IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D 2128/18

Reportable

In the matter between:

THE ASSOCIATION OF MINEWORKERS	
AND CONSTRUCTION UNION	**APPLICANT**
And	
UASA	
(FORMERLY NAMED	
UNITED ASSOCIATION OF SOUTH AFRICA)	**FIRST RESPONDENT**
THE FOOD AND ALLIED WORKERS UNION	**SECOND RESPONDENT**
SUGAR MANUFACTURERS AND REFINERS	
EMPLOYERS ASSOCIATION	**THIRD RESPONDENT**
NATIONAL BARGAINING	
COUNCIL FOR THE SUGAR	
MANUFACTURING AND REFINING INDUSTR	**FOURTH RESPONDENT**
L SULLIVAN N.O.	**FIFTH RESPONDENT**
CCMA	**SIXTH RESPONDENT**

Application heard: 20 January 2022 (via Zoom)

Delivered: 9 May 2022 (electronically)

JUDGMENT

WHITCHER J

Introduction

[1] In this matter, the Applicant (AMCU) has brought a number of applications.

[2] In the first, AMCU seeks an order:

2.1 Reviewing and setting aside, in terms of section 145 of the Labour Relations Act, 1995 (the LRA), the arbitration award dated 14 February 2018 and made by the Fifth Respondent (the Arbitrator).

2.2 That the award be substituted with one to the effect that the agency shop agreement (the 2017 Agreement) between the First, Second and Third Respondent (UASA, FAWU and the SAMREA respectively) be interpreted and applied in a manner contended by AMCU. More particularly, that:

2.2.1 The 2017 Agreement does not permit the deduction of agency shop fees from AMCU's members for so long as AMCU is a member of the Fourth Respondent (the NBCS).

2.2.2 All and any agency fee deductions made from AMCU's members after 1 August 2017 be refunded to those members by UASA and FAWU within one calendar month.

2.3 That UASA, FAWU and SAMREA are prohibited from amending the 2017 Agreement and/or entering into a further agency shop agreement designed to circumvent the orders made in sub-paragraph 1.2 above.

[3] In the event that the Review Application fails, AMCU seeks an order:

3.1 Declaring the 2017 Agreement to be non-compliant either with the provisions of section 25(3) of the LRA or, alternatively, the LRA generally, and thus invalid and void *ab initio*. [1]

3.2 Reimbursing AMCU's members for agency fees paid by them.

[4] AMCU also seeks condonation in respect of the late filing of the Review Application.

[5] All three applications are opposed by the NBCS.

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[1] I questioned the propriety of such an application in these proceedings, but both parties requested that I determine the validity of the agreement for completeness.

Condonation

[6] The late filing of the review application is condoned. While the extent of the delay is significant and the explanation for it not above criticism, the case raises important legal issues.

The review application

[7] The Arbitration Award stems from the referral of an interpretation and application dispute in respect of an Agency Shop Agreement.

[8] Section 25(1) and (2) of the LRA provides that:

> (1) A representative trade union and an employer or employer's organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement, who are not members of the trade union but are eligible for membership thereof.
>
> (2) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed (a) by an employer in a workplace; or (b) by the members of an employers' organisation in a sector and area in respect of which the agency shop agreement applies. [Emphasis added]

[9] During July 2017 FAWU, UASA, and SMREA[2] entered into the Agency Shop Agreement.[3] FAWU, and UASA together, at the time of conclusion of the agreement, met the definitional requirements of a "representative trade union" in terms of section 25 of the LRA. AMCU agrees that the Agency Shop Agreement was, as a result, properly concluded.

[10] Clause 1.1 of the Agency Shop Agreement states:

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[2] SMREA is an employers' organisation.
[3] There were previous such agreements dating back years between the parties.

The majority of the employees employed by the members of the employer's organisation within the registered scope of the Bargaining Council for the Sugar Manufacturing and Refining Industry are members of the unions.

[11] Clause 1.2 states:

It is recorded that the unions have represented the majority of the employees employed by the members of the employers' organisation within the registered scope of the Bargaining Council for the Sugar Manufacturing and Refining Industry since before 1 June 1997.

