**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: J 353/19 and J 380/19

In the matter between:

**ASSOCIATION OF MINEWORKERS**

**AND CONSTRUCTION UNION** **Applicant**

and

**SIBANYE GOLD LIMITED t/a**

**SIBANYE STILLWATER** **First Respondent**

**NATIONAL UNION OF MINEWORKERS** **Second Respondent**

**SOLIDARITY** **Third Respondent**

**UASA THE UNION** **Fourth Respondent**

**INDIVIDUAL NON-UNIONISED EMPLOYEES**

**OF SIBANYE** **Fifth to Further Respondents**

**Heard:** **27 February 2019**

**Delivered:** **20 March 2019**

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**JUDGMENT**

**PRINSLOO, J**

Introduction

[1] This is a consolidated urgent application in which the Applicant (AMCU) attacks the lawfulness of the extension of a wage agreement to its members, in terms of section 23(1)(d) of the Labour Relations Act[1] (LRA).

[2] Case no. J353/19 (the first application) was brought in respect of an extension effected on 13 December 2018 (the first extension) and case no. J380/19 (the second application) was brought in respect of an extension effected on 18 February 2019 (the second extension).

[3] It is evident from the papers before me that the First Respondent (Sibanye) no longer relies on the first extension, as it was superseded by the second extension, which renders the first application essentially moot. Mr Boda for AMCU took a cautious approach in seeking the setting aside of the first and the second extensions, in the event that the second extension is invalid and Sibanye seeks to fall back on the first extension to prevent the AMCU members from striking. In argument, Mr Myburgh for Sibanye confirmed that the proceedings relate only to the second extension as no reliance will be placed on the first extension.

[4] It is on this basis that the matter before me will be decided.

Background

[5] This matter has taken a long and winding road and this urgent application is just another brick in the wall of an on-going battle between the parties since the commencement of AMCU's industrial action on 21 November 2018.

[1] Act 66 of 1995 as amended.

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[6] The litigation history since the commencement of the strike, has been dealt with extensively in other judgments[2]. I will provide a brief factual background as it is relevant and necessary to place this application into context.

[7] Sibanye recognised NUM, Solidarity, UASA and AMCU for collective bargaining purposes.

[8] Negotiations between Sibanye and the recognised unions in regard to wages and terms and conditions of employment for the period 1 July 2018 to 30 June 2021 commenced on 11 July 2018 at the Minerals Council South Africa (the Council).

[9] In the run up to the negotiations, AMCU tabled its demands in a letter dated 4 June 2018, which included a proposal about implementation as follows: "The implementation date for the above increase should be the 1st of July 2018. In case where wage negotiations take longer than excepted before conclusion, a back payment to be made irrespective as to when agreement has been reached."

[10] On 30 August 2018, AMCU referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate of non-resolution was issued on 26 September 2018.

[11] Following protracted negotiations, a wage agreement was concluded on 14 November 2018 between Sibanye and the union coalition comprising NUM, UASA and Solidarity. AMCU was not party to the collective agreement, and to date an agreement remains elusive. It is common cause that when the collective agreement was concluded, the union coalition did not have majority representation at the workplace

[12] Following a strike notice issued by AMCU on 19 November 2018, industrial action commenced on 21 November 2018. The strike action is still ongoing and has now entered its fourth month. AMCU stated that the strike is ongoing

[2] The history of the dispute was aptly summarized in case number J 4552/18, wherein judgment was handed down on 21 December 2018, as well as case number J 69/19 wherein judgment was handed down on 8 February 2019.

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as the demands that it has made in respect of basic salary / wages, allowances, benefits and other conditions of service remain unsatisfied.

[13] On 13 December 2018, Sibanye, NUM, UASA and Solidarity concluded the first extension agreement, in the form of an amendment to the wage agreement by the addition of a new clause 16. Clause 16 extended the wage agreement to all employees employed by Sibanye 'in the category 4-8 miners, artisans and official recognition units in the workplace of each representative employer'.

[14] On 18 December 2018, Sibanye approached this Court on an urgent basis under case number J4552/18, for an order declaring *inter alia,* that the continuing strike that commenced on 21 November 2018 is unprotected as contemplated in sections 65(1)(a) and 65(3)(i) of the LRA with effect from 13 December 2018 and for an order interdicting and restraining AMCU and its members from participating in the said strike. The gist of Sibanye's case was that NUM, Solidarity and UASA have between the period 22 November 2018 and 13 December 2018 increased their membership to the extent that they enjoyed majority representation for purposes of extending the wage agreement. As the wage agreement was extended to AMCU, the strike was to be declared unprotected, as contemplated in sections 65(1)(a) and 65(3)(a)(i) of the LRA.

