IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA11/17

In the matter between:

SOLIDARITY obo MEMBERS EMPLOYED IN MOTOR INDUSTRY	**Appellant**
and	
AUTOMOBILE MANUFACTURERS EMPLOYERS' ORGANISATION (AMEO)	**First Respondent**
NISSAN SA (PTY) LTD	**Second Respondent**
TOYOTA SA (PTY) LTD	**Third Respondent**
VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD	**Fourth Respondent**
FORD MOTOR COMPANY OF SOUTH AFRICA (PTY) LTD	**Fifth Respondent**
BMW SA (PTY) LTD	**Sixth Respondent**
GENERAL MOTORS SA (PTY) LTD	**Seventh Respondent**
MERCEDES-BENZ SA (PTY) LTD	**Eighth Respondent**
NATIONAL BARGAINING FORUM	

(AUTOMOBILE INDUSTRY) **Ninth Respondent**

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (NUMSA) **Tenth Respondent**

Held: **12 September 2019**

Delivered: **16 October 2019**

Summary: Lawfulness of the agency shop agreement – Union contending that the conclusion of the agency shop agreement null and void *ab initio* as it did not comply with section 25(3) of the LRA and that any fees deduction unlawful – parties to the agency shop agreement amended the collective agreement to comply with section 25(3) – Union still contending that an agency shop agreement that does not comply with the LRA is void *ab initio* and cannot be amended to cure unlawful deductions made in terms thereof.

Held that the original collective agreement did not comply with section 25(3) of the LRA, and was null and void *ab initio* and incapable of rectification. However, the agency shop agreement is a collective agreement which could be amended and not rectified - Rectification is a remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. The NBF did not seek to rectify clause A3 of the collective agreement because it did not reflect the true intention of the parties. It amended the collective agreement to ensure enforceability by repealing the original version and substituting it retrospectively with a compliant version. Appeal dismissed with costs – Labour Court judgment upheld.

Coram: Coppin JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The appellant ("Solidarity") appeals against the judgment of the Labour Court (Lallie J) delivered on 16 August 2016 dismissing its application for orders *inter alia* declaring two clauses of a collective agreement concluded in the National Bargaining Forum – Automobile Industry (the NBF Agreement on Wages and Conditions of Employment for the period of 1 July 2013 to 30 June 2016) null and void and interdicting the respondents from deducting a "bargaining fee" from its members' salaries and directing the respondents to repay any amount that had already been deducted.

[2] Solidarity is a trade union which, in 2016, had 853 members employed in the automobile manufacturing sector. It was not however admitted as a member to the National Bargaining Forum – Automobile Industry ("the NBF") because it was not a representative trade union. The first respondent is the Automobile Manufacturers Employers' Organisation ("AMEO") an employers' organisation. The second to eighth respondents are automobile manufacturers and the employers of Solidarity's members. The ninth respondent is the NBF and the tenth respondent is the National Union of Metal Workers of South Africa ("NUMSA") a representative trade union of employees in the industry and a member of the NBF.

[3] The NBF is a forum in which collective bargaining negotiations take place. It is not a bargaining council established in terms of section 27 of the Labour Relations Act[1] ("the LRA").

[4] Collective bargaining in the NBF has been ongoing since 1993. Solidarity is the successor of two trade unions, the SA Yster, Staal en Verwante Nywerhede Unie and the SA Workers Union which, at different times, were parties to collective agreements concluded in the NBF. Since 2004, NUMSA has been the majority union in the NBF.

[5] On 12 June 2014, a collective agreement was concluded in the NBF for the period 1 July 2013 to 30 June 2016 ('the collective agreement"). The collective agreement was "a composite" NBF agreement on wages and conditions of employment applicable to all hourly paid employees in the

[1] Act 66 of 1995.

Automobile Manufacturing Industry. The parties to the collective agreement were AMEO, the second to eighth respondents ("the employers"), and NUMSA, the majority union in the sector.

[6] Clause A3 of the collective agreement incorporated an agency shop agreement as contemplated in section 25(1) of the LRA providing for the deduction of a bargaining fee. Section 25(1) of the LRA reads:

> 'A representative trade union and an employer or employers' 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.'

[7] Agency shop agreements are less intrusive than closed shop agreements which compel employees to be members of majority trade unions. An agency shop agreement does not compel membership of the union but only requires employees who benefit from the fruits of collective bargaining achieved by the majority union to pay an agency fee.