[12] Clause 3.1 with 3.1.1 states:

An employer will deduct the agreed agency fee of 1.4% of basic pay (subject to clause 3.3 of this Agreement) from the wages of employees who are not members of the unions but are eligible for membership thereof.

[13] In August 2017 AMCU was welcomed as a party to the National Bargaining Council for the Sugar Manufacturing and Refining Industry ("NBCS").

[14] AMCU was of the view that, it being now a member of the NBCS, and a bargaining agent, that its members no longer fell foul of the mischief sought to be corrected by the Agency Shop Agreement and would, as a result, no longer be subject to the Agency Fee.

[15] After failing to come to a resolution after engaging with the other parties to the NBCS, AMCU referred an interpretation and application dispute in respect of a Collective Agreement (the Agency Shop Agreement).

[16] The Arbitrator correctly recorded the issue to be decided, namely whether the Agency Shop Agreement applies to AMCU's members.

[17] AMCU contended that the purpose of Section 25 and thus agency shop agreements is to deal with free-riders. Since it is now a bargaining agent [in the NBCS], it is no longer a free-rider and by this logic the Agency Shop Agreement

must be interpreted to mean that its members are no longer covered by the Agreement.

[18] In dismissing the case, the Arbitrator reasoned as follows:

> *Nowhere in the section[4] is there any mention of unions that become bargaining council agents having special dispensation. Neither…can it be said that any section even suggests…a special dispensation for unions who are bargaining council agents. The agency shop agreement likewise does not give bargaining council agents any special dispensation.*
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> *The best [AMCU] can argue is that it was the intention of the legislature to exclude unions who are also bargaining agents. To succeed it would obviously have to prove the legislator's intention.*
>
> *The CCMA is able to clarify any dispute relating to interpretation and application of some legislation. It does not have the ability to make binding orders relating to the legislator's intention.*
>
> *If there is any dispute about the interpretation or application of section 25 of the LRA the CCMA is required to resolve the dispute by setting out the correct interpretation of the section.*
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> *In this matter the interpretation and application of the section has already been clearly set out: members of unions who are not majority or majority allied unions must pay the additional fee.*
>
> *What [AMCU] is effectively asking is that the CCMA add to the meaning of the section…It is beyond the powers of the CCMA to add to the law.*
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> *The interpretation is clear. Employees who are not members of FAWU and UASA have to pay the 1.4% in addition to their own union fees. There are no*

[4] He is obviously referred to section 25 of the LRA.

exceptions provided by the existing sections and no exceptions can be read into the wording of the existing sections or of the agency shop agreement.

[19] AMCU contends that the Arbitrator got it wrong and, *inter alia,* referred to the judgment in *Municipal & Allied Trade Union of SA v Central Karoo District Municipality & Others*[5] in which the Labour Appeal Court stated [from para [21]:

"The evident intention of the section is to empower a majority union or unions to conclude an agency shop agreement with the employer. The employer is then "required" and thus obliged to deduct the agreed agency fee from the wages of employees identified in the agreement, including in this case from MATUSA's members, who are not members of the majority trade union(s) but are eligible for membership thereof. The meaning and effect of section 25 of the LRA, therefore, is clear and unambiguous: IMATU and SAMWU had the legal right to conclude an agency shop agreement with the employer, which agreement imposes a legal obligation on the employer to deduct agency fees from MATUSA members who do not belong to IMATU and SAMWU…

…It is a fee for work done to advance workers' interests through collective bargaining. It must be deducted by the employer from the worker's remuneration if an agency shop agreement meets the requirements of section 25 of the LRA has been concluded…

…..

As mentioned earlier, the purpose of section 25 of the LRA and an agency shop agreement is to address the problem of free riders, employees who choose not to join the trade union with collective bargaining rights, but who benefit from the fruits of the collective bargain struck by that trade union. In *National Manufactured Fibres Employers Association v Bikwani (Bikwani*)[6] the Labour Court set out the rationale for the agency shop agreement as follows:

[5] (2020) 41 ILJ 1918 (LAC).
[6] (1999) 20 ILJ 2637 (LC) paras 20-21.

