



A clash of titans or a natural mix? The intersection between interest issues and matters of right

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Introduction

Bygone Era

- 1956 LRA, no clear distinction between Disputes of Right and Disputes of Interest
- Particularly, in collective disputes
 - Various: Industrial Court, LAC, SCA
- Distinction between Disputes of Right and Disputes of Interest
 - Corner Stone of 1995, LRA

Basic concepts

Rights Disputes

- Arise from breach of rights
- Justiciable or arbitrable under Employment Laws

Interest Disputes

- All other disputes
- Must be resolved by agreement, if not Industrial Action

Mutual Interest

- S134: Any dispute between an employer and employees, which includes rights and interest disputes, in which employers and employees share a mutual interest

Basic concepts continued

Mutual Interest

- S134: Any dispute between an employer and employees, which includes rights and interest disputes, in which employers and employees share a mutual interest

SCA 2005, *NUMSA v Fry's Metals* – observed

- *“the dichotomy btw matters of mutual interest and questions of right do not in our view form the basis of the collective bargaining structure adopted by the LRA”*
- Comment made in context of debate in 2005 re whether disputes may *“migrate”* from the one category to the other
- Prophetic – lets see

So, where are we now 14 years later?

1. *NUMSA obo Members v South African Airways SOC Ltd & Another* (2017) 9 BLLR 867 (LAC)
2. *AMCU obo Members v Royal Bafokeng Platinum Ltd & Others* (2018) 39 ILJ 2205 (LAC)
3. *NUMSA & Another v Aveng Trident Steel (A Division of Aveng Africa) & Others* (13 June 2019)
4. *NUMSA & Others v Dunlop Mixing and Technical Services (Pty) Limited & Others* (CCT202/18) (28 June 2019)

Clash of Titans: *NUMSA obo Members v South African Airways*, 2017

Nature of Dispute

- Labour Court dismissed NUMSA's application under S189A(13) - to interdict SAA, from proceeding with a large-scale retrenchment exercise pending compliance with a fair procedure

What does this mean?

- NUMSA is complaining about consultation process

Rights issue?

- Agree?

NUMSA obo Members v South Africa Airways, 2017 **continued**

- But, plot thickens, real issue
- Issue to be determined:

whether a retrenchment agreement concluded with unions representing the majority of employees in the workplace and extended in terms of S23(1)(d) - settled any dispute that non-union member employees and minority union members had about the retrenchment process

NUMSA obo Members v South Africa Airways, 2017 **continued**

- NUMSA had less than 2% membership and was unrecognised
- Consultation/Facilitation process involved seven recognised unions
- NUMSA was a consulting party

NUMSA obo Members v South Africa Airways, 2017 **continued**

- A Collective Agreement concluded by SAA, NTM, UASA, SACCA and SAA management employees. Jointly representing about 80% of employees
- CA also makes reference extension to non-party employees to S23(1)(d) and that it is the agreement contemplated in the Regulation
- Court a quo held: *“while it may appear objectionable that s 23(1)(d) can be used in a way that seems to deprive individuals & their unions of right to challenge fairness of a retrenchment process, the Sec permits all CA’s to be extended & is not limited in its scope to only agreements that do not involve a deprivation of rights ... ”*

NUMSA obo Members v South Africa Airways, 2017 **continued**

- Court a quo held that:

“the retrenchment agreement, and its extension to non-party employees, constituted a settlement of any and all such complaints raised by NUMSA”

- “Collective Agreement” - S213:

“a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered Trade Unions on the one hand, and on the other by one or more registered employers’ organisations; or one or more employers and one or more registered employers organisations”

NUMSA obo Members v South Africa Airways, 2017 **continued**

- NUMSA argued:

The words “(or) any other matter of mutual interest” serve to qualify and circumscribe the preceding words “terms and conditions of employment in order to restrict it to the realm of matters of interest (i.e. the creation of new rights) and not rights issues (existing rights). The definition of a collective agreement,, contemplates the resolution of interest dispute, i.e. the creation of new rights and does not pertain to the settlement of disputes concerning existing rights”

NUMSA obo Members v South Africa Airways, 2017 **continued**

[32]

- Merit in the SAA contention that the fundamental misconception by the Union is to confuse the term “*mutual interest*” with two other terms being “*interest dispute*” and “*rights dispute*”

[33]

- Nothing in the definition in S213 that suggests that the words “*any other matter of mutual interest*” should be limited. The term “*matter of mutual interest*” is broad enough to cover both interest and rights disputes

