

## Onlangse regspraak/Recent case law

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### *S v Haupt* 2018 (1) SACR 12 (GP)

*Defeating the anomaly of the cautionary rule and children's testimony*

#### 1 Introduction

The origins of the cautionary rule lie in the practice of warning the jury against certain kinds of witnesses, notably accomplices, complainants in sexual cases and young children. This comes from the notion that these witnesses could not safely be relied upon without some kind of corroboration or other form of evidence confirming their trustworthiness. The presiding officer was also required to show that he or she had kept the warning given to the jury in mind. In this way the cautionary rule persisted even when the jury system was abolished (Zeffert & Paizes *Essential Evidence* (2010) 308-309).

The starting point in any criminal matter is that the state must prove the guilt of the accused beyond any reasonable doubt. This must never be lost sight of even where a number of cautionary rules apply. The purpose of the cautionary rule is to assist the court in deciding whether or not the onus on the state has been discharged (*S v Hanekom* 2011 (1) SACR 430 (WCC) at par 8). It should accordingly be borne in mind that satisfying the rule does not in itself guarantee a conviction. The rule is merely an aid in establishing the truth. The final analysis is whether the court is satisfied beyond reasonable doubt that all the evidence presented is essentially true (*S v Francis* 1991 (1) SACR 198 (A) at 205f).

The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. In this regard children's evidence is considered in the same light as that of accomplices and complainants in sexual cases (Prior to 1998, the law took the view that the cautionary rule as it applies to accomplices had to be applied to the evidence of complainants in sexual cases. This rule was, however, abolished by the Supreme Court of Appeal in *S v Jackson* 1998 (1) SACR 470 (A). It was further held in *S v M* 1999 (2) SACR 548 (SCA) at 554-555 that the approach applied in the former case also applied to all cases in which an act of a sexual nature was an element and thus also to the evidence of children. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now also provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence). In terms of the cautionary rule a court should not easily

convict unless the evidence of the child has been treated with due caution. Where the child is also the sole witness the evidence will be regarded with even more caution (*S v Mokoena* 1932 OPD 79 at 80). As a consequence the court will seek corroboration, even though corroboration of a child's evidence is not required by law or by practice. A child's evidence, if not corroborated, will therefore be scrutinised with great care in terms of this rule and will be accepted with great caution (*R v Manda* 1951 (3) SA 158 (A)).

There is no particular age below which the cautionary rule applies. The degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with the age of the child and the other circumstances of the case (*R v Manda* 1951 (3) SA 158 (A); *Wojj v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A). Note that a child means a person under the age of eighteen years. Refer to s 28(3) of the Constitution of the Republic of South Africa, 1996). The court does not enumerate the factors that could increase or lessen the danger, nor does it define the class of children to whom the danger of reliance on the child's evidence is applicable (Joubert *et al The Law of South Africa Vol 9 Evidence* (2005) par 832). However, the younger the child the greater the likelihood that the court will require substantial confirmation of the evidence (*R v Bell* 1929 CPD 478; *De Beer v R* 1933 NPD 30; *R v W* 1949 (3) SA 772 (A); *R v J* 1958 (3) SA 699 (SR)).

In *R v Manda* (1951 (3) SA 158 (A) at 163) the court emphasised that the dangers inherent in reliance upon the uncorroborated evidence of a young child should not be underrated. The court explained (at 163) that the danger involved in the evidence of children can be attributed (among a number of factors) to their "imaginativeness and suggestibility" ... "that require their evidence to be scrutinised with care, amounting perhaps to suspicion" (the court did not elaborate on the other factors). However, in *R v J* (1958 (3) SA 699 (SR)) the court held that although there may be circumstances that necessitate special caution, "the exercise of caution should not be allowed to displace the exercise of common sense" (at 90).

The court's stance in *R v Manda* accords with societal views that were prevalent until the 1960s, namely, that children are inherently more unreliable than adults as witnesses (Spencer & Flin *The Evidence of Children: The Law and Psychology* (1993) 286-287). Conversely, subsequent research in cognitive psychology and child development have challenged these conventional views and led to a realisation that children's ability to be reliable witnesses has been greatly undervalued. This is coupled with research on the reliability of adults' testimony, which has shown that adults' memories may be just as susceptible to suggestion and misinformation (Spencer & Flin 286-287). This has resulted in an awareness that the gap between the abilities of children and adults as witnesses has been exceedingly exaggerated (Schwikkard "Getting somewhere slowly" in Artz & Smythe (eds) *Should we Consent? Rape Law Reform in South Africa* (2008)79).

It is therefore unsurprising that this rule has its critics (see for example Whitear-Nel 2011 “Law of Evidence: Cautionary rule: Single child witness” SACJ 382 at 396; Schwikkard in Artz & Smythe (eds) *Should we Consent? Rape Law Reform in South Africa* 79) and that the South African Law Commission in its report in 2002 (SALC *Sexual Offences Report* Project 107 (2002) at 186) recommended that the cautionary rule relating to children should be abolished unequivocally. The abolition of the cautionary rule in respect of the evidence of children is by no means a novel idea. The trend internationally has been to abolish this cautionary rule. England abrogated the cautionary rule applicable to children’s evidence through section 34(2) of the Criminal Justice Act 1988. In Canada the Supreme Court of Appeal rejected the cautionary rule more than two decades ago (*R v W (R)* (1992) 74 CCC 3(d) 134; *S v B (G)* (1990) 56 CCC (3d) 200). Regionally, in Namibia the cautionary rule relating to children’s evidence has been abolished by the insertion of section 164(4) of the Criminal Procedure Act (51 of 1977; through subsection 2b of the Criminal Procedure Amendment Act 24 of 2003) stating that the evidence of a child should not be regarded as inherently unreliable nor should such evidence be regarded with special caution because of the fact that the witness is a child. Nonetheless, sixteen years later the rule is still being applied in relation to children’s testimony in South Africa. This rule recently formed part of a decision in *S v Haupt* (2018 (1) SACR 12 (GP)) and is the subject of this discussion.