[15] On 21 December 2018, this Court (per Tlhotlhalemaje J) dismissed Sibanye's application to interdict the strike on the basis of the extension – finding that Sibanye had not established that the union coalition had majority representation as at 13 December 2018. The Court went on to order that a CCMA verification process be undertaken.

[16] On 16 January 2018, the verification process at the CCMA came to a standstill and was postponed, pending the finalisation of the application for leave to appeal that was filed by AMCU.

[17] On 23 January 2019, Sibanye once again approached this Court on an urgent basis for an order *inter alia,* to declare the strike action that had commenced

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on 21 November 2018 unprotected in terms of the provisions of section 65(1)(a), as read with section 65(3)(a)(i) of the LRA.

[18] On 8 February 2019, I dismissed Sibanye's second application to interdict the strike on the basis of the extension by finding that the issue was *res iudicata.*

[19] On 14 February 2019, AMCU launched the urgent application under case number J535/19 in respect of the first extension agreement.

[20] On 18 February 2019, Sibanye and the coalition unions entered into a second section 23(1)(d) extension through another amendment to the wage agreement, which replaces and supersedes the first extension. According to Sibanye, the second extension came about in circumstances where the prolonged strike produced changes in union membership (i.e. floor crossing) to the extent that the union coalition now enjoys 52% representivity.

[21] Different to the first extension, the second extension expressly provides that the wage agreement binds all employees employed by Sibanye 'in the category 4-8, miners, artisans and official recognition units in the workplace of each representative employer' retrospectively from 1 July 2018. This date is in line with the wage agreement.

[22] AMCU filed an urgent application on 20 February 2019 under case number J380/19 in respect of the second extension. The matters were consolidated and enrolled for hearing on 27 February 2019. As already alluded to, case number J353/19 effectively became moot and I will only decide the application in respect of the second extension.

[23] The parties are *ad idem* that whether or not, the union coalition collectively had as their members, the majority of the employees in the bargaining units referred to in the wage agreement of 14 November 2018, is not an issue to be dealt with in this application. There remains a dispute as to whether or not the coalition union had majority status at the time that the extensions were concluded. If the second extension is found to be lawful and valid, a verification exercise is necessary to determine the representativeness of the union coalition as at 18 February 2019. In other words, this application is

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concerned only with the principles to which I refer below; whether the union coalition meets the section 23(1)(d) threshold remains to be determined.

Sibanye's case

[24] I will briefly refer to Sibanye's case insofar as it is relevant to the issues that I have to decide.

[25] In answer to AMCU's applications, Sibanye explained that a wage agreement was concluded on 14 November 2018 between the Sibanye and the union coalition. This agreement was concluded in respect of wages and other conditions of employment and its duration is for the period 1 July 2018 – 30 June 2021. The agreement contains a peace clause in terms of which it was recorded that the agreement was entered into in full and final settlement of all demands and proposals made during the course of the negotiations that led to the conclusion of the agreement and that it is in full and final settlement of the issues of wages, terms and conditions of employment and benefits for the period 1 July 2018 – 30 June 2021. The agreement further recorded that no party to the said agreement, or other person or entity bound by it shall, in respect of the period 1 July 2018 to 30 June 20121, seek to vary, review or negotiate wages and other terms and conditions of employment or call for, encourage or participate in any strike in respect of any demand or proposal to amend wages, other conditions of employment of benefits. The employer also committed not to enter into any collective agreement with any other union which provides for more favourable terms and conditions of employment than those regulated in the said agreement.

[26] AMCU commenced with strike action on 21 November 2018. From early on, the strike has been marred with acts of violence and unlawful conduct and on 21 November 2018, Sibanye secured an interdict against the acts of violence etcetera.

[27] The first extension happened on 13 December 2018 and as Sibanye indicated that this agreement is no longer relied upon, there is no need to deal with it in any more detail herein.