[8] Clause A3 of the collective agreement reads:

> '3.1 The parties agree that a bargaining fee will be deducted from hourly paid non-Union members' weekly remuneration, subject to:
>
> 3.1.1 Each employer shall pay to the NBF the bargaining fee deducted and provide a record of non-Union employees the total amount deducted and the period to which deductions relate. The NBF will hold such monies in a national banking account for distribution proportionally to the Union parties to this agreement, on a quarterly basis. For application of this clause, the membership of the Union parties will be reviewed on an annual basis.
>
> 3.1.2 Non-Union members for the purposes of this clause mean employees who are covered by this Agreement who do not have Union subscriptions deducted from their remuneration for

payment to a registered Trade Union which is party to this agreement.'

[9] The wording of Clause A3 was identical to the agency shop arrangements in earlier collective agreements concluded since 1998. In the past, the bargaining fee deductions were paid to both Solidarity and NUMSA. In more recent years the bargaining fees have been received exclusively by NUMSA.

[10] Clause B9 of the collective agreement set the bargaining fee at 1% of the weekly wages of each non-union employee.

[11] According to Solidarity, despite NUMSA being entitled to receive the bargaining fees from 1 July 2013, the employers only began deducting the bargaining fees as required by the collective agreement from 1 February 2015. On 7 April 2015, Solidarity addressed a letter to AMEO contending that clause A3 did not comply with the requirements of section 25(3) of the LRA in various respects, and that the agency shop agreement in the clause was without legal effect and the deductions from its members' salaries of the "bargaining fee" were accordingly unlawful. It sought assurances that no further deductions would be made and that its members would be reimbursed.

[12] The relevant provisions of section 25(3) of the LRA read:

'An agency shop agreement is binding only if it provides that –

(a) Employees who are not members of the representative trade union are not compelled to become members of that trade union;

(c) the amount deducted must be paid into a separate account administered by the representative trade union; and

(d) no agency fee deducted may be –

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any public office;

(iii) used for expenditure that does not advance or protect the socio-economic interests of employees.'

[13] On 13 May 2015, Solidarity filed an application with the Labour Court for an order declaring clauses A3 and B9 of the collective agreement to be null, void and without force and effect for non-compliance with the requirements of section 25(3) of the LRA. In its founding affidavit, Solidarity contended that clause A3 of the collective agreement was invalid and void *ab initio* for three reasons. It submitted that the agency shop agreement did not comply with: i) section 25(3)(a) of the LRA in that it contained no provision that employees who are not members of the representative trade union are not compelled to become members of that trade union; ii) section 25(3)(c) of the LRA in that it provided for the monies collected to be paid to the NBF rather than into a separate account administered by the representative trade union; and iii) section 25(3)(d) of the LRA because clause A3 did not provide mechanisms by which the use of monies handed over to the representative trade union can be monitored once distributed, as contemplated by clause 3.1.1.

[14] Solidarity also sought interdictory relief prohibiting further deductions, as well as orders compelling AMEO and the employers to repay the amounts deducted from the salaries of its members under the impugned clauses. In the alternative, it sought an order declaring section 25 of the LRA unconstitutional. It no longer pursues this relief.

[15] On 15 May 2015, AMEO, the employers and NUMSA entered into a second collective agreement ("the second collective agreement") at the NBF. Clause 1 of the second collective agreement explains its purpose as follows:

'1.1 Clause A3 of the NBF Agreement concluded between the parties for the period July 1, 2013 to June 30, 2016 (the NBF Agreement), read in conjunction with Clause B9, makes provision for the deduction of a bargaining fee from hourly paid non-union members' weekly remuneration.

1.2 Solidarity, acting on behalf of its members, insofar as they are included amongst the non-union employees provided for in Clause A3 of the NBF

Agreement, has objected to the deductions made from the remuneration of its members.

1.3 In order to address the objection, and any potential dispute, the parties agree to the following distinct and separate amendments as set out below.'

[16] The second collective agreement provided for two amendments. Clause 2 of the second collective agreement amended the collective agreement by inserting Clause A3.2, the relevant part of which reads:

'The parties acknowledge and agree for the period from 1 July 2013 to the date of (this amendment) to the insertion of the following clause:

3.2.1 Non-union employees have not been compelled to become members of the Trade Union that is party to this Agreement….

3.2.3 The Trade Union which is party to this Agreement confirms that all monies distributed to such Trade Union by way of a bargaining fee

(a) have been paid into and are retained in a separate account administered by the Trade Union which is party to this Agreement;

(b) have not been and will not be paid to a political party as an affiliation fee;

(c) have not been and will not be contributed in cash or kind to a political party or a person standing for election to any public office;

(d) have not been and will not be used for expenditure that does not advance or protect the socio-economic interests of employees covered by this Agreement.'

[17] The purpose of the amendment in clause 2 of the second collective agreement was to afford retrospective legality and validity to the deduction of the bargaining fees during the period of 1 February 2015 to 15 May 2015.

