ConCourt rules on procedural fairness of minority union retrenchments without consultation

On Thursday, the Constitutional Court delivered judgment in the case of *Association of Mine Workers and Construction Union and Others v Royal Bafokeng Platinum Mine Limited and Others*. In this matter, the constitutionality of Section 189(1) of the Labour Relations Act (LRA) was debated.

© Andriy Popov – 123RF.com

Facts of the case

On 30 September 2015, members of the Association of Mineworkers and Construction Union (AMCU) reported for duty. They were denied access. They were told to wait outside until a representative from the company's Human Resources Department met them. They were then bussed to the company's Protection Services Department. There, they were handed letters of retrenchments, dated 18 September 2015 (i.e. two weeks earlier).

It transpired that the company had negotiated and reached a retrenchment agreement with the National Union of Mineworkers (NUM) which represented approximately 75% of the workforce. The company had also consulted with the United Association of South Africa (UASA), a union enjoying approximately 11% support. The company and NUM together with UASA had concluded a retrenchment agreement which applied to the AMCU members (despite AMCU and its members playing no role whatsoever in the retrenchment consultations).

AMCU, on behalf of its members, challenged the retrenchments on the basis that its members had not been consulted.

"The Constitutional Court found and confirmed that if a union has a majority in a particular workplace, the company has the right to consult with that majority union only," says Jonathan Goldberg: CEO of Global Businesss Solutions. "In addition, the majority union may conclude further agreements with the employer that set out the terms of the retrenchment."

AMCU disputed whether or not the retrenchments had been conducted according to a fair procedure because they (their members) were not consulted. The matter was taken through the following labour law tribunals:

- Commission for Conciliation, Mediation and Arbitration (CCMA),
- Labour Court, and
- Labour Appeal Court.

In the Constitutional Court, AMCU alleged that Section 189(1) of the LRA is not in keeping with Section 23 of the Constitution, which guarantees the right to fair labour practices.

"The majority judgement held that Section 189(1) does not limit the right to fair labour practices as it does not guarantee individuals the right to individual consultation during retrenchments," says Goldberg. "If it did, such a limitation would be justifiable. However, as retrenchments are not based on individual conduct, there is no need for individual consultation."

In addition, it was also held that the right not to be unfairly dismissed is contained in the LRA and not the Constitution.

The minority judgment held that Section 189(1) of the LRA violates Section 23 as it limits fair labour practices.

The appeal was dismissed by the majority of the Court confirming that in these circumstances, only the majority union needs to be consulted.

"As this is a Constitutional Court ruling, this is the final say in terms of any debates on the constitutionality of section 189(1) of the LRA," concludes Goldberg. "However, it still means that any retrenchments in your organisation need to adhere very strictly to set-down principles contained in the Labour Relations Act."