

An Ill Contractual Wind Blowing Collective Good? Collective Representation in Non-Statutory Bargaining and the Limits of Union Authority (1994) 15 ILJ 39 *

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What is the legal relationship between a trade union and its constituency in non-statutory bargaining?

In the statutory arena one facet at least, the interaction between union and employer parties at industrial council level, is defined by the Labour Relations Act 28 of 1956 (LRA). The other crucial nexus, that between the union and its constituents, is not expressly defined but can be construed in the context of the statutory process. ¹ This may be one reason why the issue has given rise to relatively little litigation ² or debate.

No comparable framework exists within which to situate non-statutory bargaining. Case law on the subject, though on the increase, is still meagre. Three such cases are reviewed below. All three turn on the question whether agreements (purportedly) entered into by union officials had in fact been authorized by members of the union and, hence, whether the agreements were valid. In all three cases the agreements were upheld though with little in the way of a common rationale to underpin future legal development. This article will argue that the key to the development of a coherent approach lies in a more consistent application of the principle of majoritarianism.

Ramolesane & another v Andrew Mentis & another ³

In *Ramolesane* the appellants were two workers who had previously been involved, with their union, in an Industrial Court action for reinstatement based on 'their alleged unlawful [sic] dismissal'. ⁴ This was settled by an agreement reached between the employer and a union official. Subsequent to the settlement, the two instituted a further action against the employer. In these subsequent proceedings, the employed filed a special plea to the

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effect that the appellants were precluded from proceeding with their action. The appellants argued that the official had not been authorized to conclude the agreement on their behalf. The Industrial Court upheld the special plea, ruling that there had been 'an implied authority and also an ostensible authority' for the official to do so. ⁵

On appeal Van Schalkwyk J endorsed the principle of majoritarianism to the effect that 'where the collective interests of the union conflict with the interests of an individual member, it only makes sense . . . that the collective interests of the members as a whole should prevail'. ⁶ A party who wishes to rely on majoritarianism, the court held, needs 'to demonstrate, not merely that the settlement concluded was in the interests of the union as a whole, but that it was in the interests of the majority of those persons affected thereby'. ⁷ This requirement must be met by the presentation of evidence:

'If [the official] has an implied authority to conclude an agreement that is beneficial to the union, then the implied authority is not proven until evidence of that benefit is given.' ⁸

The court held that there had been no such evidence in this case. Nevertheless it found that the appellants were estopped from relying on an absence of authorization. The official had stipulated in writing that he was duly authorized to conclude the agreement on behalf of the applicants. The appellants' 'actual or at least tacit consent that the union was authorized to continue to act on their behalf in pursuing the application, establishes the basis for the estoppel'. ⁹

The fact that the appellants had not been present when the settlement was concluded raises the question how they could have been aware of its terms and, hence, how they should have gone about withdrawing or denying the official's authority to accept on their behalf. Yet, surprisingly, the court found that this circumstance counted against them:

'[H]aving once authorized the union to act on their behalf . . . and, having thereafter absented themselves from the further proceedings, they

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created the impression in the minds of the representatives of the first respondent that the union was authorized to act on their behalf.' ¹⁰

These findings, with respect, are questionable. The suggestion that the appellants had 'absented themselves' from negotiations which, by definition, the union had been appointed to conduct on their behalf, suggests that there is a duty on union members to be present at such negotiations in order to keep a watchful eye on their representatives and alert the employer party if the union officials go beyond their brief. This, surely, negates the concept of collective bargaining. The plea of estoppel should not have been upheld since there was no representation by the appellants that could have given rise to it.

The problem can only be unravelled if we distinguish between the two elements of 'authorization' - firstly, the appointment of the representative (ie, its identity) and, secondly, the nature and extent of the authority which the representative is given (ie, its mandate). In *Ramolesane* it was not in dispute that the union had been appointed to represent the appellants or that the official in question had been duly appointed to represent the union. The point in issue was whether the union had authority to enter into the agreement which it purported to do on the appellants' behalf - in other words, its mandate.

The court unfortunately did not address this issue. The authority given by union members to a union to negotiate on their behalf will not necessarily anticipate all the contingencies which the negotiators may have to address (though certain non-negotiable minima may be stated). To this extent the union's authority can only be implied. This takes us back to the finding by Van Schalkwyk J that a union's implied authority can only be to conclude an agreement that is beneficial to a majority of the members directly affected but that no evidence had been placed before the court.

