THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J 1338-19

Reportable

In the matter between:

UASA on behalf of its members	FIRST APPLICANT
SOLIDARITY on behalf of its members	SECOND APPLICANT
NATIONAL UNION OF MINEWORKERS (NUM)	
on behalf of its members	THIRD APPLICANT
and	
WESTERN PLATINUM LIMITED	FIRST RESPONDENT
EASTERN PLATINUM LIMITED	SECOND RESPONDENT
ASSOCIATION OF MINEWORKERS AND	
CONSTRUCTION UNION (AMCU)	THIRD RESPONDENT

Heard: **20 June 2019**

Judgment: delivered: **24 June 2019**

Summary: **agency shop agreement invalid and unenforceable – not compliant with statutory formality – agency shop agreement must expressly provide for matters prescribed by s 25(3) of the LRA**

JUDGMENT

WHITCHER J

[1] UASA, Solidarity and NUM, in summary, seek on an urgent basis that the agency shop agreement concluded between AMCU and Lonmin (the First to Third Respondents) on 24 April 2019 be declared to be invalid and unenforceable.

[2] AMCU, as majority union in the workplace of Lonmin, concluded an agency shop agreement with Lonmin on 24 April 2019. In terms of the agreement, Lonmin shall deduct an agency fee from wages of all employees within the bargaining unit at Marikana Operations as defined in the recognition agreement between Lonmin and AMCU, but from wages of only employees who are not members of AMCU. The Applicants have members who are employees within the bargaining unit at Lonmin's Marikana Operations, as defined in the recognition agreement between Lonmin and AMCU. On the same day, the Registrar of Labour Relations in terms of section 106(2B) of the LRA gave notice of his intention to cancel AMCU's registration as a trade union on the basis that AMCU has ceased to function in terms of its constitution and AMCU is not a genuine trade union as envisaged in the LRA. The Applicants and their members only received a copy of the agency shop agreement on 22 May 2019 and within days sought certain undertaking from Lonmin and AMCU. When this failed, they launched this application on 29 May 2019.

[3] The Applicants have two main grounds for the application: invalidity of the agency shop agreement and the intended cancellation of AMCU's registration. The application is opposed by AMCU only. AMCU contends the matter is not urgent, the dispute concerns the interpretation of a collective agreement, thus the Labour Court lacks jurisdiction, the agency shop agreement is valid and AMCU is a registered trade union.

Urgency

[4] I accepted that the matter is urgent in light of the Department of Labour's intention to deregister AMCU and the difficulty this would place the Applicants'

members as creditors to recoup payments through an uncertain process. In the absence of AMCU addressing the merits of the department's allegation that they are indeed not functioning as a *bona fide* union, the prospect of an injury to the Applicants' members compelled by the agency shop agreement to contribute to AMCU is a possibility the court cannot overlook as merely speculative. Moreover, AMCU was not prejudiced in the preparation of its response as it took 12 court days to deliver its answering affidavit.

Validity of agreement

[5] Section 25(3) of the LRA reads as follows:

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;

(b) the agreed agency fee must be equivalent to, or less than-

…

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

(d) …

[6] The Applicants submit that the agency shop agreement does not comply with the provisions of section 25(3)(a) of the LRA in that it does not provide that *"employees who are not members of [AMCU] are not compelled to become members of [AMCU]".*

[7] Clause 7.1 of the agency shop agreement provides that *"…employees who are not members of any trade union shall not be compelled to become members of AMCU".*[1]

[8] In ***Greathead v SACCAWU***[2] an agency shop agreement did not expressly provide for the matters referred to in sections 25(3)(a) and (c) of the LRA. The

[1] Applicants'emphasis.
[2] ***(2001) 22 ILJ 595 (SCA)***

union argued that there was substantial compliance in that the requisite provisions of s 25(3) need not be expressly recorded in the agreement, but may also be incorporated by implication. The Supreme Court of Appeal disagreed and held that:

> The Act requires the agreement to be in writing and to 'provide' specifically for those matters prescribed by s 25(3). In my judgment the agreement in the respects referred to failed to comply with the requirements of s 25(3). In the result it never became a binding agreement.[3]

[9] Counsel for the Applicants correctly argued that under the authority of ***Greathead*** an agency shop agreement is valid only if it expressly and specifically replicates all the provisions of s 25(3) of the LRA.[4] This is so because agency shop agreements entail a limitation of employees' constitutional and statutory rights.

[10] The argument that the basis on which ***Greathead*** was decided is distinguishable from the facts of this matter because more was wrong with the agency shop agreement in ***Greathead*** than *in casu*, is misconceived. Even if one provision of s 25 (3) is not replicated in the agency shop agreement, the *ratio* in ***Greathead*** applies.