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[28] The second extension happened on 18 February 2019 and Sibanye explained what considerations were taken into account before concluding the second extension. Those are: the fact that the verification process at the CCMA, pursuant to the order of Tlhothlalemaje J, is stalled in light of the pending appeal and it is not likely that it will yield an outcome any time soon, and even if the verification process yields an outcome confirming that the union coalition had the majority at the time when the first extension was effected, any subsequent application to interdict the continued strike based on the first extension, would be met with a special plea of *res iudicata.*

[29] According to Sibanye, there had been a sustained and substantial improvement of the union coalition's representivity levels to the point where there is now a confirmed buffer of nearly 600 employees in the majority grouping. This happened as a result of non-unionised employees joining the union coalition during the course of the strike and AMCU members who do not wish to be part of the strike, have joined other unions. The point has been reached where the wage agreement enjoys the majority support within the workplace and there is increased opposition against the continuation of the strike.

[30] On 18 February 2019, the second extension was effected by way of an agreement between Sibanye and the union coalition to amend clause 16 of the wage agreement to read as follows:" The Minerals Council, acting on behalf of the companies, and the unions further agree that this agreement shall, by virtue of the provisions of section 23(1)(d) of the Labour Relations Act, 66 of 1995, and retrospectively from 1 July 2018, bind and be extended to all employees employed by the companies whether or not they are members of the unions, who are employed in the category 4-8 miners and artisans and official recognition units in the workplace of each representative employer'

[31] Sibanye's case is that clause 16, read together with the peace clause contained in the wage agreement, is now binding on AMCU and its members and therefore the strike is unprotected.

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[32] Sibanye explained that the second extension happened in circumstances where the strike has been violent and the death toll currently stands at seven, 48 homes of non-striking employees have been petrol bombed, five children were assaulted with petrol bombs, of which two are still in ICU with life threatening burns, 95 persons required hospital treatment for injuries and 26 vehicles have been damaged or completely burnt out. Notwithstanding the fact that 147 persons have been arrested for public violence, arson, malicious damage to property and related criminal activities, the violence continued and by far the majority of the victims have been non-striking employees or members of their families.

[33] The situation continues to escalate as on 13 February 2019, a bus transporting employees to work at Sibanye, came under fire at a stop street in Welkom and two NUM members passed away. Also on 13 February 2019, AMCU's Regional Secretary (Gauteng West Region) addressed the striking AMCU members and stated *inter alia,* that "*So now the issue that we are facing with Comrades, since they have seen that Driefontein is in our hands, they are now using Kloof. So what we need to do now Comrades, we need to put more effort into our fight to see as to how we are going to assist those Comrades from Kloof."*

[34] Sibanye stated that the very next day (14 February 2019) a vehicle transporting employees of an independent contractor to Sibanye's Kloof Mine, came under fire by gunmen and two persons have been treated for gunshot wounds. It further contends that it suffers daily losses and continues to do so, with the total loss to date approaching R 2 billion.

[35] On 14 February 2019, Sibanye issued a section 189(3) notice to notify employees that it is contemplating dismissal based on operational requirements and the prolonged strike is not helping matters.

[36] NUM, UASA and Solidarity concluded the first section 23(1)(d) extension, in the form of an amendment to the wage agreement by the addition of a new clause 16. Clause 16 extended the wage agreement to all employees

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employed by Sibanye 'in the category 4-8 miners, artisans and official recognition units in the workplace of each representative employer'.

[37] Sibanye submitted that there is no end in sight to the strike, and with it the violence and losses suffered, and in those circumstances, but for the second extension, the strike is not going to end.

[38] The gist of Sibanye's case is that the floor crossing (non-unionised employees joining the coalition unions and AMCU members joining other unions) resulted in the attainment of majority status by the union coalition and that afforded them the power to effect the second extension in terms of section 23(1)(d) of the LRA. The power was exercised with a view to restore orderly collective bargaining, achieving labour peace and the effective resolution of the labour dispute. The said extension ensures uniformity of the terms and conditions of employment for all employees for the duration of the wage agreement and no conditions are imposed on AMCU that are less favourable than those applicable to the members of the coalition unions.

AMCU's case

[39] AMCU seeks an order to declare that the second extension agreement is invalid and that it be set aside as it amounts to a breach of the principle of legality, alternatively that it is *ultra vires*, alternatively unlawful.

[40] AMCU's case is premised on two legs.

[41] Firstly, that any extension of the wage agreement to members of a non-party union must necessarily have been incorporated into that agreement on the date that it was concluded. Section 23 of the LRA does not authorise the subsequent extension of the collective agreement after it has been concluded.