It does not follow that the union had necessarily exceeded its mandate. Majoritarianism implies, as Van Schalkwyk J pointed out, that 'there will inevitably be groups of people . . . who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also'. ¹¹ It may be that the settlement reached was indeed in the interests of or supported by the majority of the union members affected. This was never established; yet the appellants found themselves for all practical purposes in the position of a disaffected minority.

Can the decision be justified by considerations of public policy?

Inconvenience would no doubt have resulted if the appeal had been upheld. The settlement (possibly supported by a majority of the original applicants) would have been invalidated and, unless a new settlement was reached, the applicants would have been able to resume proceedings in the Industrial Court. Bargaining relations between the employer and the union would have been dealt a blow. Although these issues were not addressed, it is likely that the court was not unmindful of them. But hard cases make bad law. The interpretation of the estoppel doctrine in this judgment is one which, if followed, could open the door to a degree of arbitrariness in bargaining conduct by employer as well as union representatives which could in due course undermine the legitimacy of collective bargaining.

Food & General Workers Union & Others v Sundays River Citrus Co-operative Co Ltd ¹²

The *Food & General Workers Union* case graphically illustrates this danger. Following a wage dispute the employer and the union agreed on an incentive scheme; there was, however, confusion about its implementation. At one of the respondent's two pack-houses, the Hermitage pack-house, this gave rise to a strike as a result of which most of the day shift were dismissed. After negotiations a further agreement was reached on 12/13 September 1991 providing for re-employment of the dismissed workers on condition that 'all workers' maintained certain production targets for the remainder of the season. In the event workers at the other pack-house, the Kirkwood pack-house, failed to reach these targets and, in terms of the abovementioned agreement, were offered a pro rata portion of their wages. When they refused to accept this, the company made up the shortfall out of their bonus and paid them a correspondingly reduced bonus. The union asked that this should be declared an unfair labour practice.

The central issue was whether the agreement of 12/13 September was intended to apply only to the Hermitage day shift, whose re-employment was its immediate subject-matter, or to the Kirkwood workers as well. In the preamble 'workers' was defined as 'all the members of the union employed by the company as at 10 September 1991'. ¹³ According to the union 'the intention of the general secretary [who negotiated with the company and its attorney] was that the agreement should apply only in respect of the dismissed workers and that meant the day shift at Hermitage'. ¹⁴ The company, on the other hand, argued that 'the board of directors had made it a requirement for the re-employment of the dismissed workers that all the workers at both pack-houses should

achieve the level of production referred to [therein]'. ¹⁵ While accepting that the agreement was 'bizarre', John AM concluded that 'the probabilities are that its effect is what the respondents contend'. ¹⁶

At least two questions are raised by these facts, both of which go to the heart of the agreement. The first is whether there was consensus between the parties. The company's attorney was adamant that re-employment of the Hermitage day shift would be subject to an agreed production quota not only at Hermitage but also at Kirkwood and that this was put to the union side at the meeting of 12/13 September. It appears that the situation was confused and not conducive to clear communication. It was late at night and hundreds of

workers were 'anxiously awaiting the outcome of the discussions'. ¹⁷ On top of this the company's attorney realized belatedly that he had omitted an important condition and allegedly returned to the union caucus to convey it.

Against this background the union's general secretary declared that he 'did not apply his mind to [the definition of "workers"] as he was exhausted' and took the word 'as referring to the dismissed workers'. ¹⁸ '[I]f the agreement had referred to Kirkwood', he said, 'he would have objected'. ¹⁹ Significantly, John AM accepted that '[i]t would undoubtedly have been desirable that the effect of the agreement should have been spelt out more clearly' ²⁰ and that '[t]he circumstances in which the agreement was drawn up . . . did not assist the achievement of perfection in drafting'. ²¹

The problem would not have arisen if John AM had rejected the evidence of the general secretary; but this was not the case. As noted above, the learned member came to the more cautious conclusion that 'the probabilities are that [the agreement's] effect is what the respondents contend'. ²² This finding, however, merely substitutes one difficulty for another. If the company had not *intended* to confine the agreement to the Hermitage day shift only, or if the general secretary had been mistaken in believing otherwise, it would mean that the parties had not been *ad idem* as to the subject-matter of their agreement. This would render the agreement void. ²³