[18] Clause 3 of the second collective agreement provided for prospective amendment of the collective agreement for the period of 15 May 2015 until 30

June 2016 (the expiry date of the collective agreement). It sought firstly to ensure compliance with section 25(3)(c) of the LRA by providing for future payments to be made to NUMSA rather than to a bank account administered by the NBF. Thus, clause A3.1.1 of the collective agreement was deleted and replaced by the following:

> 'Each employer will pay to NUMSA the bargaining fee deducted and provide a record of the numbers of non-Union employees, the total amount deducted and the period to which deductions relate.'

[19] Clause 3 of the second collective agreement further sought fuller compliance with the other provisions of section 25(3) of the LRA by amending the collective agreement to insert clause A3.3 which reads:

> 'The parties agree that for the period from the date of the amendment giving rise to the insertion of this clause into the NBF Agreement, to 30 June 2016:
>
> 3.3.1 Non-union employees are not compelled to become members of the Trade Union which is party to this Agreement…..
>
> 3.3.3 All monies distributed by way of a bargaining fee to the Trade Union which is party to this Agreement shall be paid into in a separate account administered by such Trade Union;
>
> 3.3.4 No bargaining fee deducted in terms of this Agreement may be
>
> (a) paid to a political party as an affiliation fee;
>
> (b) contributed in cash or kind to a political party or a person standing for election to any public office;
>
> (c) used for expenditure that does not advance or protect the socio-economic interests of employees covered by this Agreement.'

[20] Clause 4 of the second collective agreement expressly provided for the period of operation of the amendments. In terms of clause 4.1 of the second collective agreement, the amendment in clause 2 was "effective retrospectively from 1 July 2013, to the date of this amendment". Clause 4.2

of the second collective agreement provided that the amendment in clause 3 would be “effective from the date of this amendment to 30 June 2016”.

[21] On 22 May 2015, the attorneys acting for AMEO and the employers addressed a letter to Solidarity informing it of the amendments to the collective agreement effected by the second collective agreement and requested it to reconsider its position and tendered its costs in the application. On 29 June 2015, Solidarity advised AMEO and the employers that it was willing to settle the dispute provided they complied with prayers 5 and 6 of the notice of motion requiring the re-payment of the deductions made prior to the second collective agreement. Agreement was not reached and the litigation proceeded.

[22] Solidarity did not amend its notice of motion or file a supplementary affidavit in response to the conclusion of the second collective agreement. However, in its replying affidavit, it averred that an agency shop agreement that does not comply with the LRA is void *ab initio* and cannot be amended to cure unlawful deductions made in terms thereof. It also contended in argument that the amendments, in any event, did not fully comply with section 25(3)(d) of the LRA.

[23] The Labour Court in its judgment failed to determine whether prior to the amendments clause A3 of the collective agreement complied with the requirements of section 25(3) of the LRA. It dismissed the application solely on the basis that the NBF was entitled to amend the impugned clause with retrospective effect, and that the amendment cured the defects of the original version.

[24] The appeal requires consideration of two issues: the compliance of the original version of clause A3 with the statutory requirements and the effect of the amendments.

[25] Section 25 of the LRA regulates the circumstances in which, and the purposes for which, monies generated by agency shop arrangements may be collected, distributed and used. The provision is a reasonable limitation of the constitutional rights of affected employees to freedom of association but is

circumscribed by prudential constraints. Agency shop agreements are binding only if they comply with the requirements of section 25(3) of the LRA.

[26] It is indisputable that the original version of clause A3 did not comply with section 25(3) of the LRA, and its non-compliance was the most logical and probable reason for the NBF concluding the second collective agreement amending it. Clause A3 of the collective agreement did not contain any provision that employees who are not members of the representative trade union are not compelled to become members of that trade union. Furthermore, it did not comply with section 25(3)(c) of the LRA requiring that the monies collected to be paid to the union.

[27] In *Greathead v SA Commercial, Catering & Allied Workers Union,*[2] the SCA declared an agency shop agreement not in compliance with section 25(3) of the LRA to be unenforceable. It rejected the notion that the requisite provisions may be incorporated by implication. The LRA requires an agency agreement specifically to provide for the matters prescribed in section 25(3) of the LRA and the failure to so provide will render the agreement not binding and unenforceable. The original clause A3 of the collective agreement did not provide for the matters in section 25(3) of the LRA and was therefore unenforceable. Thus, prior to its amendment, clause A3 did not empower the employers to deduct a "bargaining fee" from the salaries of members of non-signatory parties.

[28] The question then is whether the amendments cured the irregularity of the initial version of clause A3 and whether it served to render lawful the deductions from the salaries of Solidarity's members.