## 2 Facts

The complainant in the case and also the main witness for the state, was a fifteen year-old girl. At the time of the incident she was almost 12 years old. She testified three years later that the appellant, her mother’s boyfriend who resided with them, had on various occasions touched her on her breasts and her vagina. According to her testimony the appellant did so by putting his hand underneath her T-shirt and by placing his hand on her vagina whilst she had a panty on (par 6-9). She also testified that she did not confide in anyone about the incidents at the time, as the appellant was the breadwinner of the family and she was afraid that should he leave they would be left destitute (par 10). The state also led evidence of a Dr Rawat, who testified that the complainant’s external genitalia were swollen, tender and red, but the hymen was intact (par 11).

To contextualise the evidence tendered by the state it is necessary to take note of the fact that the appellant was charged with “the crime of rape” by “inserting his finger into her vagina” as well as with “the crime of sexual assault” by “sucking her breasts and private parts” (par 5).

The appellant testified in his defence. He denied the allegations against him and stated that the false charges were laid subsequent to a financial quarrel with the complainant’s mother (par 12). The appellant was convicted on two counts of attempted rape and sexual assault and was sentenced to respectively twelve years and six years imprisonment

which sentences were to run concurrently (par 1). The appellant's name was also entered into the register for sex offenders (par 1).

The appellant then applied for leave to appeal against his conviction and sentences which was granted by the High Court (par 2). The appellant submitted that the trial court had erred in returning a guilty verdict in that the state had failed to prove its case beyond a reasonable doubt. His submission was based on the fact that the complainant was not only a single witness but also a minor child whose evidence ought to have been treated with extra caution. The appellant further submitted that the complainant's evidence was unclear and contradictory and thus unreliable in material respects (par 13).

### 3 Judgment

In addressing the matter, the High Court commenced by confirming that it is trite that the proper approach to evidence is to look at the evidence holistically in order to determine whether the guilt of the accused has been proven beyond a reasonable doubt (par 16).

In so doing the High Court referred to *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426f-426h where it was stated that:

“But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that the broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

In order to conform to this approach the High Court examined a variety of factors, such as the fact that the complainant was a minor child testifying in a case of a sexual nature in which she was a single witness as well as the time between the alleged crime and the testimony and the testimony itself (par 17-20). The High Court highlighted that as the state relied on the complainant's evidence it was imperative for her testimony to be clear and reliable in all material respects (par 18). The court found that in *casu* this was not the case. The court per Bagwa J held that whilst the complainant was quite clearly an intelligent child, her powers of free recollection, narration and capacity to frame and express appropriate answers were found wanting in some instances. This furthermore manifested in periods of silence or sheer inability to respond to some questions. In some instances she even stated that she did not want to answer the question. Given the charges, the relevant testimony was, the court found, inadequate and at variance with the charges in material respects (par 20). Bagwa J, indicated that, for example “putting a hand to a breast” is totally irreconcilable with “sucking breasts and private parts

of the complainant” (par 20). In addition, he stressed the fact that the complainant had not voluntarily told anyone about the alleged incidents until being prompted about it by her mother (par 24).

In conclusion, the High Court held that, having weighed the strengths, weaknesses, probabilities and improbabilities, it was not persuaded that the state had proven its case beyond reasonable doubt. The court furthermore stated that the trial court had not applied the cautionary rule adequately in evaluating the complainant’s evidence thereby constituting another misdirection. The appeal accordingly succeeded and the conviction and sentence were set aside (par 18, 26-27).

#### 4 Analysis and comments

An assessment of *S v Haupt* reveals that the High Court approached the matter of how to assess the evidence of the child witness (and thus children) from two perspectives. On the one hand it endorsed the cautionary rule referring to the case of *Wojj v Santam Insurance Co Ltd* (1981 (1) SA 1020 (A) at 1027H-1028A) where the latter court stated the following:

“The question which the trial Court must ask itself is whether the young witness’s evidence is trustworthy. Trustworthiness ... depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears ‘intelligent enough to observe’. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion ‘to remember what occurs’ while the capacity of narration or communication raises the question whether the child has ‘the capacity to understand the question put, and to frame and express intelligent answers’ ...”

It should be noted that although *Wojj v Santam Insurance Co Ltd* recognised children’s individuality, the court’s decision was based on the premise that children are inherently unreliable witnesses (Schwikkard “The abused child: a few rules of evidence considered” 1996 *Acta Juridica* 148 at 152).

On the other hand, the High Court followed a more enlightened approach by evaluating the evidence of the child in a fashion similar to that of any other witness in a criminal case. This can be seen from the fact that the court with reference to *S v Hadebe* (supra) and *S v Chabalala* (2003 (1) SACR 134 (SCA) at 139i-140a) stressed that the correct approach to a criminal trial is (paras 16, 25):

“[T]o weigh up all the elements which point towards the guilt of the accused against those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities, and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

*In casu* there were good reasons for treating the child's evidence with caution, which were so noted by the court. This includes the inability of the complainant to answer certain fundamental questions, inconsistencies and contradictions and the lapse of a significant time between the incident complained of and the trial. There were also questions of suggestibility on the part of the mother (par 20-24). The conclusion of the High Court (par 18) that the trial court did not apply the cautionary rules adequately in evaluating the complainant's evidence is therefore undoubtably correct and is supported by the writer hereof.

However, it is submitted by writer hereof, that the same result would have been achieved by the High court without the application of the cautionary rule. By focusing on the case holistically and weighing up all the elements the High Court would be able to, and in fact was able to, base its decision on the basis of the case before the court and not on a generalised notion that children are unreliable witnesses.