A second and more fundamental question is whether the agreement intended by the company could have been valid even if the parties had been entirely *ad idem*. The respondent's case was

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that the general secretary was negotiating on behalf of the Kirkwood workers and validly bound them to the productivity agreement. In the light of the evidence this is an extraordinary construction. At least three problems present themselves:

- (a) No express authority was given by the Kirkwood workers to the union to enter into the agreement of 12/13 September. It appears to have been common cause that 'no shop stewards or other representatives of the Kirkwood workers [were] present at the meeting' and, it was argued on the union's behalf, 'the general secretary could not have got a mandate from them'. ²⁴ A subsequent letter from the company to the union made quite clear the factual situation as well as the company's peculiar understanding of majoritarianism:

'At our meeting of 23 September 1991 you agreed that the reason for the Kirkwood workers not reaching the agreed levels is because they have rejected the agreement. This state of affairs is unacceptable. The company has been negotiating with you in good faith and expects of you that when you enter into an agreement with the company, your members should honour such an agreement.' ²⁵

Though regarded by John AM as 'justifiable comment', the passage suggests that the agreement had not only been entered into without the knowledge or consent of the Kirkwood workers but that, far from ratifying it subsequently, they had specifically rejected it. According to the rules of *stipulatio alteri* or any other principle of representation known to our law it is difficult to see how a binding agreement could have come into existence.

- (b) The recognition agreement between the company and the union provided for the union's right to 'represent the interests of' and act as 'bargaining agent' for its

members. It provided for 'representation' of union members by five shop stewards per pack-house on behalf of permanent employees and an additional five shop stewards per pack-house on behalf of seasonal employees. ²⁶ The union's 'negotiating team', on the other hand, would consist of a maximum of four 'representatives' elected by 'all employees' plus not more than two union officials. From the judgment it does not appear that the union was represented by its formal negotiating team at the meeting of 12/13 September but, rather, by the general secretary and a 'caucus' of Hermitage shop stewards.

Was this seemingly ad hoc union assembly duly constituted to represent its members in general and the Kirkwood workers in particular in terms of the recognition agreement?

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While the recognition agreement did not stipulate that the 'negotiating committee' should include 'representatives' of both pack-houses, John AM nevertheless accepted that 'this had always been the practice'. ²⁷ It is therefore arguable that the Kirkwood workers had acquired a customary right to be represented at negotiations which affected them. At the very least it would appear unfair to deny them an entitlement which they had previously enjoyed, particularly in respect of negotiations which led to important changes in labour practices. ²⁸ If this is so the negotiations were flawed and, like any other flawed procedure, should have been dealt with accordingly by the court. ²⁹

- (c) Finally, having accepted that no shop stewards or other representatives of the Kirkwood workers were present on the night of 12 September and noting the argument that the general secretary could not have got a mandate from them, John AM stated:

'The respondent's reply to this was that it is not for the employer to satisfy itself, in the sort of circumstances that prevailed in this case at that time, that the trade union has a mandate, nor could it have been expected that because the respondent had not been asked to provide transport for the workers from Kirkwood that it should have been aware that no mandate had been obtained. This response seems to me to be fully justified.' ³⁰

Justified or not, this does not seem to offer authority for the proposition that the company was entitled to rely on implied authority of the union to represent the entire workforce in the negotiations. The company had full knowledge of established negotiating procedures. It alleged that the Kirkwood workers had rejected the previous productivity agreement and, given

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the objects of the LRA, must be presumed to have desired this time to reach an agreement that would prevent conflict. The fact that the union had not requested transport from Kirkwood certainly gave no grounds for believing that the Kirkwood workers were represented as in the past (and, incidentally, corroborates the general secretary's contention that the union had regarded the negotiations as relating to the Hermitage strikers only). ³¹ In the circumstances it is submitted that no implied authority can be construed.

On the one hand the criterion laid down in *Ramolesane's* case was conspicuously absent. No evidence was led that the productivity agreement was 'beneficial' to a

majority of the union members concerned; if anything, it implied more onerous conditions of work. Unfortunately John AM did not address this question; instead he based his decision on the reasonableness or otherwise of the conduct of the company. In the 'circumstances that prevailed' he found the company was entitled to assume that the union had the necessary authority to agree to the terms which it intended proposing at the meeting.