[42] Secondly, if an extension in terms of section 23(1)(d) can take place at a later date, section 23(1)(d) does not authorise the parties to extend an existing wage agreement, which had already started to run its course, with retrospective effect. In order words, an extended agreement cannot be applied with retrospective effect to a date when the required majority did not exist. Even if the second extension is valid, AMCU members cannot thus be

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prevented from striking in respect of the period 1 July 2018 - 18 February 2019, as there remains an unresolved dispute in respect of the said period. AMCU's members' rights cannot be compromised retrospectively and to a period preceding the extension.

[43] I will deal with each of the two legs in turn *infra.*

The first leg

[44] AMCU's case is that section 23 of the LRA, which enables an employer and a majority union, or unions collectively, to extend the application of a collective agreement to non-members, requires that any such extension be provided for in the collective agreement itself. Section 23 does not authorise the subsequent extension of a collective agreement to non-parties pursuant to a separate and subsequent agreement.

[45] The argument is that if Sibanye and the other three unions were not entitled, as at the date of the conclusion of the wage agreement to extend it to non-parties because the unions did not have a collective majority, they are not permitted to extend the collective agreement on some later date. This is so because section 23 does not permit the employer and some unions to select the moment to extend an existing collective agreement to non-parties.

[46] It therefore follows that the extension agreement is not authorised by the LRA and therefore it has no binding effect on AMCU's members.

[47] Section 23(1)(d) of the LRA stipulates that a collective agreement binds employees who are not members of the registered trade union(s) party to the agreement if the employees are identified in the agreement, if it expressly binds the employees and if the trade union(s) has as members the majority of employees employed in the workplace. A collective agreement is capable of being extended in terms of section 23(1)(d) if these requirements are met.

[48] The crisp question is whether a collective agreement can be extended to non-parties subsequent to its conclusion. Put differently: does section 23(1)(d) of the LRA require that any extension of a collective agreement has to be provided for in the collective agreement *per se,* or whether the subsequent

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extension of the collective agreement to non-parties pursuant to a separate agreement is permitted by the section.

[49] AMCU submitted, and in my view correctly so, that section 23(2) of the LRA is a sensible provision with the purpose to prevent a situation in which, once a collective agreement has been concluded and the majority union thereafter loses its majority status, it would not affect the binding nature of the collective agreement on those to whom it was extended. This avoids challenges to a majority union's status throughout the term of the collective agreement, which would be disruptive and detrimental to the efficacy of the collective bargaining process that gave rise to the agreement in the first place.

[50] AMCU's argument is that by parity of reasoning, just as unions lacking a majority cannot pick their moment to challenge the majority status of the union which concluded the section 23(1)(d) collective agreement, so too is a union that attains majority at some point after the conclusion of the collective agreement, not entitled to pick its moment to conclude an agreement extending an existing collective agreement to non-parties. As a result, the second extension is invalid.

[51] AMCU's assertion is that section 23(1)(d) properly interpreted, means that the requirements for extension of a collective agreement must be met at the time when the collective agreement is concluded. This contention is supported by arguments advancing the Constitutional right to strike, disruptions to orderly collective bargaining, an abuse of the principle of majoritarianism, the text of section 23(1)(d) and the doctrine of accrued rights.

[52] Sibanye's case on the other hand is that the second extension is valid and does not amount to an abuse of power. The argument is that the parties gained the power to effect the extension by virtue of attaining the required majority and they exercised it in accordance with the objects of section 23(1)(d) of the LRA, namely orderly collective bargaining, labour peace and the effective resolution of labour disputes. AMCU's assertion is at odds with the principle of majoritarianism codified in section 23(1)(d).

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[53] Sibanye contends that on the basis of the extension agreements, the issues in dispute are now regulated by the wage agreement, read with the extension agreement and therefore AMCU's members are prohibited, subject only to verification and by virtue of the said agreement, from striking over issues regulated by the wage agreement.

*Interpretation*

[54] When faced with two competing interpretations, the Constitutional Court in *NUMSA and Others v Bader Bop and Others*[3] held that:

> 'The first question that arises is whether the Act is capable of being interpreted in the manner contended for by the applicants, or whether it is only capable of being read as the respondents and the majority judgment in the LAC suggest. If it is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation should not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution.'