This application of a more holistic or enlightened approach can be compared to that of the court in *Director of Public Prosecutions v S* (2000 (2) SA 711 (T)). In *Director of Public Prosecutions v S* the court followed the approach of *S v Jackson* (1998 (1) SACR 470(A) and, referring to trends in countries such as Canada, Ireland, the United Kingdom, Australia and New Zealand, held that the proper approach was not to insist on the application of the cautionary rule as though it was a matter of rote, but to consider each case on its own merits. Although the evidence in a particular case might call for a cautionary approach, this was not a general rule. The court stressed that it could not be said that the evidence of children, in sexual and other cases, where they were sole witnesses, obliged the court to apply the cautionary rules before a conviction could take place (see *S v Jackson* (1998 (1) SACR 470 (A) at 715G-H. In the case under discussion the court *a quo* applied the cautionary rule in respect of all three aspects, namely, the evidence of children in sexual cases where they are single witnesses) What was required of the state, the court held, was to prove the accused's guilt beyond all reasonable doubt. This might require the court to apply the cautionary rule. In *S v M* (1999 (2) SACR 548 (A) at 501) Shakenovsky AJ also held that the correct approach was not to apply a general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court.

Despite what appears to be the application of a more enlightened approach by the judiciary, other recent case suggests the contrary. In *S v Hanekom* (2011 (1) SACR 430 (WCC) the magistrate was criticised for not taking sufficient notice of the two cautionary rules applicable to the case (the complainant was both a sole witness and a child) and for failing to apply them with the degree of attention to detail demanded by the particular circumstances of the case. According to Saner AJ the magistrate had merely paid lip service to the rules (at par 7). The court referred to *R v Manda* (1951 (3) SA 158 (A) and *S v Viveiros* ([2000] 2 All SA 86 (SCA), stating that because of the potentially unreliable and

untrustworthy nature of the evidence, it fully intended to follow the warning against accepting the evidence of children (at par 9-10). In *Maema v S* ([2011] ZASCA 175 (unreported case 1471, 2011, 29/09/2011) at par 14) the Supreme Court of Appeal per Shongwe JA, referring also to *R v Manda*, uncritically accepted the application of the cautionary rule to the evidence of children. In *S v Raghobar* (2013 (1) SACR 389 (SCA) as well the trial court was criticised for merely paying lip-service to the cautionary rule in respect of a sole child witness aged fourteen.

As was already alluded to above the rule has its critics. Whitear-Nel ("Law of Evidence: recent cases" 2011 *SACJ* 382 at 396) expresses the concern, and in my view rightly so, over the fact that the court in the *Hanekom* case did not refer to recent research in the arena of child psychology and development, which shows that children's ability to give reliable evidence has been greatly underestimated. Whitear-Nel states (at 398) that in light of the recent acceptance of the cautionary rule in cases such as *Hanekom* and *Maemu v S* it is becoming evident that the cautionary rule is not likely to be abolished without a constitutional challenge. She emphasises that the time is ripe for change and that South Africa's crime rate with high levels of child abuse and low rates of conviction for such crimes demands that the issue be reconsidered. She stresses, and rightly so, that it is inappropriate or even irresponsible to continue to blindly rely on the authority of old cases such as *R v Manda* and *Wojj v Santam Insurance Co Ltd* to justify the application of the cautionary rule to children (2011 *SACJ* 382 at 398).

Whilst calling attention to the fact that the trend internationally has been to abolish this cautionary rule (Schwikkard in Artz & Smythe (eds) 79) furthermore, Schwikkard emphasises that as the rule is based on discredited beliefs, its application is more likely to lead to error than to the discovery of truth (Schwikkard 1996 *Acta Juridica* 154). A strong argument was therefore made by Schwikkard, which is supported by me, that just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotyped notions and was therefore abolished, so too should the cautionary rule applicable to children be abolished. She submits that the cautionary rules applicable to children are *prima facie* discriminatory in that witnesses are disadvantaged on the basis of age and that this infringement of the equality clause will not pass constitutional scrutiny in terms of the limitation clause (Schwikkard 1996 *Acta Juridica* 154).

It should be noted that advocates for the abolition of the cautionary rule do not suggest that there may not be good reason for treating a child's evidence with caution, but argue that the issue should be decided on the basis of the case before the court and not on a generalised and unsubstantiated perception that children are unreliable witnesses (Schwikkard 2011 *SACJ* 382 at 396. This is in line with the notion held in *S v Jackson* 1998 (1) SACR 470 (A) where the court stated with regard to the former cautionary rule relating to sexual cases (at 476) that,

“evidence in a particular case might call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”).

Section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) affords everyone the right to equality, and section 9(1) guarantees the right to equality before the law and equal protection and benefit of the law. Sections 9(3) and 9(4) describes how this equality should be realised, namely by prohibiting unfair discrimination by the state and by private entities on a non-exclusive list of grounds. One of the grounds listed in section 9(3) is “age”. The effect of this is that any distinction between children and others based on their age will be scrutinised in terms of the Constitution to determine whether it complies with the prohibition on unfair discrimination (Bekink & Brand in Davel (ed) *Introduction to Child Law in South Africa* (2000) 178; Albertyn & Goldblatt “Equality” in Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed loose-leaf updates 35-69). In *Christian Lawyers Association v Minister of Health* (2005 (1) SA 509 (T)) the High Court considered age as a ground for discrimination. In the case in question the applicants challenged the validity of the provisions of the Choice on Termination of Pregnancy Act 92 of 1996 on the grounds that girls under the age of 18 years should not be able to choose to terminate their pregnancies without parental consent as they were not capable of making the decision alone. The court rejected this challenge and concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojapelo J emphasised that everyone is equal before the law and has the right to equal protection and benefit of the law and that any distinction between women on the grounds of age would infringe these rights (*Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) at 528E).