The rules of implied agency suggest a different conclusion. On the facts it was obvious that no express authority had been or could have been given by the Kirkwood workers to the union to accept the terms that were put to the union on 12/13 September. Gibson explains the consequence of this:

'Where a principal has given an agent express authority, the onus of proving an implied authority over and above the express authority given is a very heavy burden. "Very strong proof" of the implied authority is necessary. . . . It is the duty of a third person dealing with an agent to make all proper inquiries to ascertain the extent of the agent's powers and to determine whether the act or contract to be consummated comes within the province of the agency.'³²

What will be expected of a third person in a given situation to discharge this burden of proof is debatable.³³ In the present case, however, the court accepted that the company had made no effort of any kind to verify the union's authority and, moreover, saw no need for it to do so. Subsequent events showed the dangers of such a policy not only in a legal

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sense - though these were avoided by the judgment of the Industrial Court - but also from an industrial relations point of view.

Majoritarianism Turned on Its Head?

The model of majoritarianism projected by this judgment is untenable. The problem is compounded by the following elaboration of why the lack of a mandate by the Kirkwood workers should not prevent the union from binding them:

'In any event . . . there were representatives of both pack-houses present when the agreement of 5 September [ie, the previous agreement] was concluded, yet immediately thereafter the Kirkwood workers purported to repudiate that agreement. It was not unreasonable of the respondent's counsel to suggest that their response would have been the same in regard to the agreement of 12/13 September even if their representatives had been present.'³⁴

'A third person', writes Wille, 'that is a person who is not an original party to a contract, can incur no liability under it unless he accepts such liability later on.'³⁵ Leaving aside disputes of fact, the abovequoted passage turns this well-established legal principle on its head: workers who were not parties to a 'contract' are deemed to be bound by it even if they expressly indicate their refusal to accept liability under it. Such a rule would spell the end of majoritarianism or, indeed, any coherent notion of collective bargaining. Far from the majority binding the minority, union representatives would be vested with ill-defined but sweeping powers to bind all or any of their members. The majority would become powerless

onlookers; by taking a decision they would 'purport to repudiate' that which their 'representatives' have somehow bound them to.

Jordaan ³⁶ puts forward the more consistent view that, in the case of union members, employment conditions agreed by the union may be considered to be incorporated into individual contracts of employment 'provided that the trade union acted as their duly authorized representative and within the scope of its mandate'. Where a union acts beyond its authority 'members may still be bound if they have either expressly or tacitly ratified the relevant terms' - or, in the case of employees employed subsequently to the collective agreement, on the basis of *stipulatio alteri*.

Where a majoritarian system prevails - ie where an employer bargains with a majority union on behalf of all employees,

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members and non-members alike - there are alternative constructions by which non-members may be held to be bound by such agreements. Firstly, some form of authorization to act on their behalf may be construed from the facts. Secondly, they may be estopped by their conduct from denying such authorization or may be deemed to have waived their right to do so. The bottom line, however, is that in the absence of a construction to this effect majoritarian bargaining may be at the mercy of non-members (who may be members of a rival union). Jordaan, seeing this as 'a clear illustration of the inability of common-law principles to deal with collective phenomena', concludes:

'One way out of the dilemma would be to recognise the subservience of the common law to collectively established norms and standards. It has been argued that it is not the contract of employment which brings the terms of industrial council agreements into operation, but *membership of the relevant industry*. If the non-statutory agreement is acknowledged as having the same normative effect as its statutory counterpart, it will also be membership of the relevant industry, enterprise or organisation . . . and not contract, that will determine the applicability of collectively established norms.'

It may be argued that from this standpoint the distinction between union members and non-members is not particularly significant: a dissident minority of union members will be bound by the majority in precisely the same way as a dissident minority of non-union members. Conversely, the notion of the union as 'representative' of the workforce does not rely on union membership: any employee may expressly or implicitly accept a union as his or her representative. As Klare observed with reference to an early US case in point:

'[The court's] conception appeared to be that employees had a privilege to create a quasi-fiduciary or protected economic relationship between each of them individually and the others by constituting a collective bargaining unit and designating an "agent" or "agency" (a word commonly used to refer to unions in the early opinions) to represent them. ³⁷

The rights and duties of trade union membership per se, from this point of view, are of a different order. Members' rights relate essentially to control over the structure of the union, its finances, its office-bearers and its general policy. While the rule-book may provide for representation of members in collective bargaining, this cannot explain the role of the union in a majoritarian system. Jordaan is undoubtedly correct in arguing that the origin of the (majority) union's power to represent its constituency must be

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sought at a more fundamental level than that of individual consensus or contract: it arises from the collective nature of employment and the demands of modern industrial society itself.