[55] Section 3 of the LRA provides that the provisions of the LRA should be interpreted to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of the Republic. The primary objects of the LRA are *inter alia* to promote orderly collective bargaining and the effective resolution of labour disputes.

[56] *In casu* AMCU's interpretation of section 23(1)(d) is that the extension in terms of the said section has to take place at the same time the wage agreement was concluded and has to be provided for in the collective agreement itself and cannot take place at a later date and pursuant to a separate and

[3] 2003 (3) SA 513 (CC); (2003) 24 *ILJ* 305 (CC); [2003] 2 BLLR 103 (CC) at para 13.

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subsequent agreement. This interpretation is supported by the Constitutional right to strike, as it advances an interpretation that does not limit fundamental rights, which is the preferred interpretation. Care must be taken against unduly limiting a conferred fundamental right.

[57] Mr Boda for AMCU submitted that as section 23(1)(c) refers to the binding effect of 'the collective agreement' and section 23(1)(d) refers to 'the agreement' it follows that section 23(1)(d) authorizes and employer and majority union to conclude a collective agreement that binds employees who are not party to the agreement. The wording of section 23 of the LRA contemplates a single agreement and supports AMCU's contention that an extension cannot take place at a later date.

[58] Mr Boda further submitted that section 23(1)(d) cannot and should not be used and interpreted to deprive AMCU members of the right to continue with a protected strike which has already commenced, when their demands have still not been met. AMCU members have sacrificed their wages from 21 November 2018 to date and they cannot be deprived of the fruits of their sacrifice without their consent and they are entitled to persist with their strike action where the right to strike has accrued.

[59] Sibanye's interpretation of section 23(1)(d) contemplates the possibility of two separate agreements – a wage agreement and an extension agreement. Mr Myburgh for Sibanye submitted that a section 23(1)(d) extension does not have to be included in the original wage agreement as it is a self-standing and separate agreement which can be concluded at any time, and not only at the time of the conclusion of the wage agreement.

[60] AMCU's interpretation is unsustainable for a number of reasons.

[61] Firstly, the wording of section 23(1)(d) indeed refers to 'a collective agreement' and 'the agreement' and in my view it refers to any collective agreement, as a self-standing agreement, whether it be a collective agreement in relation to wages or an agreement to extend an already concluded wage agreement. Section 23(1)(d) says nothing about the timing of a collective agreement or an extension agreement and does not exclude it from being introduced through

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an amendment to the original collective agreement. AMCU's interpretation requires the reading in of a qualification into section 23(1)(d) which does not exist.

[62] *In casu,* that second extension came about further to a process of collective bargaining and the extension itself is contained in a collective agreement.

[63] Secondly, the LRA has to be interpreted to give effect to its primary objects, which include orderly collective bargaining and the effective resolution of labour disputes. To interpret section 23(1)(d) to mean that the extension of an existing collective agreement can happen subsequent to the conclusion of the collective agreement, is tailored to the specific goal of orderly collective bargaining and gives effect to the primary objects of the LRA.

[64] Thirdly, there is no authority to support AMCU's interpretation, whilst on the other hand, there is authority for the contention that an extension of a collective agreement follows after a wage agreement has been concluded and by implication that it is a separate agreement, which may be concluded later. It goes without saying that there is nothing preventing it from being included in the wage agreement itself.

[65] I am bound to follow the authorities, which I will deal with *infra*.

[66] In *AMCU and Others v Chamber of Mines of SA and Others*[4] (*Chamber of Mines*) the Constitutional Court confirmed that section 23(1)(d) is a "*codification of majoritarianism*"[5] that limits the right to strike. As to its point of application, the Constitutional Court held that section 23(1)(d) "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."[6]

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[4] (2017) 38 *ILJ* 831 (CC).

[5] *Chamber of Mines* at para 50.

[6] *Chambers of Mines* at para 57.

[67] In *Chamber of Mines of SA acting in its own name and obo Harmony Gold Mining Co Ltd and others v AMCU and* Others[7] this Court (per Van Niekerk J) held that[8]:

> 'The majoritarian principle that underlies s 23(1)(d) promotes orderly collective bargaining, a legitimate purpose of the LRA and serves the legislative purpose of advancing labour peace and the democratization of the workplace and the creation of a framework within which parties can bargain collectively to determine wages and other terms and conditions of employment. If an employer and unions party to a collective agreement were denied the right to extend their agreement to non-party employees, collective bargaining would be characterized by opportunism and the attendant threat to the formation of stable relationships.'