The Constitutional Court has developed a detailed test to be followed when confronted with claims of unfair discrimination. This test assists the court in its decision on whether the state or a private party has unfairly discriminated against any person. The test was first set out in *Harksen v Lane* (1998 (1) SA 300 (CC)) at par 54. It should be noted that although the test was developed under the Interim Constitution it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at par 15.

The Constitutional Court tabulated the test along the following lines (1998 (1) SA 300 (CC) at par 53):

- “(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:



- (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) Secondly, if the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9(3) and 9(4).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.”

In essence, the test means that a preliminary enquiry must be conducted to establish whether the provision or conduct differentiates between people or categories of people. This is a threshold test in that if there is no differentiation then there can be no question of a violation of section 9(1). If a provision or conduct does differentiate between people or categories of people, a two-stage analysis must follow. The first stage concerns the question whether the differentiation amounts to discrimination. The test here is whether the law or conduct has a rational basis. This is the case where the differentiation bears a rational relation to a legitimate government purpose. If the answer is no, the law or conduct violates section 9(1) and fails at the first stage. If, however, the differentiation is shown to be rational the second stage of the enquiry is activated, namely whether the differentiation, even if it is rational, nevertheless amounts to unfair discrimination under section 9(3) or 9(4) (Ngcukaitobi “Equality” in Currie & De Waal *The Bill of Rights Handbook* 6 ed (2013) 209 at 216. Note, however, that the Constitutional Court held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at par 18 that this does not mean that in all cases the rational connection enquiry of the first stage must inevitably precede the second stage. According to the Constitutional Court the rational connection enquiry would clearly be unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable. A court need not perform both stages of the enquiry. If the discrimination is on a specified ground, it would be presumed to be unfair. If the discrimination occurs on an unspecified ground the complainant will have to establish that the discrimination was unfair (Albertyn & Goldblatt 35-75).

If the discrimination is found to be unfair a court will proceed to the final stage of the enquiry as to whether the provision can be justified under section 36 of the Constitution, the limitation clause (Albertyn & Goldblatt 35-80). This final stage, according to the Constitutional Court,

“involve[s] a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality” (*Harksen v Lane* 1998 (1) SA 3009 (CC) at par 52). However, this stage only applies to discrimination in terms of law of general application since it is only such discrimination that can be justified under the limitation clause (*Albertyn & Goldblatt* 35-81).

As was stated above the cautionary rule originated from the notion that the evidence of these witnesses could not safely be relied upon without some kind of corroboration in the form of other evidence confirming their trustworthiness. This rule differentiates between children and other witnesses on the ground of age. The rule also differentiates between children in sexual cases and children in other criminal cases (see Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 that provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence. See also *S v M* 1999 (2) SACR 548 (SCA) at 554-555 where the court held that the approach applied in *S v Jackson* 1998 (1) SACR 470 (A) also applied to all cases in which an act of a sexual nature was an element and thus also to the evidence of children). It is hence submitted that as the rule is based on outdated and discredited beliefs about the trustworthiness of child witnesses and is void of a clear rationale for its application it will be difficult to pass constitutional muster. It therefore calls for abolition of the cautionary rule as a rule of general application.

Notwithstanding the abovementioned criticism, the legislature has to date not enacted legislation abolishing the cautionary rule, nor has the judiciary done so through the development of the common law. It should be noted that in terms of sections 173 of the Constitution the courts have the inherent power to develop the common law, taking into account the interest of justice. When fulfilling this power courts must do so in a manner that promotes the spirit, purport and objects of the Bill of Rights (see s 39(2) of the Constitution). The duty and power to develop the common law have manifested themselves in a few important constitutional decisions in recent times. See for example *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C); *S v Thebus* 2003 (6) SA 505 (CC); *Masiya v Director of Public Prosecutions, Pretoria* 2007 (5) SA 30 (CC). It is however not within the scope and extent of this article to analyse the legal position extensively). In lieu of this deferment, it is submitted that the onus to approach the judiciary to develop the common law will have to fall on NGOs, such as the Centre for Child Law.

## 5 Conclusion

As was alluded to above, the essential question in any criminal matter is whether the state has proven its case beyond a reasonable doubt. The

cautionary rule should not be allowed to be a substitute for the test of proof beyond a reasonable doubt. Judicial officers are expected to evaluate evidence properly and objectively. This should be conducted as a whole and against all probabilities in order to arrive at a just and fair conclusion. Judicial officers are trusted to weigh the evidence correctly in order to distinguish between trustworthy and unreliable evidence (See *S v Haupt* par 16; *S v Hadebe* at 426f-426h; *S v Chabalala* at 139i-140a). If the witness's evidence is found to be unreliable, the court may reject it. Even though it may be necessary in a *particular* case to approach the evidence of the child with caution it does not mean that a *general* cautionary rule should be applied. *S v Haupt* represents an example of such a case and illustrates that it is possible to reach a fair conclusion without the application of a general cautionary rule.

In conclusion it is submitted by writer hereof that the abolition of the cautionary rule should no longer be postponed but should receive serious attention. A call is accordingly made to NGOs to challenge the constitutionality of the rule, thereby ensuring that child witnesses receive equal protection and benefit of the law similar to that of other witnesses in criminal cases.