This offers an equitable basis for explaining union representation in the absence of common-law authorization. But it does not fully dispose the problems presented by the judgments discussed above. Accepting that a union may represent both members and non-members and that majorities must prevail over minorities, its authority can nevertheless not be unlimited. How do we determine what the union is legally entitled to do on behalf of such majorities?

A clear decision by a majority of members, duly taken and recorded, might well amount to a binding contract in terms of the union's constitution. Even a decision by a majority of constituents could be regarded as a quasi-agency agreement. ³⁸ But such cases are not typical. More usual is a situation where the union negotiates with a more or less flexible mandate to seek the best possible terms on behalf of its constituency and subsequently reports back for ratification of what it has done. For all the reasons advanced by Jordaan it would be misleading to construe this process in purely contractual terms. Nevertheless, some legal rule must be identified whereby the limits of the negotiators' discretion can be defined in the event of dispute.

Principles of Collective Representation

In the first place it is submitted that *consent* by a majority of employees to (a) the appointment of their bargaining agent and (b) the agreement concluded on their behalf should be essential. This raises the practical problem (which lies at the heart of the decisions discussed above) of how such consent is to be construed in the absence of a clear majority vote.

Consent is implicit in the legal fiction of the incorporation of collective agreements into individual contracts of employment. Davies & Freedland, discussing the theories by which such incorporation has been explained, distinguish three main approaches: incorporation may take place 'by conduct', 'by agency', and 'by express reference in written contract or particulars'. ³⁹ But all three, they note, are problematical. Which conduct on the part of the individual workers is needed to show acceptance of results of collective bargaining of which they might in fact be unaware? Even reference to a collective agreement in an individual contract might be a mere formality; and while the doctrine of constructive

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notice might ensure enforceability, it does not address the more fundamental questions of employment equity and industrial relations.

Agency, on the other hand, 'tends to be invoked in a restrictive sense ⁴⁰ - ie in explaining how the union is bound by the agency of its members rather than how members become bound by unauthorized acts of the union. On the face of it this proposition is more consistent than that of the South African courts in the decisions discussed above; yet, surprisingly, it has been interpreted in such a way as to produce a similar practical result. Since the authority of shop stewards 'is derived from "the bottom" - that is, from all the members - it seems to follow [it has been held] that the members themselves must be taken to authorize whatever the union or its officials do on their behalf' unless they specifically disavow it. ⁴¹ We need only substitute the words 'directors' and 'company' for 'shop stewards' and 'union' to see that this line of reasoning has little in common with the principles of agency which it purports to derive from.

Davies & Freedland conclude that agency 'is the most difficult of the three methods of incorporating the results of collective bargaining into individual contracts'.⁴² In fact, it is submitted, the bottom line is expediency rather than the law of agency. As in South Africa it may no doubt be convenient if union officials are deemed to have the power to bind union members in order to streamline the bargaining process and make agreements stick; while the less convenient question of the members' rights vis-à-vis their 'agents' may be relegated to the background.

If the rules of agency are inadequate to explain the relations between employees, unions and union officials in an area subject to important public interest considerations, a more sophisticated approach was implicit in the judgment of Centlivres JA in the old case of *Amalgamated Engineering Union v Minister of Labour*.⁴³ Here the learned judge appeared to distinguish three possible functions of a trade union in a bargaining situation: firstly, that of

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'spokesman of its members';⁴⁴ secondly, to 'represent the interests of employees';⁴⁵ and, thirdly, to represent its own interests as a persona separate from its members.⁴⁶

What is the difference between representing *members* and representing the *interests of members* (or other employees)? In the first case, it is submitted, the union would be acting essentially on the instructions of its members - in other words, as their agent - and all the requirements of agency should mutatis mutandis apply. In the second (and more typical) situation it is implied that no specific mandate (express or ostensible) can be identified. The question then becomes: has the union acted in the interests of (a majority of) the employees whom it was purporting to represent?