[68] In *Glencore Operations SA (Pty) Ltd and Others v NUMSA (Glencore)*[9] this Court was faced with a scenario where the employer and a union coalition concluded a wage agreement and a section 23(1)(d) extension, which applied to NUMSA members. The wage agreement however did not contain a peace clause and NUMSA subsequently referred a dispute of mutual interest to the CCMA. Faced with the threat of a looming strike, the parties amended the wage agreement through the inclusion of a peace clause. When NUMSA issued a strike notice, the employer sought an interdict, with NUMSA's opposition being that the company could not deprive its members of their vested right to strike by amending the wage agreement *ex post facto*.

[69] This Court (per Moshoana J) found as follows:[10]

> 'Even in instances where a strike had commenced and it becomes apparent that the strike contravenes a peace obligation, this court is empowered to place an [injunction]. Therefore, what renders this strike unprotected is not the procedural requirements but the substantive requirements. To my mind, nothing turns on the fact that the collective agreement was entered into when the procedural requirements were being complied with. It may well be so that

[7] (2014) 35 *ILJ* 3111 (LC) at para 69.

[9] (2018) 39 *ILJ* 2305 (LC).
[10] *Glencore* at para 19.

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> the intention of the applicants was to thwart the possible strike by the respondent and its members. To my mind, doing so is not unlawful and is actually part of the power play. It must be remembered that in the peace obligation clause, the applicants equally limit their power to flex their muscles, as in locking out. Similarly, the majority unions equally clipped their wings to call their members for a strike. As Van Niekerk J aptly puts it, the majoritarian principles underlies s 23(1)(d) and it promotes orderly collective bargaining with a legitimate purpose of advancing labour peace'.

[70] It is evident from the aforesaid authorities that at the level of principle there is nothing wrong or unlawful in parties agreeing on an extension or amendment to a collective agreement *ex post facto* the wage agreement.

[71] The fact that the prompt for an extension agreement is the achievement of majority representation at a point in time after conclusion of the wage agreement, is of no consequence. If the majority threshold is achieved and the other formal requirements of section 23(1)(d) are met, the extension takes effect by operation of law. The effect thereof may be to deprive minority union members of their right to strike, but that is a consequence of the application of the majoritarian principle.

[72] Inherent in section 23(1)(d) is the fact that it deprives minority union members of certain rights, including the right to strike. The Constitutional Court has confirmed in *Chamber of Mines* that section 23(1)(d) passes constitutional muster:

> 'AMCU is right that the codification of majoritarianism in s 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. 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.'

[73] AMCU's argument that members have sacrificed their wages from 21 November 2018 to date and they cannot be deprived of the fruits of their sacrifice without their consent, is not sustainable in law. AMCU members

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benefit to the extent that they become entitled to the improved conditions of employment embodied in the wage agreement, with retrospective effect to the normal implementation date.

[74] To sum up: the *ex post facto* extension of a collective agreement is not unlawful or *ultra vires* and it takes effect by the operation of law if the formal requirements of section 23(1)(d) have been met.

The second leg

[75] The second leg of AMCU's case is that if an extension in terms of section 23(1)(d) can take place at a later date, the parties cannot extend an existing wage agreement retrospectively and they cannot apply the agreement to a date when the required majority did not exist.

[76] In other words, even if the second extension is valid, AMCU members cannot be prevented from striking in respect of the period 1 July 2018 until 18 February 2019, as there remains an unresolved dispute and their rights cannot be compromised retrospectively and for any period preceding the extension.

[77] The essence of the attack on the second leg is the retrospective reach of the extension. AMCU's case is that section 23(1)(d) does not permit the retrospective extension of a wage agreement so as to compromise AMCU's demands and its vested right to strike in relation to them, which pre-date both the date of the extension and the union coalition's alleged obtaining of majority status.

[78] Mr Boda submitted that legislative provisions do not apply retrospectively unless retrospective application is expressly or by necessary implication provided for in the statute itself and legislative provisions are presumed not to affect vested rights, such as the right to strike.

[79] The gist of AMCU's case is that its constitutionally entrenched right to strike over wages and terms and conditions of employment in respect of the period 1 July 2018 until 18 February 2019, cannot retrospectively be revoked by the extension agreement and that the right to engage in protected strike action in respect of the said period, remains intact.

