles of freedom of association entrenched in the ILO Conventions. Similarly, it would avoid a limitation of the right of freedom of association in section 18 of our Constitution; and the rights of workers to form and join trade unions and to strike; as well as the right of trade unions to organise and bargain collectively entrenched in section 23 of our Constitution."

[47] International Labour Organisation (ILO) Committee of Experts' assessment of article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), cited in para 31 of *Bader Bop* above n 45. Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise provides:

> "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."

[48] *Bader Bop* above note 45 at para 31.

[53] To this should be added that the LRA does not define when a trade union is "sufficiently representative" to enjoy organisational rights under Chapter III. It allows for the representivity threshold to be agreed upon in a collective agreement between an employer and a minority union. As this judgment later clarifies, possible abuses of this kind are subject to review.

[54] And the statutory structures that enforce the majoritarian system nevertheless allow minority unions freedom of association. Minority unions have recruiting rights (which AMCU had),[49] organisational rights (which AMCU had),[50] deduction rights (which AMCU had),[51] recognition of shop stewards (which AMCU had),[52] time off for union office-bearers to do union work (which AMCU had)[53] and bargaining rights (which AMCU had).[54] Though they did lose the right to strike while the agreement was in force, none of the non-signatory unions or employees lost any of their organisational and collective bargaining entitlements.

[55] This means that the LRA, though premised on majoritarianism, does not make it an implement of oppression. It does not entirely suppress minority unions. Its provisions give ample scope for minority unions to organise within the workforce – and to canvass support to challenge the hegemony of established unions. It is precisely because the LRA affords AMCU these rights that AMCU, as an insurgent force in the established union field, was able to increase its membership, its strength and its influence as powerfully as it has. And this is important in determining the extent of the limitation on rights that section 23(1)(d) imposes.

[56] That majoritarianism is functional to enhanced collective bargaining is internationally recognised. Instruments NUM relied upon in oral argument clearly

[49] Section 12(1).

[50] Section 12(2) and (3).

[51] Section 13.

[52] Section 14.

[53] Section 15.

[54] Sections 8, 16, 27 and 28.

display this.[55] Indeed, seemingly paradoxically, promotion of collective bargaining is so deeply rooted a principle of internationally recognised labour dispensations that they require merely adequate or sufficient representivity for enforcement against non-members, and not necessarily majority representation.[56]

[57] This Court has recognised the constitutional warrant for majoritarianism in the service of collective bargaining. In *TAWUSA*, the Court considered the principle in

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[55] ILO Collective Agreements Recommendation, 1951 (No. 91) (Collective Agreements Recommendation) at article 5(1):

> "Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement."

ILO Committee of Experts' General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalisation 2008 (Report III (Part 1B) ILO Conference 102st Session 2012) (ILO Committee of Experts' General Survey) at para 245:

> "The Committee considers that the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98."

Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5 ed, 2006) (Freedom of Association: Digest of Decisions and Principles) at para 1052:

> "When the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, this situation in principle does not contradict the principles of freedom of association, in so far as under the law it is the most representative organisation that negotiates on behalf of all workers, and the enterprises are not composed of several establishments (a situation in which the decision respecting extension should be left to the parties)."

[56] Collective Agreements Recommendation above n 55 at article 5(2):

> "National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions: (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative".

ILO Committee of Experts' General Survey above n 55 at para 245:

> "National laws or regulations may make the extension of the collective agreement subject to the following, among other, conditions: (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative".

Freedom of Association: Digest of Decisions and Principles above n 55 at paras 356 and 1052:

> "The fact of establishing in the legislation a percentage in order to determine the threshold for the representativeness of organisations and grant certain privileges to the most representative organisations (in particular for collective bargaining purposes) does not raise any difficulty provided that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse. . . . When the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, this situation in principle does not contradict the principles of freedom of association, in so far as under the law it is the most representative organisation that negotiates on behalf of all workers".

the context of section 32.[57] Khampepe J emphasised that "the principle finds application after a collective agreement has been concluded", namely when the agreement is extended "at the behest of the majority after the collective agreement process has run its course".[58] The implication is analogous – that the principle applies also to section 23 extensions.