NUMSA obo Members v South Africa Airways, 2017 **continued**

- Also applied principles of majoritarianism
- Application of S23(1)(d) to the S189 process:
 - Necessary and justifiable to ensure orderly and peaceful consultation process aimed at minimising dismissals and contributing to economic viability
 - To allow a situation where a minority party would, not be bound by a product of a legitimate and fair process, particularly where it was part of that process, would lead to chaotic situations

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018)

Issue

- Constitutionality of S189(1) and S23(1)(d)
and
- The extent to which the principle of majoritarianism justifies retrenching workers who were excluded from a collective agreement about retrenchment

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

- AMCU seeks reinstatement of 103 members retrenched by Royal Bafokeng in 2015
- Retrenchment effected into Retrenchment Agreement & CA between Employer & NUM and UASA

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

In the bargaining process leading to the conclusion of those agreements:

- NUM was granted organisational and bargaining rights by Royal Bafokeng as it was the majority union
- UASA was granted the same rights as a minority union
- AMCU, which was also a minority union, was not recognised for bargaining purposes

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

- Both, CA & RA were decided to the exclusion of AMCU and its members
- But
 - RA was extended to apply to certain AMCU members who were retrenched, ito S23(1)(d).
 - The retrenched AMCU members were bound by a full and final settlement clause in the RA

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

Wait for this:

- AMCU members allege that they did not know of the RA until they reported for work on 30 September 2015 and were barred entry and issued with notices of retrenchment.

WOW!!!

WOW!!!

WOW!!!

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

- Dismissal Disputes – not entertained by CCMA – matters settled
 - LC & LAC: Not uphold argument of AMCU that the CA was constitutionally objectionable, as it allowed for a majority union to conclude a CA concerning a retrenchment process to the exclusion of minority unions in the workplace. It also argued that the extension of such an agreement to bind members of minority unions, as in this matter was constitutionally objectionable
 - The LAC – found against AMUC - principle of majoritarianism

AMCU obo Members v Royal Bafokeng Platinum Ltd & Others (2018) continued

Next instalment

- ConCourt
- Argued in late May 2019
- AMCU argue that the majoritarianism principle does not apply to retrenchment processes
- Dept of Labour disagrees in the appeal to the ConCourt and so does Royal Bafokeng

NUMSA / Trident Steel (June 2019)

- Fry's Metal issue
- Important because its an interpretation post the 2014 amendments
- Issue:
 - Claim for automatically unfair dismissal – the reason for dismissals were the refusal by the employees to accept employer's demands in respect of change of conditions of employment in terms of S187(1)(c)
 - S187(1)(c) provides that a dismissal is automatically unfair if the reason for the dismissal is *“a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer”*

NUMSA / Trident Steel (June 2019) continued

- S189A process – in the process of consultation parties agreeing re-grading positions in order to save costs pending finalisation on the structure
- Such consideration necessitating change of condition of employment
- Employees refused amendment of their terms and condition of employment and were dismissed
- NUMSA argued that dismissal automatically unfair

NUMSA / Trident Steel (June 2019) continued

Court

“the question for determination is when operational requirements may justify the dismissal of employees who reject employer demands to amend terms and conditions of employment”

NUMSA / Trident Steel (June 2019) continued

- Held that while employees cannot be dismissed for refusing to accept a demand:
 - can be dismissed if that refusal results in a more dominant or proximate operational necessity
 - legislative scheme of collective bargaining - in line with the constitutional right of Unions and Employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer's power of implementation at impasse

NUMSA / Trident Steel (June 2019) continued

- On facts – dismissals not found to be automatically unfair
- Causation test

NUMSA / Dunlop (June 2019)

- Issue:
 - Dismissal - derivative misconduct, during violent strike
 - No dispute – strike violent
- All striking employees dismissed
- Dismissals – found to be unfair
- No derivative misconduct
- No Impimpi ...

NUMSA / Dunlop – ConCrt, (June 2019)

- Much said in the case about duty of good faith & fiduciary obligations – not subject matter

[67]

- The imposition of unilateral fiduciary obligations on either employees or employers could justifiably be seen as a choice favouring only one side:
 - especially in matters relating to collective bargaining and recourse to strikes or lockouts
 - applied to the context of a violent strike, it requires a recognition of the impact of the violence on both employer and employee

NUMSA / Dunlop – ConCrt, (June 2019) continued

[71]

- In the context of a strike, the imposition of a duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers

NUMSA / Dunlop – ConCrt, (June 2019) continued

[73]

- To impose a unilateral obligation on an employee to disclose information to her employer about the participation of a co-employee in misconduct in a protected strike would be akin to imposing a fiduciary duty on the employee
- In the context of a strike:
 - the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection



Questions