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[80] Mr Boda referred to authorities [11] where the principle that legislation is not to be interpreted to extinguish existing rights and obligations, unless the statute provides otherwise or its language clearly shows such a meaning, was confirmed. There is a presumption against the retrospective application of legislation, premised upon the unwillingness of the court to inhibit vested rights and statutes should if possible, be interpreted so as not to take away rights vested at the time of their promulgation[12].

[81] Mr Boda submitted that the right to strike is a fundamental right in terms of section 23(2)(c) of the Constitution and any law that curtails that right, must be construed in a manner which is consistent with that right, save to the extent that its curtailment is justified in terms of section 36, the limitations clause.

[82] Mr Boda further submitted that section 23(1)(d) of the LRA prohibits an extension where the parties are not the majority and as the union coalition was not the majority on 1 July 2018, they cannot extend an agreement when they did not have majority status. The parties cannot by subsequent agreement confer the authority that the legislature did not confer upon them at the time the concluded the wage agreement. This will not only apply the principle of majoritarianism retrospectively, but also to a period which the parties did not have the power to bind non-parties in terms of the law.

[83] In my view there are obvious difficulties with AMCU's contention.

[84] First, AMCU's reliance on the presumption against the retrospectivity of legislation is misplaced. That presumption pertains to new legislation and operates so as to exclude new legislation from affecting matters that arose prior to that new legislation commencing. The authorities referred to by Mr Boda all pertain to new statutory enactments and the question whether those enactments applied retrospectively.

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[11] *National Director of Public Prosecutions c Carolus and Others* 2000 (1) SA 1127 at 1138 – 1139*, Veldman v Director of Public Prosecutions* 2007 (3) SA 210 (CC), *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 at 836.
[12] *Curtis v Johannesburg Municipality* 1906 TS 308, *Kaknis v Absa Bank Limited and Another* [2016] ZASCA (15 December 2016).

[85] Section 23(1)(d) of the LRA was on the statute books long before the AMCU strike commenced and is thus entirely unaffected by the presumption AMCU seeks to rely on. To the extent that AMCU seeks to draw on the presumption against retrospectivity of new legislation and to fashion a principle that there is a presumption against parties contracting retrospectively in the context of section 23(1)(d), it is without merit and not sustainable in the context of collective bargaining and the principle of majoritarianism.

[86] Secondly, in *AUSA and others v SAA SOC Ltd and others*[13] the Court held that while it may appear objectionable that section 23(1)(d) can be used in this way (i.e so as to deprive individuals (and thus their unions) of the right to challenge the fairness of a retrenchment process) the section permits all collective agreements to be extended in terms thereof and is not limited in its scope to only agreements that do not involve a deprivation of rights. Indeed, most collective agreements extended in terms of s 23(1)(d) involve depriving non-party employees of some or other right as an element of the compromise that the agreement inevitably represents.

[87] The same principle applies *in casu.* Once a collective agreement is extended in terms of s 23(1)(d), its effect is to deprive non-party employees of some right and in this instance, it deprives AMCU and its members of the right to strike.

[88] Thirdly, section 23(1)(d) does not contain any qualification or limitation as to the extension of a collective agreement or the application of an extended collective agreement. There is nothing in section 23(1)(d) that provides that a collective agreement that has been extended, is extended only prospectively. In other words, there is nothing in the provisions of the LRA as to the extension of a collective agreement that limits it to prospective application or that prohibits retrospective application.

[89] Fourthly, the fact that the union coalition did not have the majority representivity during the period 1 July 2018 until the date of the second extension is neither here nor there. A majority union has the power to contract

[13] (2015) 36 ILJ 3030 (LC).

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in relation to issues that pre-date its majority status and the determinative issue is that the union had majority status at the time of the extension.

[90] Fifthly, the operation of the collective agreement is a central consideration. *In casu* the duration of the wage agreement is 1 July 2018 until 30 June 2021. The contractual effect of the second extension agreement is that both the said extension agreement as well as the wage agreement operate retrospectively to 1 July 2018.

[91] As I have already indicated, when the wage agreement was concluded on 14 November 2018, the members of the coalition unions became entitled to the benefits of the wage agreement, which was backdated to 1 July 2018. When the wage agreement was extended in February 2019, the AMCU members also became entitled to the benefits of the wage agreement, backdated to 1 July 2018.