> ‘It takes time, effort and money for a union to strike good deals with the employer of its members. Time and effort - because proper training and preparation on the part of the union's negotiators are necessary if the negotiators are to engage in effective bargaining. Money - because all of those things cost money. Where the benefits of the deals secured through the efforts of the representative trade union in collective bargaining are passed on to other employees who are not members of the representative trade union, such employees should make a contribution towards the costs which the representative trade union incurs in connection with its collective bargaining work. If they do not pay that is unfair because members of the representative trade union pay for those costs. An agency shop agreement seeks to make them pay without compelling them to join the representative trade union.

…

The Labour Court in *Bikwani* accordingly held that agency shop agreements bind members of minority unions, even if this means they must pay both the membership fee of their own union, and the agency fee. To hold that an agency fee is only payable by employees who belong to no union, the Labour Court reasoned, would be inconsistent with the purpose of the agency shop provision because an agency shop agreement is not concerned with whether an employee is a member of a minority union but with whether the employees contribute towards the collective bargaining costs of the representative union from efforts of which they materially benefit.”

[20] In my view the award is not subject to review.

[21] I accept that courts must adopt a purposive approach to interpreting collective agreements and indeed also legislation. However, there are limits to how far a court can go in shoehorning an assumed purpose into an ill-fitting statutory provision before a court impermissibly arrogates to itself legislative functions. Purposive interpretation “should not be made an excuse for starting with the underlying purpose, and then forcing the words into a preconceived and strained construction to

fit that assumption". "Ordinarily, the stage of applying this rule arrives after a plain meaning has been given to the words of the statute and these lead to absurdity, injustice or anomaly. This should be the course of action, rather than the other way round where, at the outset, a statute is read wearing spectacles tinted with the objects and purpose of the statute".[7]

[22] The plain meaning of section 25 of the LRA is clear and its results are patently not absurd. It may be ironic or even harsh that members of a trade union that has a seat in a bargaining council must nevertheless still pay additional fees to an alliance of majority unions in the bargaining council for bargaining services, while paying union subscriptions to its chosen bargaining agent, in this case AMCU. This situation is however not absurd or unjust. It is conceivable that non-members are paying for the potency of the majority status of the union respondents who, as a majority, have the capacity to conclude an agreement on substantive conditions that binds all parties. While agency shop agreements recompense unions for their time and effort, as well as training and preparation of their negotiators, as the Court in *Bikwani* pointed out, the service being rendered by these negotiators is their ability to engage in effective bargaining. Where a majority union (or alliance of unions) is present in a bargaining council, how effective is the service provided by a minority union?

[23] I am not convinced that the plain-meaning of section 25 leads to such an absurd or iniquitous result that this court should be tempted to rewrite the provisions of the law under the guise of rendering a purposive interpretation. It is easy to see how applying section 25 to a non-free rider such as AMCU may perplex it and its members. However, had the legislature had meant to exclude the members of *any* union party to a bargaining council, (no matter its likely influence or effectiveness in that forum), from paying agency shop fees to a majority within that same bargaining council, it would have been easy enough to include provisions to that effect. If the legislature indeed neglected to offer this protection from agency shops to unions in the same position as AMCU, the outcome of this case may well serve as an invitation to explicitly do so by amendment.

Validity of the Agency Shop Agreement

[7] Lost the source.

[24] The answer here is simple. In wording, content and format the agreement complies with section 25, and that is all that is required. This is clear from the Labour Appeal Court judgment in *AMCU v UASA and Others*.[8]

Costs

[25] Given the nature and importance of the matter, an adverse cost order against AMCU is not appropriate.

Order

1. The late filing of the review application is condoned.
2. The review application is dismissed.
3. The validity application is dismissed.

Benita Whitcher
Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Futcher & Poppesqou Attorneys
For the Fourth Respondent:	Norton Rose Fulbright Attorneys

[8] *AMCU v UASA and Others* (JA 108/2019) (29 June 2021).