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## **Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the “knock on effect” on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]**

### **1 Introduction**

The Labour Relations Act (Act 66 of 1995) (LRA) aims *inter alia* to promote orderly collective bargaining, collective bargaining at sectoral level and to advance the democratization of the workplace (section 1 of the LRA). This is in keeping with the right of trade unions, employers and employers' organisations to bargain collectively enshrined in section 23(5) of the Constitution of South Africa, 1996. The end product of collective bargaining is a collective agreement as defined in section 213 of the LRA. Collective agreements are an effective tool to regulate terms and conditions of service and other matters of mutual interest (Du Toit (ed) *et al Labour relations Law* (6th ed) (LexisNexis 2015) 309). These collective agreements are capable of being extended to other parties who

are not signatories thereto. Two possibilities of extension are envisaged in section 23(1)(d) and section 32 of the LRA. Section 23(1)(d) provides that a collective agreement binds employees who are not members of the trade union or trade unions party to the agreement provided that three conditions are met, *viz* the employees are identified in the agreement; the agreement expressly binds the employees; and the trade union or trade unions concluding the agreement enjoy majority membership of employees employed in that workplace (See *Fakude & others v Kwikot (Pty) Ltd* [2012] ZALCJHB 169 par 34). The extension envisaged in section 32 relates to collective agreements concluded at a bargaining council and which require the endorsement of the Minister for them to be extended to an entire sector. The Constitutional Court in *AMCU v Chamber of Mines of South Africa CCT87/16* [2017] was faced with a contended section 23(1)(d) extension applicable at workplace level.

A difficulty arises where an extended collective agreement limits certain rights enshrined in the Constitution. In the *AMCU* case, the extended collective agreement limited the non-party trade union and non-party employee's right to strike for matters relating to wages and conditions of employment. The right to strike is a very important bargaining tool for workers and trade unions and is protected by section 23(2)(c) of the Constitution and section 64(1) of the LRA. This limitation is triggered in terms of section 65(1)(b) of the LRA which proscribes any person to partake in a strike if that person is bound by a collective agreement that prohibits a strike in respect of a particular dispute. This difficulty is compounded by situations where the business of the employer operates at different geographical locations (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 36). The question that arises is whether the different sites constitute separate workplaces or remain a single workplace. The LRA defines a workplace as 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 (section 213 of the LRA). The Constitutional Court in *AMCU* was faced with this question coupled with a constitutional challenge to the principle of majoritarianism embedded in the scheme of the LRA. This note provides a conspectus of the facts and the decision of the court. Moreover, it discusses the rationale for a provision such as section 23(1)(d), the meaning of a "workplace" as defined in the LRA and explicated by the court. International and foreign law comparators are drawn to make the point that the practice of extending collective agreements to non-parties is not peculiar and lastly some remarks on the limitation of the right to strike are made.

## 2 Factual matrix of the case

In 2013 the Chamber of Mines of South Africa engaged in negotiations on wages and conditions of service on behalf of its members in the gold

mining sector. The mining companies represented by the Chamber of Mines were Harmony Gold, AngloGold Ashanti and Sibanye Gold. The chamber of mines entered into these negotiations with the National Union of Metalworkers (NUM), Solidarity and the United Association of South Africa (UASA) as they represented the majority of workers in the sector. The applicant, Association of Mineworkers and Construction Union (AMCU), was also invited to these negotiations as it represented a minority of workers sector-wide but had a majority membership in certain individual mines. These negotiations culminated in a collective agreement that was accepted and endorsed by all the parties except AMCU. This agreement dealt with wages and other conditions of employment. Moreover, the agreement explicitly stated that it was an agreement as contemplated in section 23(1)(d) of the LRA. Among other provisions, it stated that no party bound by the agreement could call for a strike or lockout in respect of issues dealt with in the agreement for as long as it subsisted. Although the collective agreement expressly made itself applicable to all employees working for the represented mining companies, AMCU maintained that its members were not bound by the agreement since it was not a party thereto. Perhaps it serves justice to mention that the issues raised by AMCU were legitimate and related to the very dignity and livelihood of mineworkers. The union was demanding a R12 500 basic salary for its members (Mapenzauswa and Shabalala “AMCU accepts Sibanye Gold new wage offer” 10 April 2016 *Moneyweb* accessed at <https://www.moneyweb.co.za/news/companies-and-deals/amcu-accepts-sibanye-gold-new-wage-offer/> (accessed on 2018-06-08)).

In 2014 AMCU served the three mining companies with a notice to strike over the same issues dealt with in the agreement. The Chamber of Mines approached the Labour Court for an urgent interdict proscribing the strike. The urgent interdict was granted and on the return day, the Court confirmed the order. AMCU then lodged an appeal against this interdict to the Labour Appeal Court and that appeal was dismissed. The matter was then brought to the Constitutional Court as there was evidently a challenge on the constitutionality of s23(1)(d)(iii) read with s65(3) of the Labour Relations Act. Apart from the issue of jurisdiction, the Constitutional Court had to make a determination on the meaning of a “workplace” for purposes of s23(1)(d). Furthermore, the Court had to decide on the constitutionality of limiting the right to strike, the right to collective bargaining and the right to freedom of association in terms s23(1)(d) read with s65(3) of the LRA.

AMCU argued that each individual mine and operation was a separate “workplace” for purposes of s23(1)(d) and that the collective agreement did not extend to those workplaces where it had a majority and thus it was entitled to strike in those mines or operations. It argued that the forum in which the agreement was concluded operates as a bargaining council although not recognized or registered as such, therefore an extension of the agreement, if any, had to take place in terms of section 32 of the LRA. Section 32 provides that the Minister of Labour may

extend a collective agreement concluded in a bargaining council provided that the majority unions and majority employers involved vote in favour of such an extension. AMCU therefore contends that what the Chamber is doing is in fact sidestepping of the requirements of section 32. In the alternative, AMCU challenges the Constitutionality of section 23(1)(d) in that it unjustifiably limits the right to strike, to bargain collectively and to freedom of association. Lastly, the union argued that the section 23 extension offends the rule of law in that it constitutes exercise of public power with no oversight or remedy in cases of abuse of such power and the private actors who exercise such power are not bound by the duties of public administration and public interest in section 195 of the constitution. This note limits the analysis to the two former issues and does not deal with the rule of law argument, which the court responded to adequately.

