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# EMPLOYMENT ALERT

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*Section 32 includes a Ministerial discretion upon extension, but there is no such mechanism in s23 to protect minority unions from an extension of agreements that impact their members' rights outside a bargaining council regime.*



Back in 1995, the drafters of the Labour Relations Act (LRA) made a policy choice to discard the previous duty to bargain in favour of a system of voluntary collective bargaining, preferably at sectoral level, underpinned by the principle of majoritarianism.

The aim was to achieve industrial peace and the democratization of the workplace. The impact would be to minimize the proliferation of trade unions that would compete for members in that space. An example is the provision in the LRA which allows collective agreements, concluded outside a bargaining council between the employer and majority union at the workplace or at enterprise level, to be extended to bind non-unionized employees and any minority unions that are not party to such an agreement. These are known as s23 extensions.

With the recent strife in the mining and agricultural sectors many have been of the view that collective bargaining has been facing a challenge. The Framework Agreement concluded by representatives of Government, organized labour and business in the mining sector during October 2013 recognized that while majoritarianism had served South Africa's system of industrial relations effectively in the past, it appeared to be causing unintended consequences in infringing upon the rights of minority unions. The challenge is that the LRA is not addressing minority unions' complaint that private actors are determining their fate in collective bargaining outcomes without their consent.

The Marikana Tragedy of August 2012 illustrates the frustration of employees who had lost faith in NUM but went it alone to coerce Lonmin to concede to their demands. A lengthy unprotected and violent strike was pursued outside recognised bargaining structures which breached the existing two year wage agreement,

concluded with NUM in 2011, which had been lawfully extended to non-parties.

During 2013, AngloGold Ashanti workers led a campaign to change Saturday working arrangements governed by agreements concluded with NUM, a union which they no longer supported. They joined AMCU. The employer rightly claimed that these collective agreements remained binding for its duration.

In 2013, in the gold sector, AMCU endeavoured to mount a strike over wages, the protected nature of which depended upon the interpretation afforded to the statutory term 'workplace'. In the earlier Labour Court decision of *Chamber of Mines acting in its own name and on behalf of Harmony Gold Mining Co Ltd & Others v Association of Mineworkers and Construction Union & Others*, AMCU contended that the wage agreement concluded by all the other unions with the Chamber of Mines (COM) and extended to non-parties, constituted a sectoral determination which should have been extended in terms of s32 of the LRA. However, s32 had no application because there is no registered bargaining council in this sector. It is noteworthy that s32 includes a Ministerial discretion upon extension, but there is no such mechanism in s23 to protect minority unions from an extension of agreements that impact their members' rights outside a bargaining council regime. AMCU argued that the gold producers' individual mines were separate workplaces. The Labour Court held that the test is not whether a union has a majority or particular level of representivity at a specific mine

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CONTINUED

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within each gold producer, but focuses instead on "whether the operations carried on by the employer in different places are 'independent' of one another". The COM contended all the mines of each gold producers constituted a 'single workplace' for centralized collective bargaining purposes. This was the result of rich historic, powerful bargaining patterns that served the purpose of ensuring parity in conditions of employment and hence labour stability could be achieved. The s23 extension impacted AMCU's members as it curtailed their constitutional right to collectively bargain and strike. The Labour Court held that where the s23 extension applied across such 'single workplace', there could be no valid challenge to the constitutionality of s23 as the right to strike carries limitations and the existence of an extended collective agreement, thereby prohibiting a strike, was such an example.

AMCU did not accept this outcome and applied for leave to appeal in the Labour Appeal Court which handed down judgment, in late March 2016.

The Labour Appeal Court concurred that the COM is not a bargaining council and that AMCU's quest for Ministerial approval ahead of any extension of a collective agreement taking effect had no application. AMCU's argument that it could not be bound by a wage agreement that it did not sign was not sustainable, as it was contrary to the clear wording of s23 which does not require a signature to make such agreement binding by extension.

The Labour Appeal Court went further and held that AMCU's very argument undermined collective bargaining and the policy of majoritarianism which had been carefully selected by the 'lawmakers' when the LRA was first constructed. The fact that s23 limits a minority union's right to strike over wages, once the wage agreement is concluded with the majority union and is

extended, is a limitation that is reasonable and justifiable and not in conflict with the Constitution. It found that the majoritarian principle was also not in conflict with international standards. It was apparent to the Court that AMCU had accepted the legitimacy of such extensions but only took issue with s23 because it does not have the Ministerial oversight that applies when a collective agreement concluded in a bargaining council is extended to non parties.

## **AMCU's appeal was dismissed.**

This is unlikely to be the last word on the matter. However, the voluntarist model, chosen by the legislature and applied by our Courts, should not be discarded but there could be room for improvement. Most countries in Europe provide for extensions. Interestingly, Ireland requires the registration of a collective agreement by its Labour Court if it is to be extended, and only minimum wages and conditions of employment can be the subject of such extension. In some European jurisdictions one or both parties must request that extension as it is not automatic. In Germany, its Minister of Labour and Social Affairs can extend a collective agreement if that is deemed to be in the public interest. Under Australian law, its Fair Work Commission exercises oversight when approving enterprise agreements and their implementation. It determines whether the enterprise agreement satisfies the 'better off overall test' requiring that employees covered by the enterprise agreement would be in a better position if the agreement was extended.

The institution of collective bargaining is indeed resilient, but our law needs to support it effectively to ensure its long term survival.

.....  
*Fiona Leppan*



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