This is the question that was highlighted in *Ramolesane's* case; and it is this question which is most relevant to the problem under discussion. It does not contradict the requirement of consent - ie subsequent ratification - by the employees whom the union represents. If the union's action is repudiated by a majority of those concerned, it must render such action invalid. This consequence, far from introducing uncertainty into collective bargaining, might rather concentrate the parties' minds on the need to arrive at agreements that genuinely express the will of (the majority of) those concerned. Unions would need to ensure that they obtain a new mandate when entering new bargaining territory. Situations where this cannot be done, it is submitted, would be exceptional and should not serve as basis for the rule.

Employers, for their part, would be under a duty - analogous to that of a third party seeing to rely on an agent's ostensible authority⁴⁷ - to take reasonable steps to ascertain whether the union indeed has authority for the act in question. Obtaining a categorical assurance from the union, as in *Ramolesane's* case, might be a minimum requirement. If, however, it should turn out that the assurance was in fact unfounded, and if the union's constituents in no way contributed to the misunderstanding, it would hardly be fair if they were required to suffer the consequences. Rather, the loss should lie where it falls: it is the employer who would unfortunately but unavoidably be left with an unenforceable bargain but with a possible remedy against the union.

But even such an ill wind might well blow some good by encouraging parties to tighten up on bargaining procedure. Employers, like wary purchasers, might learn the wisdom of not seeking to buy more than unions are able to deliver. Union officials might learn to be more careful to stay within their

mandates or pay the price in lost credibility with their membership as well as their bargaining partners. Union members could well discover the importance of more active involvement in union affairs. All this, it is submitted, would constitute a healthy development of the majoritarian system.

Don Products (Pty) Ltd v Monage & Others ⁴⁸

In *Don Products* the Transvaal Division of the Labour Appeal Court went a considerable way towards upholding the principles discussed above. Once again Van Schalkwyk J was faced with an appeal in which the authority of union officials was at issue. The following summary of the facts is extracted from the headnote:

'After an illegal strike the appellant dismissed 156 employees. . . . The union and three representatives nominated by the dismissed employees then negotiated . . . with the appellant. An agreement was finally concluded in terms of which all but 16 of the dismissed employees would be re-employed. . . . The 16 employees thereafter sought reinstatement.'

Van Schalkwyk J found against the 16 employees on the basis that the union had been duly authorized to enter into the agreement in question. 'Much of the debate', the learned judge noted, 'centred upon the unlikelihood that the respondents would have authorized their representatives to have concluded an agreement so unfavourable to themselves.' ⁴⁹ This argument was rejected. The inevitability of selective re-employment had apparently been accepted by the workers. Debate between the workers and their representatives had only been concerned with the number of workers who would not be offered re-employment. On this basis the court applied the principle of majoritarianism as follows:

'At all times the workers understood that only a comparatively small number of their members would not be re-employed and it seems to me quite likely in the circumstances that the totality of the work-force would have agreed to abide the final decision upon the basis that each of them had a good chance of not finding themselves on the unfortunate list.' ⁵⁰

However, it was held further that the respondents were prevented only from seeking reinstatement but not from seeking alternative relief since, on an analysis of the facts, the union's authority extended to the issue of reinstatement alone. In so doing the court disposed of the main underpinning of the decision in the

Food & General Workers Union case, as discussed above. As in that case, Van Schalkwyk J found that management and the workers' representatives had not been not ad idem as to the subject-matter of their agreement. In contrast to John AM's assumption that the 'effect' of the agreement should then be what the employer 'intended', however, Van Schalkwyk J ruled as follows:

'[T]he mere fact that management had that intention, does not yet disclose that the representatives of the workers, or for that matter the workers themselves, must have seen the matter in the same light. *The onus is upon the appellant to establish not only that the agreement concluded is enforceable in its terms, but also that the representatives who appeared on behalf of the work-force were duly authorized to conclude an agreement in the terms stipulated.*' ⁵¹

Whatever the employer's intention may have been, the court found that the workers' authority to their representatives 'did not include an authority to deprive them of any other rights which they may have had against the appellants'. ⁵²