### 3 Decision of the Court

With regards to the meaning of a “workplace”, the court considered arguments that discourage any notion that the term as used in section 23(1)(d) may mean a single place where a worker works as the word may be used in common parlance (par 26). It was pointed out that a workplace is not the place where every single employee works, such as that individual employee’s desk or office. Rather, it is where employees collectively work. This construction is more in line with the promotion of orderly collective bargaining as the object of the Act. Moreover, the court pointed that functional organisation is more important than location. The definition envisages a place or places where employees work denoting the possibility of multiple locations where work is being carried out. An important consideration is whether an operation is independent and not where it is located (par 27). What is more important is whether the operation at separate locations are independent of each other. The term “workplace” therefore does not have its ordinary meaning for purposes of the LRA (par 29). The question whether the different mines at which AMCU enjoyed majority constituted separate workplaces therefore becomes a factual one bearing in mind the statutory definition of a workplace (pars 30-31). Factual evidence relating to organizational methodology, processes and procedures was led in the Labour Court and the Labour Appeal Court and both courts could only conclude that the individual mines did not constitute workplaces or independent operations. Some of the evidence produced by the mining companies showed that the mining licenses were held by the mining companies and not by the individual mines they operated (*Association of Mineworkers & Construction Union v Chamber of mines of SA acting in its own name & obo Harmony Gold Mining Co (Pty) Ltd [2016] ZALAC 11* pars 55-57). All the mines owned by the mining companies are controlled from one central head office where all production and financial planning take place (*ibid*). Financial management; human resources; IT systems and procurement are all centralised (*id*). The mining companies were the employers and not each individual mine (*id*). The court agreed with AMCU that the exercise it had to engage in was both interpretational and factual (pars

34-36). Considering these factors, the court concluded that there is no reason to regard each AMCU-majority mine as a separate workplace and deviate from the statutory definition (pars 38-39). It was held that the extension of the agreement to AMCU members at the AMCU-majority mines was valid (par 40).

The court then turned to deal with the constitutional attack on section 23(1)(d). It extrapolated the gist of AMCU's challenge against the application of the principle of majoritarianism recurrent in the LRA (pars 42-43). AMCU contended that the tenets of section 23(1)(d) infringed upon the right to strike and the right to freedom of association. Using the words of Zondo JP, as he then was, in *Kem-Lin Fashions CC v Brunton [2000] ZALAC 25*, Cameron J made the point that the legislature made a policy choice and that choice was that the will of the majority must prevail and that the LRA had numerous provisions illustrating this policy standpoint (par 43). This was done to promote orderly and productive collective bargaining. Section 23(1)(d) enhances the power of the majority union within the workplace (par 44). Granted, the codification of the principle of majoritarianism in section 23(1)(d) limits the right to strike. However, such a limitation is reasonable and justifiable given the purpose of the limitation; the fact that the limitation only subsists for the duration of the agreement and that it limits the rights for specific issues *viz* wages and conditions of service (pars 50 & 58). The court further pointed out that the principle of majoritarianism has been recognized by the court in *TAWUSA v PUTCO Ltd [2016] ZACC 7 (CC)* where Khampepe J said that majoritarianism in the context of section 32 only finds application after a collective agreement has been concluded and the majority seeks to extend it (par 57). The same applies with regards to a section 23(1)(d) extension. AMCU's contention that the extension offends the rule of law was also rejected by the court (pars 82-87).

## 4 Discussion

### 4.1 *The rationale for section 23(1)(d)*

Section 23(1)(d) is a minuscule provision with serious ramifications. Before the introduction of the LRA, there existed a legal *lacunae* and uncertainty with regards to the binding effect of collective agreement (Du Toit (ed) *et al* 311-312). Only collective agreement concluded at the industrial councils had a binding effect and were in fact regarded as subordinate legislation (Vauthier "Collective agreements: A comparative study between Belgium and South Africa" (1998) Unpublished LLM dissertation (University of South Africa) 82). The labour courts, however, have always expressed that the will of the majority, provided that it is in the interests of both the majority union and majority of the affected workers, should prevail over that of an individual (*Ramolesane & another v Andres Mentis another* (1991) 12 ILJ 329 (LAC) par 335H, See also Du Toit "An ill contractual wind blowing collective good? Collective representation in non-statutory bargaining and the limits of union authority (1994) 15 ILJ 39). The courts were therefore supporting the

position that collective agreements negotiated by majority unions and in the interests of the majority workers bound the parties thereto and bound the minority irrespective of the forum they were negotiated (*ibid*).

Section 23 of the LRA removed this uncertainty and gave all collective agreements, as defined in section 213 of the Act, a statutory binding effect (section 23(1)(a) of the LRA). Section 23(1)(d) confirms the legislative policy of governance by majority as it allows the majority to extend a collective agreement and bind minority union members and non-unionised employees. The Labour Appeal Court has stated that a trade union that enjoys majority in a workplace may conclude a collective agreement with an employer and extend that agreement to bind all employees of that employer. This includes those employees who are not members of the union, those who may have been its members and resigned and those that the employer is still to employ in the future (*Mzeku and others v Volkswagen SA (Pty) Ltd and others* [2001] 8 BLLR 857 (LAC) pars 55 and 67).

Section 23(1)(d) is amongst numerous sections in the LRA which encapsulate the legislative policy choice of majoritarianism. That choice is based on the legislature's assumption that it would best serve the primary objects of the LRA of labour peace and orderly collective bargaining (*Aunde South Africa (Pty) Ltd v NUMSA* [2011] 10 BLLR 945 (LAC) par 32; see Cohen "Limiting organisational rights of minority unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" (2014) 17.5 *PER* 2211. See also Du toit (ed) *et al Labour Relations Law* (6th ed) (LexisNexis 2015) 283-284).

