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# Collective bargaining agreements are valid - whether or not all employees agree

By Johan Botes

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Protection of employment during business transfers is an integral piece in the employment law legal puzzle in many jurisdictions around the world. South Africa is no exception. Employees enjoy statutory safeguards against termination or changes to the terms and conditions of employment. So, imagine the surprise of some employees when they were told that they may be subject to a reduction in their workforce prior to a business transfer, to give effect to a demand by the purchaser of the business. Such conduct is expressly prohibited under the Labour Relations Act. The Labour Court, however, agreed with the employer that its conduct did not fall afoul of its legal obligations in respect of the employees or the business transfer.



In *National Union of Mineworkers & others v Anglogold Ashanti & others* (judgment delivered 19 October 2018), the court considered whether the collective bargaining agreement reached with the majority trade union could vary the statutory consequences of a business transfer, including protection against termination or changes to benefits.

The employer engaged in redundancy discussions with the trade unions about redundancies across its underground and surface operations, including the hospital that later became the subject of the business transfer. In an effort to avoid or minimise redundancies, it agreed that it would sell off distressed assets where buyers could be found. A prospective purchaser expressed interest in the hospital operation but was unwilling to take over all existing staff. The old employer concluded a collective labour agreement with the majority trade unions whereby employees would be categorised into two lists: those who would transfer and those facing redundancy. The National Union of Metalworkers staff went on strike and sought to interdict the termination of those employees on the 'B' list.

## For the collective good

The court considered whether employees, who did not consent to the issues covered in the collective labour agreement, would be subject to the terms of the agreement. This collective bargaining agreement, once implemented, would result in the employees' redundancy. As such, this appears to be a draconian example of individual rights sacrificed on the altar of collective expediency. Or is it?

Our employment law balances individual and collective labour rights. In the interest of sound employee relations, orderly collective bargaining and, arguably, legal certainty and business efficacy, our law allows employers to conclude collective labour agreements with a trade union on any matter of mutual interest. The agreement, on general principles, applies to the parties to the agreement, typically the employer and the trade union. The agreement also applies to the members of the trade union, which is no surprise as the trade union represents its members at such negotiations.

However, the legislature also allows for this collective agreement to be extended to parties other than those who concluded the agreement or were represented by agents at the negotiations. If the trade union represents (or more than one trade union acting in concert represent) the majority of workers in a workplace, the agreement may be extended to all workers in that workplace.

## Loss vs gain

This is not controversial where non-parties gain rights. Where a wage agreement concluded with the majority trade union is extended to other workers in the workplace, they are unlikely to object to receiving the negotiated salary increase. But what happens when rights are forfeited as part of the horse-trading that typifies labour negotiations? Should non-parties have to sacrifice other benefits exchanged for a salary increase by the trade union? Even more pressing - should employees forfeit the right to have their individual interests taken into consideration before a decision is made to terminate their employment?

The Labour Appeal Court had previously confirmed that a collective bargaining agreement can be extended to non-parties in the context of redundancies. Non-parties can thus be bound by an agreement reached between an employer and a majority trade union where the latter two agreed on who is to be made redundant, who will be saved from the termination and what payments will be made. By extension, such an agreement could even include a waiver and release, whereby the trade union agrees to a payment to be made to terminated employees in return for a waiver and release of claims.

The court in NUM, above, agreed that there is nothing in our law that prevented the collective bargaining agreement from being extended to other employees in the same workplace. Parties may agree to vary the statutory consequences of a business transfer. Employees can agree that they will not automatically transfer, that they will transfer on different benefits, or that they will be terminated (with or without settlement of claims). In law they can be represented by a trade union during such negotiations, and where they are not members of the majority trade union, they may have their rights impacted by an agreement reached between the majority trade union and their employer.

There is an interesting debate on whether the import of such a decision will prompt non-members to join majority trade unions or whether organised labour will face greater concerns from employees feeling alienated by this venerable movement. For employers, the important take-away is that there is value in the sound management of collective labour relations, especially during times of business transfer, redundancy or change. Where a business can only be transferred after reducing the staff complement, a collective bargaining agreement with a majority trade union provides protection against claims of automatically unfair termination.

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