The significant feature of the judgment is the centrality which it attributes to the terms of the union's mandate and its acceptance that the union was bound to act in terms of such mandate. It is true that the effect of majoritarianism in this instance was to uphold, once again, a union agreement in the face of a challenge to its validity. The acid test, it is submitted, would be a situation where a union had acted contrary to the decision or against the interests of a majority of the employees concerned. It may well cause inconvenience if such an agreement, entered into bona fide by an employer, were to be ruled null and void. Counterposed to the employer's (or union's) convenience, however, is that of the union's constituency and the future of the bargaining relationship. Clear recognition of employees' right not to be bound by unauthorized union acts, it is submitted, is fundamental to the longer term interests of collective bargaining. *Don Products* provides a valuable startingpoint for development in this direction. ⁵³

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¹ Cf Darcy du Toit 'Statutory Collective Bargaining: A Duty of Fair Representation?' (1993) 14 ILJ 1167 .

² Cf *SA Association of Municipal Employees v Pretoria City Council* 1948 (1) SA 11 (T); *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A); *Amalgamated Engineering Union v Minister of Labour* 1965 (4) SA 94 (O); *National Union of Furniture & Allied Workers of SA v Paper Wood & Allied Workers Union* (1984) 5 ILJ 161 (W).

³ (1991) 12 ILJ 329 (LAC).

⁴ at 331E.

⁵ at 334C.

⁶ at 335H, citing the English case of *Iwanuszezak v GMBMATU* 1988 IRLR 219 at 220. For a recent discussion of the principle in a more general context see Brenda Grant 'In Defence of Majoritarianism: Part 1 - Majoritarianism and Collective Bargaining' (1993) 14 ILJ 305 .

⁷ at 336G.

⁸ at 336J.

⁹ at 337C. A peculiar feature of the case was that estoppel had not been pleaded but was only introduced in argument in the Industrial Court. The applicants' attorney submitted on appeal that, for this reason, the respondent should not be allowed to rely on the estoppel but then agreed to leave the matter in the hands of the court. The court found that the appellants had 'waived their right' to object (at 332E-J).

¹⁰ at 337D-E.

¹¹ at 336A; but of the contrary dictum by the same judge in *Don Products (Pty) Ltd v Monage & others* (1992) 13 ILJ 900 (LAC) at 906D; discussed at 52-3 below.

¹² NHE 11/2/179 (PE) (unreported).

¹³ at 8.

¹⁴ *ibid*

- [15](#) at 12
- [16](#) at 25.
- [17](#) *ibid.*
- [18](#) at 23.
- [19](#) at 24.
- [20](#) at 25.
- [21](#) at 26.
- [22](#) at 25.
- [23](#) Cf *Don Products v Monage* at 909B-C; discussed below.
- [24](#) at 26-7.
- [25](#) Cited at 28.
- [26](#) As summarized at 13-14.
- [27](#) at 14-15.
- [28](#) The argument that the doctrine of *audi alteram partem* should be extended to private sector employment relationships may also be relevant here. Given that the union denied representing the Kirkwood workers in the negotiations, the workers should have been afforded a reasonable opportunity to be heard before any decision affecting their existing rights could be taken. Cf Alan Rycroft & Barney Jordaan *A Guide to SA Labour Law* (2 ed Juta 1992) at 109; *Damsell v The Southern Life Association Ltd* (1992) 13 ILJ 533 (C).
- [29](#) John AM added: 'Much was made by the union of the failure of the respondent to give 21 days' notice [as required by the recognition agreement] of the change in the conditions of employment of the night shift at Hermitage and all the workers at Kirkwood but there is nothing to prevent parties to an agreement such as the recognition agreement departing from its terms if they agree to do so in any specific instance' (at 14). With respect, this is doubtful. Apart from the question whether or not the parties were actually *ad idem*, it is submitted that the *procedural* requirements contained in an agreement must be followed unless or until the parties duly agree to alter such requirements. Merely treating conduct contrary to such requirements as implicit 'agreement [to depart] from its terms', it is submitted, would be to render procedural agreements meaningless. In *casu* this would mean that the respondent should, when entering negotiations with the union about reinstatement, either have given due notice of its desire to alter working conditions, or have demanded a change of procedure prior to raising the question of changes in working conditions. If either option would have been 'unrealistic', the respondent had only itself to blame for agreeing to 'unrealistic' negotiating procedures in the first place.
- [30](#) at 27
- [31](#) The productivity demands in respect of the Kirkwood workers, according to the company's own evidence, were raised for the first time at the meeting of 12/13 September: see at 19-20.
- [32](#) J T R Gibson *SA Mercantile and Company Law* (6 ed Juta 1988) at 240. See also A J Kerr *The Law of Agency* (3 ed Butterworths 1991) at 130-2, 146-8.
- [33](#) Cf *Ramolesane's case*, where the employer had received a warranty from the union official concerned that he had been duly authorized to enter into the agreement in question. Conclusive evidence would be provided (in the case of individual workers) by written authorization or (where larger numbers are involved) by certified minutes of a meeting mandating their representative. While this would be more cumbersome, it submitted that it would not be unduly onerous and, especially where substantial interests are at stake, the additional effort would be outweighed by the advantage of greater certainty.
- [34](#) at 27.
- [35](#) D Hutchinson, B van Heerden, D P Visser & C G van der Merwe (eds) *Wille's Principles of South African Law* (8 ed Juta 1991) at 469. 'The same principle', it is added, 'applies to the acquisition of rights under a contract by a third person, namely, that there must be an acceptance of the right by the third person.'
- [36](#) The quotations that follow are from Rycroft & Jordaan at 48-50.
- [37](#) Karl Klare 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941' (1978) 62 *Minnesota Law Review* 265. The reference is to the judgment of Chief Justice Hughes in *NLRB v Jones & Laughlin Steel Corporation* 301 US 1 (1937).
- [38](#) The obvious difference with common-law agency being that a dissenting minority would be bound by the majority decision as if they had given the union a mandate to act on their behalf.
- [39](#) Paul Davies & Mark Freedland *Labour Law: Text and Materials* (London 1979) at 221.