The Labour Court remarked that if the minority employees represented at the workplace by AMCU were to succeed and have a new wage agreement to come about and to supplant the existing collective agreement, the minorities would be governing the majority in the workplace and that would be an undesirable outcome (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 44). Section 23(1)(d) also serves to discourage the proliferation of minority unions in one workplace which is in keeping with the majoritarian preference in the Act. Although the Act provides for the recognition and endorsement of minority unions, a reading of provisions such as section 21(8)(a) which encourages commissioners faced with a dispute regarding the representativeness of a union to seek a solution that minimizes proliferation of unions in a single workplace. This also helps minimise the financial and administrative burden of having to provide stop-order facilities and office space to many unions in one workplace (*SA Commercial Catering & Allied Workers Union v The Hub* (1999) 20 ILJ 479 (CCMA) 481).

The Labour Appeal Court alluded to the Constitutional importance of section 23(1)(d) (*AMCU v Chamber of Mines acting in its own name & obo Harmony Gold Mining* [2016] ZALAC 11). To really appreciate the importance of this provision, one has compare it with its equivalent in



section 31. Section 31 deals with the binding nature of collective agreements concluded in a bargaining council (*ibid* par 42). The provisions of section 31(a)-(c) are similar to those in section 23(1)(a)-(c) (*ibid*). Collective agreements concluded in bargaining councils are capable of extension in terms of the mechanism in section 32. Section 23(1)(d) serves to extend agreements concluded outside a bargaining council (*ibid*). This provision therefore ensures that the absence of a bargaining council does not preclude the exercise of the right to collective bargaining enshrined in the Constitution (*ibid* par 47).

What happens in a situation where a minority union has concluded a collective agreement that in conflict with a collective agreement extended in terms section 23(1)(d)? Du Toit opines that the extended collective agreement must prevail as it sanctioned statutorily (Du Toit (ed) *et al* 313). It is submitted that even if the trade union had its way and concluded a separate agreement in conflict with the majority, a proper application of the law will see the will of the majority prevail. This is called workplace democracy (Cohen 2210 & 2218). This also shows the consistency in the majoritarianism characterizing the whole LRA and the role section 23(1)(d) plays towards this (Kruger & Tshoose “The impact of the Labour Relations Act on minority trade unions: A South African perspective” 2013 (16) 4 *PER* 288-289).

#### **4 2 “Workplace” envisaged in section 23(1)(d)**

The statutory definition of a “workplace” was supplied in the introductory remarks above. This definition is exclusively applicable to the private sector. Whether a site constitutes a “workplace” is a question of fact. The meaning of the term is incontrovertible in a situation where all employees work in one place. That is their workplace. However, in situations such as the one in this case, where there is locational multiplicity, the separate locations may be separate workplaces but they are also capable of constituting a single workplace (*Chamber of Mines v AMCU & others supra* par 32, Thompson in Cheadle *et al Current Labour Law* 1997 (Juta Cape Town 1994) 3). Deciding whether two or more locations are separate workplaces entails an examination of the extent to which they operate independently of each other, which in turn entails a consideration of the size, function and organisation of each (Brassey *Commentary on the Labour Relations Act* (Revision Service 2) (Juta Cape Town 2006) A9-35–A9-36). The correct procedure to determine if a site constitutes a workplace, requires on to look at the facts of a particular case with the definition in mind (*SA Commercial Catering & Allied Workers Union v The Hub (supra)*, *AMCU v Chamber of Mines of South Africa supra* par 30-31)

In terms of the definition in section 213, the criterion to determine if two or more places of work owned by the same employer constitute separate workplaces, requires on to consider their size, function or organisation. The meaning given to a word in terms of this section applies throughout the entire Act unless the context in which it is used

indicates otherwise (*AMCU v Chamber of Mines acting in its own name & obo Harmony Gold Mining supra* par 49-51). A determination that the statutory definition is applicable to the term “workplace” means that the extension of collective agreements in terms of section 23(1)(d) encompasses the entire workforce irrespective of the geographic location. As the Constitutional Court held, the “workplace” envisaged in section 23(1)(d) is the same as the one contemplated in section 213.

### **4 3    *Limitation on the right to strike***

The Constitutional Court has recognised the historical and contemporary importance of the right to strike in safeguarding the dignity of workers and to enable them to assert their bargaining power in labour relations (*NUMSA & others v Bader Bop & another* [2003] 2 BLLR 103 (CC) par 13). This right is an important component of a successful collective bargaining system (*ibid*). Therefore, this right is not an end to itself but a means to an end. The end product is effective collective bargaining that enables the workers to influence the terms and conditions of employment (*Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par 50). Provisions such as section 65(1)(a) imposes a limitation on this right by prohibiting employees bound by a collective agreement that proscribes a strike in respect of the issue in dispute. As noted by the court, the limitation fashioned by the section 23(1)(d) extension on the right to strike is merely a “knock on effect” as the provision is not meant to limit the right but to extend collective agreements (*AMCU v Chamber of Mines of South Africa CC* par 44, See also *Chamber of Mines v AMCU & others* (J 99/14) [2014] ZALCJHB 13 par (54). Section 65(1)(a) of the LRA prohibits employees from embarking on a strike if the issue in dispute is regulated by a collective agreement.

Section 23 of the LRA deliberately limits the right to strike in order to attain orderly collective bargaining and fair and expeditious resolution of disputes. The limitation may be generally unfair, however, depending on the circumstances of a particular case it may be justifiable (*National Union of Metalworkers South Africa obo members' v South African Airways Soc Limited & Another* [2017] ZALAC 32 par 34). To check the justifiability of the limitation, we have to hold it against the section 36 scrutiny. Section 36 of the Constitution provides that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Factors such as (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 alternatives means to limit the right while achieving the same purpose, should be taken into account.