[92] In *Kem-Lin Fashions CC v Brunton and Another*[14] the Labour Appeal Court has held that :

> '….it seems to me that the effect in law of an extension of a collective agreement in terms of section 32(2) is that, for all intents and purposes, a non-party is turned into a party, and is placed in relation to the collective agreement on the same level as a signatory to the collective agreement'[15].

[93] In other words, the collective agreement is binding to the non-parties as if it is their agreement, struck for them by the majority union. The terms of the agreement become applicable once the agreement is extended and *in casu,* it means that the agreement, operational from 1 July 2018 until 30 June 2021, is effective from 1 July 2018 and that it settles the issues set out in the agreement.

[94] In *Chamber of Mines* the Constitutional Court confirmed that:

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[14] (2001) 22 *ILJ* 109 (LAC) at para 25.

[15] In *Chamber of Mines* (at para 57) the Constitutional Court referred to a principle in the context of section 32 of the LRA and found that the implication was analogous to section 23 and that the same principle applies to section 23 extensions. The same applies *in casu* and the same principle applies to section 23(1)(d) extensions.

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> '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'. (own emphasis)

[95] AMCU seems to have accepted that the vested right to strike is compromised by an extension and if the second extension is valid, they can no longer strike to secure better wages as from 18 February 2019, for the duration of the wage agreement.

[96] AMCU however complains of the limitation or deprivation of a vested right to strike in respect of the period 1 July 2018 – 18 February 2019. This complaint is without merit. Section 23(1)(d) provides for the extension of a collective agreement to minorities and in the context of collective bargaining, such extension limits the right of minority unions to strike if there is a peace clause in the collective agreement. *In casu* and by extending the wage agreement to AMCU, the peace clause was also extended to AMCU and this clause expressly deprives AMCU, or any of the other parties to the agreement, of the right to strike for the duration of the agreement.

[97] The LAC in *Association of Mineworkers and Construction Union and others v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd and others* (*AMCU v COM)*[16] held that section 23(1)(d) is a manifestation of the principle of majoritarianism and that:

> '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

[16] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd and Others* (2016) 37 ILJ 1333 (LAC).

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> 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'.

[98] To accept AMCU's contention that its members retain the right to strike over the issues settled by the collective agreement for the period 1 July 2018 until 18 February 2019 will have absurd results and will not give effect to the object of orderly collective bargaining. To illustrate this point: the wage negotiations commenced in July 2018, after the previous wage agreement expired on 30 June 2018. The parties were engaged in wage negotiations since July 2018 and the wage agreement between Sibanye and the union coalition was concluded in November 2018. If, at the time of the conclusion of the wage agreement, the union coalition had the majority and extended the agreement in terms of section 23(1)(d), there could be no question of AMCU being able to continue with the strike, demanding a greater increase for the period 1 July – 14 November 2018. There is no reason in law or otherwise why the position should be different only because the wage agreement was extended in February 2019 and not in November 2018.

[99] Furthermore, it would effectively mean that in all instances where parties enter into a wage agreement that applies retrospectively and such agreement is extended to minority union members, there would be no way of stopping the minority union from striking for a wage increase or better benefits in respect of the period that preceded the date of the wage agreement. Not only will this be absurd, it will also undermine the fibre of orderly collective bargaining and the accepted principle of majoritarianism.

[100] To allow minority unions, bound by an extended collective agreement, to strike over demands relating to a specific period either prior to the signing of the collective agreement or the extension thereof, will result in chaos and uncertainty, the direct antithesis of labour peace.

[101] Lastly, AMCU's argument that it retains the right to strike in respect of their demands for the period 1 July 2018 until 18 February 2019, is entirely artificial as the AMCU members are in fact striking about their demands concerning

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terms and conditions of employment for the period 1 July 2018 to 30 June 2021, and not from 1 July 2018 to the date of the extension.

Costs

[102] This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[103] I have considered the fact that the parties before me are in a continuous collective bargaining relationship and that the issues before me were not clear cut. In my view this is a case where the interests of justice and fairness will be best served by making no order as to costs.

[104] In the premises, I make the following order:

Order:

1. The application is dismissed;
2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

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| For the Applicant: | Advocate F A Boda SC |
| Instructed by: | Larry Dave Attorneys |
| For the First Respondent: | Advocate A Myburgh SC with Advocate M van As and Advocate R Itzkin |
| Instructed by: | Cliffe Dekker Hofmeyr Inc Attorneys |

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