[58] And the limitation a section 23(1)(d) agreement imposes on the right to strike is strictly circumscribed – in both ambit and time. A collective agreement extended to non-parties does not apply to them indefinitely. It applies only for the duration of the agreement and regarding the specific issues it covers. Section 23(1) does not countenance indefinite or far-reaching extension. It directly ties the limitation of the right to strike to the outcome of the collective bargaining. It is narrowly tailored to the specific goal – orderly collective bargaining. Given the carefully circumscribed ambit of the limitation and the importance of its purpose, it is reasonable and justifiable.

Rule of law

[59] AMCU takes aim also at the mechanism by which the extension to non-parties was effected, and its impact once extended. The nub of its complaint is that section 23's unsupervised private extensions license lawless exercises of power. The provision thereby violates the rule of law, and is constitutionally offensive.

[60] Its argument is that while the extension of the agreement to non-parties, including AMCU, did not in itself constitute an exercise of public power, it was "tantamount to the exercise of public power". It points out that the three mining companies who through the Chamber concluded the agreement employ nearly three-quarters of all employees in the entire gold mining sector. So the private extension of

[57] *Transport and Allied Workers Union of South Africa v Putco Ltd* [2016] ZACC 7 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) (*TAWUSA*) at para 52.

[58] Id at para 63.

the agreement "by and large impacted an entire sector in the [country's] economy". All this, it says, in private hands, with no judicial or legislative checks and balances.

[61] Here, AMCU submits, "the rule of law is both relevant and applicable". The section 23 scheme permits private actors to exercise public power arbitrarily. This is antithetical to the open, accountable, democratic principles of our constitutional state. In this way, section 23 offends the principle of legality – and indeed "poses a serious threat to our democratic [s]tate".

[62] Hence as an alternative to its interpretative challenge, AMCU asks the Court to declare section 23(1)(d) unconstitutional and invalid. AMCU's rule of law challenge is not a rights-violation plus limitation challenge. Instead, it impugns section 23(1)(d) as irrational. It invokes the foundational value of the rule of law to contend that the provision violates the principle of legality.[59] This is because it grants "private actors the right to effectively exercise public power arbitrarily, that is without observance of the rule of law".

[63] The respondents urged that section 23(1)(d) did not involve the exercise of public power. It was, they said, merely an ordinary statutory provision that allowed legal consequences to flow from private parties' conduct. This was unobjectionable. Both the Labour Court and the Labour Appeal Court endorsed this approach. The Labour Court held that there is "nothing inimical to the rule of law for legislation to provide for legal consequences to flow from the conduct of private parties".[60] The Labour Appeal Court similarly characterised the provision approvingly as one that allowed self-regulation as a means to supporting collective bargaining.[61]

[59] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) and *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*).

[60] Labour Court judgment above n 9 at para 47.

[61] LAC judgment above n 12 at para 136.

[64] In adopting this approach, the respondents' argument and the Labour Appeal Court's conclusion in effect treats section 23(1)(d) as though it is similar to the Wills Act.[62] This allows testators to determine the post-mortem distribution of their property. That distribution obviously affects others – some may receive, others may be excluded – but the invocation of the statutory power remains in essence private: one between the testator and her earthly goods. The power is statutorily sourced, but its exercise remains largely that of a private property owner choosing the devolution of her property after death. As will appear, though the endpoint of the Labour Court and the Labour Appeal Court was unimpeachable, the path I take differs from theirs.

[65] We start with the springboard for AMCU's rule of law attack. The rule of law is enshrined as a foundational value in the Constitution.[63] From this it flows as "axiomatic" that the exercise of public power must comply with the doctrine of legality, which stems from the rule of law.[64] This foundational principle binds Parliament. Its legislation must show "a rational relationship between the scheme which [Parliament] adopts and the achievement of a legitimate governmental purpose", since "Parliament cannot act capriciously or arbitrarily".[65]

[66] Invoking *Law Society of South Africa*,[66] AMCU complained that section 23(1)(d) failed the test of legislative rationality. There this Court emphasised that the requirement that a legislative scheme must be rational "is not directed at testing whether legislation is fair or reasonable or appropriate", but "is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise".[67] This, the Court explained, is a lower threshold

[62] 7 of 1953.