Although the court did not deal with these factors one by one, the judgment shows that they were considered. The limitation imposed by the provision does not abrogate the right categorically and the extension does not preclude the minority from joining or participating in the collective bargaining process (Cheadle “Collective bargaining and the

LRA” 2005 (9) 2 *Law, Democracy & Development* 153). It only means that when there is disagreements about the issues regulated by the collective agreement, there will be no strike. This is referred to as a peace clause inserted in favour of the employer (Rautenbach “The constitutionality of statutory authorization to conclude collective agreements that bind non-parties not to strike” 2017 (4) *TSAR* 863). Pienaar and Badenhorst posit that in this particular case there is no less restrictive means of achieving the purposes of orderly collective bargaining (Pienaar & Badenhorst “Minority trade unions are bound by extended collective agreements” Employment Alert May 2015 available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2015/employment/downloads/Employment-Alert-18-May-2015.pdf> (accessed on 2018-06-01)). Rautenbach argues that adding a requirement of administrative approval by an executive or administrative organ similar to the section 32 procedure would be a less intrusive way to limit this right (Rautenbach 864-865). This author asserts that administrative control, even if the scope is very limited, serves as a procedural safeguard because the exercise of such discretion must comply with rules of administrative law and may not violate the right to just administrative action (*ibid*). The court had an opportunity to justify why the legislative policy of majoritarianism could not be subjected to judicial review because it was now part of legislation and was clearly limiting rights. The court should have dealt with this aspect instead of just mentioning that the policy choice justified the limitation of the right to strike.

#### 4 4 Foreign and international comparators

The Constitutional Court agreed with the National Union of Mineworkers’ (NUM) submission that majoritarianism is internationally recognised as a tool to enhance collective bargaining (par 56). Among the instruments considered was article 5(1) of ILO Collective Agreements Recommendation, 1951 (No 91) (Collective Agreements Recommendation) which states that measures should be taken, where appropriate, to extend the application of all or certain clauses of a collective agreement to all employers and workers within a certain industrial and territorial scope of the agreement (See ILO policy brief by Visser, Hayter and Gammarano “trends in collective bargaining coverage: stability, erosion or decline?” accessed at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_409422.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_409422.pdf) (accessed on 2018-06-08)). The report of the 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) expresses a view that the extension of collective agreements to non-parties is not contrary to the principle of voluntary collective bargaining and does not violate Convention 98 of the ILO. The court noted that, in fact, international instruments require a mere sufficient representation to extend agreement to bind non-parties and not majority. Article 5(2) of the Collective Agreements Recommendation provides that national legislation may make collective agreements extendable to non-parties

subject to *inter alia* the condition that the collective agreement already covers sufficiently representative employers and workers. Lastly, the court considered the Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5 ed, 2006). This instrument stipulates in pars 356 and 1052 that the extension of a collective agreement to cover non-parties does not in principle contradict the principles of freedom of association since under the law, the most representative organisation negotiates on behalf of all workers (*ibid* fn 55 and 56).

The Organisation for Economic Co-operation and Development (OECD) countries (the OECD is made up of the following member countries: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States) have two legal mechanisms in which they extend collective agreements to non-parties (Traxler “Collective bargaining: levels and coverage” in OECD *Employment Outlook* (1994) 178-179). The first is to extend a collective agreement to bind everyone within a particular sector or region generally (*ibid*). This extension is usually sanctioned by the Labour Ministry of the country provided that certain preconditions are met. For example, in Germany the bargaining parties concluding the agreement must represent at least 50 per cent of employees within that sector (*ibid*). The second mechanism is commonly referred to as an enlargement. This type of extension binds employers and employees in a sector or geographical area outside the domain of the collective agreement if they are economically similar to those covered in the agreement (*ibid*). Member countries such as Austria, Belgium, France and Portugal have a significant number of collective agreements that are regularly extended (*ibid*). Provisions for extending collective agreements are made in the Japanese labour legislation although these are seldom used. Norway and Sweden have highly centralised bargaining systems but do not have extension mechanisms (*ibid*). Collective agreements relating to welfare issues such as pension and training are extended by the state based on the principle of *erga omnes* (towards all or towards everyone) in Denmark, France, Germany and the Netherlands (Trampusch “Industrial Relations as a Source of Solidarity in Times of Welfare State Retrenchment” (2007) 36(2) *Journal of Social Policy* 206-210).

Out of the 27 European Union (UE) member states, 21 have legal provisions to extend collective agreements to non-parties (Kerckhofs “Extension of collective bargaining agreements in the EU: Background paper” 2011 *Eurofound* 1 available at [http://www.bollettinoadapt.it/old/files/document/15105EF\\_collectivebar.pdf](http://www.bollettinoadapt.it/old/files/document/15105EF_collectivebar.pdf) (accessed on 2018-06-06). Extension of an agreement in the UE is normally done by means of an administrative decision by the labour ministry, a publication in an official journal, or both. Usually, there’s a precondition relating to the threshold levels of the bargaining parties.

## 5 Conclusion

The decision of the court in *AMCU* demonstrated that the impugned section 23(1)(d) of the LRA can withstand constitutional scrutiny, especially when considered in conjunction with the policy of majoritarianism embedded in the LRA. A challenge to the provision is also a challenge to the legislative policy chosen by the legislature and this has a far-reaching effect as it involves the whole scheme of the Act and not just section 23(1)(d). In any case, the union that sought to attack the principle wanted to rely on its majority representation in some mines of the employer. This is therefore a self-defeating exercise. The judgment has also highlighted the constitutional importance of this provision. It has shown that section 23(1)(d) ensures that employees whose trade union operates outside a bargaining council can still exercise their right to collective bargaining effectively. The note has considered the significance of the right to strike but that it is not absolute and the limitation imposed upon it is merely collateral and justifiable in an open and democratic society. Lastly, consideration of international and foreign jurisprudence demonstrates the international recognition and acceptance of the practice. Furthermore, it vindicates the importance of section 23(1)(d) with its specificity because in most EU countries, agreements are extendable to entire sectors through some administrative action. Section 23(1)(d) creates the possibility to extend within one employer but encompasses all the workers.

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