[40](#) *ibid* at 224 with particular reference to *Singh v British Steel Corporation* 1974 IRLR 131.

[41](#) Lord Denning MR in *Chappell v Times Newspapers Ltd* 1975 ICR 145 (CA), cited in Davies & Freedland at 661.

[42](#) at 225. The third method of incorporation is by means of statutory statements of terms: at 225-6. The authors suggest a 'general theory of incorporation of the results of collective bargaining' based on the rule in *Edwards v Skyways Ltd* [1964] 1 WLR 349, as follows: 'an agreement or arrangement capable of taking effect as a contractual agreement . . . should be rebuttably presumed to be intended to create legal relations when it occurs in the context of an existing contractual or commercial relationship, but should be rebuttably presumed not to be so intended when it occurs outside such a relationship' (at 233). Posed in these terms, the question under discussion would be when and how union members may rebut the presumption that their contractual relationship with the union was intended by them to give rise to particular legal consequences.

[43](#) 1949 (4) SA 908 (A).

[44](#) at 912.

[45](#) at 913.

[46](#) at 914-15.

[47](#) See 46 above.

[48](#) (1992) 13 ILJ 900 (LAC).

[49](#) at 904D

[50](#) at 906B-C. The court went on to observe (at 906D) that if the minority who were not re-employed intended to withdraw their mandate 'it was incumbent upon them to do so expressly and to instruct their representatives to convey this information to management. This, according to the evidence, was never done'. It is not entirely clear what the effect would have been if it *had* been done. The suggestion that, in that event, the agreement would not have been binding upon the respondents might be consistent with the principles of agency but would suggest an 'all-comers' approach to collective bargaining: a minority of workers, on this reasoning, could opt out of a collective bargaining agreement by withdrawing their authority to the union to represent them. Is this what the court intended?

[51](#) at 909B-C; emphasis added.

[52](#) at 909F

[53](#) Cf *Transport & Allied Workers Union v Natal Co-operative Timber Ltd* (1992) 13 ILJ 1154 (D) where authorization of a union by its members was likewise held to be essential but where the means of determining the extent of its mandate was less clear. The court found that a union has no authority to accept notice of termination of employment on behalf of its members on the basis that '[w]hilst an employee *may be* quite content to allow a union to negotiate better terms and conditions of employment on his behalf, he *might well be* quite unwilling to authorize the union to accept notice of termination' (at 1164C; emphasis added). The question, surely, was the de facto presence or absence of such authority, express or implied.