[63] Section 1(c).

[64] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 49. See also *Affordable Medicines* above n 59 at para 49.

[65] *New National Party* above n 59 at para 19.

[66] *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 35.

[67] Id.

than a limitations analysis under section 36 of the Constitution. That asks whether an infringement of an entrenched right is "reasonable and justifiable".[68] And indeed, the Court noted, to constitute a justifiable limitation, a provision must necessarily be rational: "It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right".[69]

[67] That reasoning applies here. As already explained, section 23(1)(d) infringes on the right to strike, but this is justifiably limited.[70] Embedded in this conclusion, as pointed out in *Law Society of South Africa*, is that the provision is also rational. Section 23(1)(d) furthers the legitimate governmental purpose of promoting effective collective bargaining by way of a scheme premised on majoritarianism. As the provision is a constitutionally permissible limitation on certain entrenched rights, it is by corollary rational.[71]

[68] And AMCU's argument stems from an incorrect premise. Permitting a private actor to exercise public power does not inherently violate the rule of law. Our constitutional scheme is more complex. It casts up no impenetrable wall between the public and the private. This is not least because the unjust grief of past exclusionary subordination and oppression based on race, which the Constitution is dedicated to eradicating, was perpetrated through both public and private means. And the risk our Constitution recognises and confronts is that patterns of exclusion and discrimination could be perpetuated through ostensibly "private" exercises of power.

[69] Thus the constitutional dispensation recognises that state organs and public authorities may perform acts that are not public in nature,[72] but conversely, and more

[68] Id at para 38.

[69] Id at para 37.

[70] See [58].

[71] See *Law Society of South Africa* above n 66 at para 37, where the Court explained that "the requirement of rationality is indeed a logical part of the proportionality test."

[72] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* [2001] ZASCA 56; 2001 (3) SA 1013 (SCA).

pertinently to the present, that private actors may perform acts that entail the exercise of public power.[73] This is because "public powers and public functions are wider than governmental powers and governmental functions".[74] The Bill of Rights itself binds natural and juristic persons if, and to the extent, that it is applicable, taking into account the nature of the right and the nature of the duty it imposes.[75] The constitutional guarantee of just administrative action is conferred without distinction as to whether the actor is governmental or non-governmental.[76] And so the Promotion of Administrative Justice Act (PAJA),[77] enacted to fulfil this guarantee, expressly covers administrative action taken by a natural or juristic person, other than an organ

[73] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA Investments*), and especially the minority judgment of O'Regan J.

[74] Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (DPhil thesis, Rhodes University, 2002) at 195.

[75] Section 8 of the Constitution provides:

> "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
>
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[76] Section 33 of the Constitution provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

[77] 3 of 2000.

of state, when that person exercises a public power or performs a public function in terms of an empowering provision.[78]

[70] Hence, it is trite that state organs do not alone exercise public power. Non-state organs may and do exercise public power.[79] Beyond the initial question of

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[78]Section 1(i) of PAJA provides:

> "administrative action" means any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—
>
> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
>
> (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
>
> (cc) the executive powers or functions of a municipal council;
>
> (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
>
> (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No.74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
>
> (ff) a decision to institute or continue a prosecution;
>
> (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
>
> (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
>
> (ii) any decision taken, or failure to take a decision, in terms of section 4(1)."

[79] This follows from this Court's endorsement of *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) (*Dawnlaan*) in the majority judgment of Yacoob J in *AAA Investments* above n 73 at para 31:

> "In the pre-constitutional era in South Africa the nature of institutions and the way in which they exercised their power became relevant in the context of determining whether particular

typology (private vs public) lies the practically more crucial inquiry as to how the particular exercise of power is regulated and what safeguards exist for its exercise. When legislation authorises private parties to exercise public power the question is thus how to ensure a rational relationship between their exercise of power and the attainment of legitimate legislative ends.