[29] There is no basis for any successful challenge to the prospective agency shop agreement applicable from 15 May 2015 to 30 June 2016 concluded in clause 3 of the second collective agreement. That agreement meets the requirements of the definition of a collective agreement in section 213 of the LRA[3] and complies with section 25(3) of the LRA. Solidarity, however,

[2] 2001 (3) SA 464 (SCA) paras 12 and 22

[33] It is a written agreement concerning matters of mutual interest concluded between a registered trade union and several employers and an employers' organisation.

submitted that the amended prospective version of clause A3 did not comply with section 25(3)(d) of the LRA because it lacked mechanisms to ensure that the monies so distributed were not used in a manner and for the prescribed prohibited purposes prohibited. Section 25(3)(d) does not prescribe any particular mechanisms to ensure compliance. It is sufficient if the agency agreement contains provisions in relation to the prohibitions. There is no evidence in this case that any of the prohibitions were contravened. The submission is accordingly without merit and there is no other basis to challenge the prospective amendment.

[30] With regard to the retrospective amendment of the collective agreement by clause 2 of the second collective agreement, Solidarity relies on the following *dicta* of the SCA in *Greathead:*

> 'The respondent submits that if the issue of non-compliance had been raised before the court a quo the respondent would have been entitled to seek rectification of the agreement to accord with the true agreement of the parties. The problem facing the respondent in this regard is that non-compliance with the provisions of s 25(3) gives rise to an agreement which is formally invalid for want of compliance with statutory formalities. For these reasons the agreement is incapable of rectification.' [4]

[31] Solidarity submits on this basis that clause A3 could not be rectified retrospectively. The proper course for the NBF wishing to rectify the collective agreement, it submitted, was either to apply to court for rectification or to terminate the agreement and conclude a fresh one.

[32] The NBF in effect did terminate the agreement going forward by replacing it prospectively with the agreement in clause 3 of the second collective agreement. The question is whether the *dicta* in *Greathead* impose a requirement that retrospective rectification could only have been achieved by judicial decree. But even then, it was argued, an agreement may be rectified only if it is valid. An agency shop agreement that does not confirm with the requirements of section 25(3) is invalid *ab initio* and incapable of rectification.

[4] At para [13].

[33] The concept of rectification is not the same as the concept of retrospective amendment of a collective agreement. Rectification is a remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It enables parties to give effect to their actual agreement.[5] The NBF did not seek to rectify clause A3 of the collective agreement because it did not reflect the true intention of the parties. It amended the collective agreement to ensure enforceability by repealing the original version and substituting it retrospectively with a compliant version.

[34] Clause 2 of the second collective agreement is in itself a collective agreement which replaced the earlier unenforceable one. The key question is whether it was permissible for clause 2 of the second collective agreement to operate from a date earlier than its conclusion, as provided for by clause 4.1 of the second collective agreement.

[35] Collective agreements are peculiar statutory instruments. They obtain their legal force and effect from section 23 of the LRA. They are both contractual and legislative in effect. They advance the legislative policy aimed at encouraging employers and unions to regulate their relationships by collective bargaining. The terms of collective agreements of one kind or another (such as agency shops, closed shops and agreements extended by the Minister in terms of section 32 of the LRA) are often applicable to non-parties.

[36] There is no express statutory prohibition on the retrospective operation of collective agreements. However, it is generally presumed that the law maker does not intend statutory instruments to be retrospective in their operation. The presumption is of course rebuttable, expressly or by necessary implication, even where the instrument impacts negatively on vested or existing rights.[6]

[37] Section 23(2) of the LRA provides that a collective agreement will bind every person bound in terms of section 23(1) of the LRA for the whole period of the collective agreement. From this provision, it is clear that the operative period

[5] See for example *Intercontinental Exports (Pty) Limited v Fowles 1999 (2) SA 1045 (SCA)* at 1051H.
[6] *Curtis v Johannesburg Municipality* 1906 TS 308, 311

of a collective agreement is a matter for the parties to it. As such, and as often happens, it is possible for the parties to a collective agreement to make it applicable from a date earlier than its conclusion. Although imposing reasonable limitations on other rights, retroactive operation in some instances, such as the present, will promote the purpose of orderly collective bargaining.

[38] Hence, clause 2 of the second collective agreement, constituting a lawful agency shop agreement, applied retrospectively to 1 July 2013 and the bargaining fees deducted in the period 1 February 2015 to 15 May 2015 were deducted lawfully in terms of it. Insofar as the original clause A3 of the collective agreement may have been unenforceable between 1 February 2015 and 15 May 2015, any claims that may have arisen during that time have been rendered moot by the repeal and retrospective substitution of the original clause A3 by clause 2 of the second collective agreement.

[39] Consequently, the Labour Court did not err in dismissing the application.

[40] For these reasons, the appeal is dismissed with costs including where applicable the costs of senior counsel.

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JR Murphy

Acting Judge of Appeal

I agree

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P Coppin

Judge of Appeal

I agree

_____

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

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