[11] Counsel for AMCU makes a good point that, in the labour arena, a practical approach to interpreting collective agreements is generally the norm such as evinced in ***North East Cape Forests v SAAPAWU***[5]. Labour courts do more readily recognise implied or tacit terms in collective agreements especially if these give effect to the purpose of the document. I may have been inclined to do so too if the essence of this matter rested on interpreting the terms and conditions of the agreement. Likewise, if the issue in dispute primarily concerned interpreting the terms of the agreement to rule on the enforceability of these terms, I would have declined to hear the matter for want of jurisdiction. However, determining the present matter rests not on interpreting terms and conditions. Rather, following the interpretation of s 25 (3) of the

[3] At para [12].
[4] John Grogan, Collective Labour Law, 2nd ed, p 34.
[5] [1997] 6 BLLR 711 (LAC).

LRA set out in ***Greathead***, this court is called upon in the first place, to examine whether an agency shop agreement complies with certain formalities in order to be *valid*. An enquiry into the validity of a collective agreement may, of needs be, perform some interpretive work but what gives the court jurisdiction is the essential nature of the claim made by the Applicants. This is that the collective agreement is invalid and that its application to their members would thus be unlawful. These matters are properly the provenance of the Labour Court.

[12] In this matter, we must examine clause 7.1 of the agency shop agreement simply to understand whether it was compliant with the formality stated in ***Greathead*****.** The interpretive work is thus confined to testing the <u>form</u> of the clause and not so much its content. As set out in ***Greathead***, form is constitutionally important in agency shop agreements.

[13] It is apparent that clause 7.1 does not expressly provide that employees who are not members of the representative union obtaining the agency shop agreement are not compelled to become members of that union. Instead, it states that "(t)he parties agree that employees <u>who are not members of any trade union</u> shall not be compelled to become members of AMCU".[6] This is really the end of the matter. The agency shop agreement is not compliant with the <u>statutory formality</u> and the agreement is thus invalid. It follows that it would be unlawful to make any deductions from non-AMCU members in terms of an invalid agreement and the Applicants are thus entitled to the relief they seek to interdict an imminently unlawful act occurring.

[14] For completeness sake, I should briefly deal with the construction AMCU places on **Solidarity and Others v Minister of Public Service and Administration**[7] where the Labour Court held as follows in para [25]:

> In my view the agreement substantially complied with statutory requirements…However this does not make the agreement valid for reasons that the agency agreement interferes with a person's constitutional right of freedom of association as contained in section 18 of Chapter 2 of the Bill of

[6] Own emphasis.
[7] (J648/03) [2003] ZALC 122 (21 April 2004).

> Rights. It therefore becomes an unfair labour practice to force the employee to join a trade union by making deductions on his salary to make him join the union. The legislature was aware of this and therefore sought to provide that the agreement should make provision for the fact that non-union members are not compelled to become members. This is a fundamental requirement necessary to make the agreement valid.[8]

[15] Taking his lead from the ***Solidarity*** matter, counsel for AMCU submits that clause 7.1 makes provision that non-union members are not compelled to become members. But herein he reproduces the original error of the drafters of the collective agreement. What the legislature provided for – and what the learned judge in ***Solidarity*** was saying – is that employees who were not members of the union obtaining an agency shop should not be compelled to become members of this union. 'Non-union' in this sense means employees who are not members of the majority union; a class that may include employees who are not members of any union and those who are members of minority unions. The agency shop agreement between Lonmin and AMCU only expressly **provided for** the exemption of the former from compulsion to join AMCU when it is a statutory formality that the latter are also expressly excluded.

[16] On the issue of costs, considering the relationship between opposing parties, it is not appropriate to grant an adverse cost order.

Order

1. The Agency Shop Agreement concluded between the First to Third Respondents on 24 April 2019 is invalid and unenforceable.

2. The First and Second Respondents are interdicted from deducting any agency fee in favour of the Third Respondent from the wages of the Applicants' members in terms of the said Agency Shop Agreement.

3. The First and Second Respondents are ordered to immediately refund all

[8] Their emphasis.

agency fee deductions made or to be made from the wages of the Applicants' members in terms of the Agency Shop Agreement.

4. There is no order as to costs.

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Benita Whitcher

Judge

REPRESENTATION:

For the Applicants: R Grundlingh, instructed by Bester & Rhoodie Attorneys and Serfontein Viljoen & Swart Attorneys

For the Third Respondent: A L Cook, instructed by Larry Dove Attorneys