[71] Neither in its papers nor at the hearing did AMCU fully explain how section 23(1)(d) is irrational. As shown earlier, section 23(1)(d) promotes and serves the goals of collective bargaining, which is clearly a legitimate legislative end.[80]

[72] AMCU framed its rule of law argument as a challenge to the constitutionality of section 23(1)(d), rather than to the particular extension the Chamber and the contracting unions effected here. But an extension could itself conceivably be subject to a legality challenge. The typology thus answers the question whether invocation of the provision entails the exercise of a public power. From there follows the more important substantive inquiry as to what safeguards apply to the exercise of the power.[81]

[73] 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

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> decisions were subject to judicial review. The Court in *Dawnlaan* had to consider whether the decisions of the Johannesburg Stock Exchange (JSE) were subject to judicial review. It was necessary there to decide the correctness of the contention that the decisions of the JSE were not subject to judicial review because the JSE was a private body. The High Court placed considerable emphasis on the fact that the legislation in terms of which the JSE had been established requires a stock exchange (a) to be licensed if it was in the public interest; (b) to ensure that its rules safeguard and further the public interest; and (c) to list securities only if that was in the public interest. The relevant legislation imposed upon the JSE a public duty to adhere to these rules and requirements, the Court held, and added that the functions of the JSE affected the public and indeed the whole economy. The Court concluded that, to regard the JSE as a private entity would be to ignore commercial reality and the very public interest that the Legislature sought to protect. It ultimately held that the decisions of the JSE are subject to judicial review. The Appellate Division confirmed the correctness of this High Court approach in the *Witwatersrand Nigel* case."

[80] See [51] – [58].

[81] See Craig "Public Law and Control over Private Power" in Taggart *The Province of Administrative Law* (Hart Publishing, Oxford 1997) at 211: "the fact that a particular institution is felt to possess public power should not lead inexorably to the conclusion that all principles of a public law nature should be equally applicable".

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 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.

[74] So does using section 23 to extend a collective agreement to non-parties, including minority unions, entail the exercise of public power? In answering this, the predominant focus is on the nature of the power that is being exercised.[82] The question is not so much, who exercises the power, nor even, where does the power come from: but what does the power look and feel like? What does it do? Pointers here include—

(a) the source of the power;

(b) the nature of the power;

(c) its subject matter; and

(d) whether it involves the exercise of a public duty.[83]

[75] What do "public function" and "public power" mean? Langa CJ illuminatingly noted in a minority judgment in *Chirwa*:

> "Determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest.

[82] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*) at para 20. Nugent JA made this statement in determining whether the power exercised was administrative in nature – but the reasoning applies all the more to determining the antecedent question whether the conduct was public or private.

[83] Id at para 25.

> None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context."[84]

[76] And in *Grey's Marine*, the SCA correctly stated that "the exercise of public power generally occurs on a continuum with no bright line marking the transition from one form to another".[85]

[77] In *AAA Investments*, the Micro Finance Regulatory Council, whose existence and functioning was recognised and approved by the Minister of Trade and Industry, played a regulatory role in supervising financial transactions. It took on many of the features of an organ of state. In a minority analysis, concurring in the majority's order, O'Regan J determined whether a private actor exercised public power by asking whether the decision is "coercive" in effect, and whether the decision is related to a "clear legislative framework".[86] Though the majority took a different path, nothing in its judgment disavows the more general significance of O'Regan J's analysis.

[78] Those features are present here. The decision by private parties to invoke the power section 23(1)(d) affords them to extend their collective agreement to parties entirely alien to it has a coercive effect: it binds non-parties to the agreement, willy-nilly. And, as AMCU rightly points out here, the statute empowers contracting parties to do this with just about industry-wide effects. The extension of the agreement also has extensive implications for members of the public. For its duration, non-member employees are bound. Even more, they forfeit the right to strike if the collective agreement regulates the issue in dispute.[87]

[79] These are far-reaching effects. They show that invoking section 23(1)(d) is not simply a private matter between private parties. It affects the public. The rationale

[84] *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 186.

[85] *Grey's Marine* above n 82 at para 25.

[86] *AAA Investments* above n 73 at para 119.

[87] Section 65(3)(a).

for the power and its exercise is the public interest in improving workers' conditions through collectively agreed bargains. What is more, the decision to conclude and extend the agreement is rooted in Parliament's exercise of its legislative power: it is licensed by legislation. The power is statutorily sourced.

[80] This all points distinctly to a power more than private in nature. It is public. The conclusion of a collective agreement triggering a statutorily licensed extension under section 23(1)(d) is in its effects and substance an exercise of legislatively conferred public power. It's not the same as the statutory power the Wills Act confers on testators.

[81] Features pointing to "public" are: (a) the decision is rooted in legislation and its effects are circumscribed by the statute; (b) the effect of the decision is mandatory on non-parties and coercive on their constitutional entitlements; (c) the decision results in binding consequences without those parties' acquiescence; and (d) the rationale for extension is a plainly public goal, namely the improvement of workers' conditions through collectively agreed bargains.

[82] The Chamber and the mining houses it represented, together with the workplace-majority unions party to the agreement, were not governmental actors. Nevertheless their conduct had a sufficiently public character, and entailed sufficient public consequences, to make what they did the exercise of public power.

[83] That their exercise of power entailed public law consequences does not mean that it was "administrative action" as defined in PAJA. This is because the decision to conclude an agreement that the statute, upon fulfilment of the conditions it specified, extends to non-parties, was not "of an administrative nature".[88] The parties were not

[88] Section 1(v) of PAJA provides:

> "decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;

administering policy or statutory powers; they were agreeing amongst themselves. Their agreement had wide-ranging public consequences. But in concluding it they did not act administratively. Their conduct was public, but not administrative, in nature.[89]

[84] 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.[90] Invoking the statute's enormous clout by using a statutory power may not occur irrationally or arbitrarily.

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."

[89] *Free Market Foundation v Minister of Labour* [2016] ZAGPPHC 266; 2016 (4) SA 496 (GP) concerned a challenge to section 32 of the LRA. In that case, the High Court went further, and considered the possibility that an extension of a collective agreement made in a bargaining council framework could amount to administrative action. The Court found that while the negotiation and conclusion of a collective agreement would not necessarily constitute administrative action, the parties' request under section 32(1) to the Minister to extend the agreement may constitute administrative action. The Court was inclined to find that PAJA would apply; and if not, the decision would still be subject to rationality and legality review.

Whatever the position in regard to section 32, section 23 extensions entail the exercise of public power. A section 23(1)(d) extension occurs without more upon the conclusion of an agreement that conforms to the provision's specifications. Differently put, the parties' employment of the statutory provision by itself entails extension. This entails a public dimension. Unlike extensions under section 32, there is a single rather than a two-step process.

[90] In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85, Chaskalson P explained it thus:

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[85] AMCU's grievance was of course not that the collective agreement here was capricious, irrational or arbitrary. It was that the statute offended the Constitution because a section 23(1)(d) agreement *might be*. But since agreements concluded under the provision are liable to scrutiny, that grievance is abated.

[86] 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. A particular agreement may be vulnerable to attack for irrational and undue effects on minority unions and non-members. An instance might be where parties to a section 23(1)(d) agreement conclude it in flagrant breach of an express agreement with minority unions protecting them from the exercise of the power.

[87] But that question need not be answered now. The facts and the ambit of the parties' arguments before us do not require a speculative quest for instances of in-practice (as opposed to facial) irrationality. It is enough to note that parties extending agreements in terms of section 23(1)(d) may not irrationally exercise the power the statute confers.

[88] It follows that AMCU's challenges to the constitutional scheme that permits extensions of collective agreements to non-parties under section 23(1)(d) cannot succeed.

Costs

[89] Though AMCU in its written argument sought costs, at the hearing all the parties agreed that, whatever the outcome, no costs order was appropriate.

Order

[90] The following order is made:

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

For the Applicants:	P Kennedy SC and V September instructed by Larry Dave Incorporated Attorneys
For the First Respondent:	A Myburgh SC and T Ngcukaitobi instructed by Edward Nathan Sonnenbergs
For the Fifth Respondent:	W Trengove SC and A Hassim instructed by Cheadle Thompson & Hayson Inc
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