THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 290/98

In the appeal between:

GREATHEAD, BRIAN COURTNEY Appellant

and
SOUTH AFRICAN COMMERCIAL CATERING & ALLIED WORKERS UNION

Respondent

Coram: F H Grosskopf, Nienaber, Streicher, Zulman, JJA and Melunsky AJA
Heard: 19 September 2000
Delivered: 29 September 2000

Summary: Invalidity of agency shop agreement - failure to comply with provisions of s 25(3) of Labour Relations Act 66 of 1995.

JUDGMENT

F H Grosskopf J A:
[1] The respondent is a trade union duly registered in terms of the Labour Relations Act 66 of 1995 ("the Act"), and hereinafter called "the union". On 2 July 1997 the union and Metcash Trading Limited ("Metcash") concluded an

"agency shop agreement" ("the agreement") provided for in s 25 of the Act. Since the agreement was a "collective agreement" it had to be in writing (see the definition of "collective agreement" in s 213 of the Act). The agreement required Metcash as the employer to deduct an agreed monthly agency fee from the wages of those of its employees who were not members of the union and to remit the agency fees so deducted to the union. (I shall assume that the parties to the agreement intended that all those employees who were non-union members should fall within the obscure definition of "affected employees" contained in the agreement.)

[2] The appellant is employed by Metcash as a retail adviser. He is one of the affected employees who is strongly opposed to the union and its policies and affiliations. He objects to the imposition upon him of the agreement on the grounds that it contravenes his constitutional right to:

1. freedom of association in terms of s 18 of Chapter 2 ("Bill of Rights") of the Constitution of the Republic of South Africa 108 of 1996; and

2. freedom of political choice in terms of s 19(1) of the Bill of Rights.

[3] The appellant launched an application in the Witwatersrand Local Division for an order against Metcash as first respondent and the union as second respondent:

> "1. Declaring that the agreement entered into between the first respondent and the second respondent on 2 July 1997 (hereinafter referred to as "the agency shop agreement")

infringes upon the applicant's rights to:

1.1 freedom of association;
1.2 freedom to make political choices;
1.3 freedom from servitude or forced labour.

2. Declaring the agency shop agreement to be unenforceable.

3. *Alternatively to paragraph 2 above*, declaring the agency shop agreement to be of no application to the applicant."

The appellant's notice of motion also contained prayers for costs and alternative relief.

[4] Metcash abided the decision of the court *a quo* and is not a party to the present appeal.

[5] The court *a quo* (Blieden J) dismissed the application with costs on the ground that the application was limited to an attack only on the concluded agreement and not also on the constitutionality of s 25 of the Act. The court *a quo* nonetheless granted the appellant leave to appeal to this court.

[6] The parties were asked by this court in advance to file supplementary heads of argument on the question whether the agreement complies with s 25(3) of the Act, and if not, as to the effect of the non-compliance. This aspect thereupon became the central issue on appeal and we intend deciding the matter without considering the constitutional issue. The Constitutional Court has in fact laid it down as a general principle that "where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed" (*per* Kentridge AJ in *S v Mhlungu and Others* 1995(3) SA 867 (CC) at 895E; and followed in *S v Vermaas; S v Du Plessis* 1995(3) SA 292 (CC) at 298 F-I; *Zantsi v Council of State, Ciskei, and Others* 1995(4) SA 615(CC) at 617H-

618C; *Motsepe v Commissioner for Inland Revenue* 1997(2) SA 898 (CC) at 908D-E).

[7] S 25(3) of the Act provides as follows:

"(3) 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 -

(i) the amount of the subscription payable by the members of the representative *trade union;*

(ii) if the subscription of the representative *trade union* is calculated as a percentage of an *employee's* salary, that percentage; or

(iii) if there are two or more registered *trade unions* party to the agreement, the highest amount of the subscription that would apply to an *employee*;

(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 political office; or

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

[8] It is common cause that the agreement does not expressly provide for the matters referred to in s 25(3)(a) and (c). In my view the agreement is also silent about the requirements stated in s 25(3)(d)(i) and (ii). It is evident from the wording of s 25(3) that the agreement is binding "only if" it complies with all the

requirements of the section, and that if it does not so comply it is invalid. The respondent seeks to meet the problem of the apparent invalidity of the agreement by relying on one or more of the following arguments:

1. The agreement complies substantially with s 25(3) of the Act.
2. The agreement is capable of being rectified.
3. Factual issues cannot be raised for the first time on appeal.
4. The appellant waived his right to rely on non-compliance.

I shall consider these points in the same order.

***Substantial Compliance*:**

[9] The respondent submits that the requisite provisions of s 25(3) need not be expressly recorded in the agreement, but may also be incorporated by implication. Reliance is placed in this regard on clauses 6 and 8 of the agreement. It should however be pointed out that these clauses are not contained in the actual terms of the agreement but in the introductory section which records the events leading up to the agreement. The actual terms of the agreement are set forth in clause 9 and following under the heading "Agreement".

[10] Clause 6 refers to a memorandum, dated 9 June 1997, which was circulated to the affected employees. The memorandum summarised the requisite provisions of s 25(3) and requested written comment from the affected employees. I cannot, however, agree with the submission that the parties to the

agreement, by a mere reference to the memorandum, intended to incorporate the requisite provisions of s 25(3) which are summarised in that memorandum.

[11] Clause 8 sets out that Metcash and the union have agreed to enter into an agency shop agreement pursuant to the provisions of s 25 of the Act. The respondent's submission is that the reference to s 25 incorporates, by implication, all the requisite provisions of s 25 which are not expressly recorded in the agreement. In my view clause 8, properly construed, leads to a different conclusion. The concluding part of clause 8 actually records that the parties have agreed to enter into an agency shop agreement "pursuant to the provisions of section 25 of the Act *in accordance with the terms and conditions more fully recorded in this agreement*". (Emphasis supplied). In my view clause 8 shows that the parties to the agreement intended to record the terms of their agreement expressly in the body of the agreement. This was done in the section under the heading "Agreement" which followed upon clause 8.

[12] 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.

***Rectification*:**

[13] 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 and rectification is not competent where the agreement is invalid for want of compliance with statutory formalities. (*Magwaza v Heenan* 1979(2) SA 1019 (A) at 1025H-1026D and 1029A-C; *Intercontinental Exports (Pty) Ltd v Fowles* 1999(2) SA 1045 (SCA) at 1051C-G.) For these reasons the agreement is incapable of rectification.

***Factual issues raised on appeal*:**

[14] The respondent further submits that it would be substantially unfair to the respondent to allow the issue of non-compliance to be raised for the first time on appeal. The respondent relied in this regard on the following *dictum* of Innes J in

the case of *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-3:

> "[I]t has been suggested that the appellant should not be allowed to take advantage of the point on appeal. But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong."

(See further *Paddock Motors (Pty) Ltd v Igesund* 1976(3) SA 16 (A) at 23D-G.)

[15] The law point was raised for the first time in this court in response to the court's query. The validity thereof depends upon the question whether the contents of the agreement comply with the requirements of s 25(3). A copy of the agreement was appended to the appellant's founding affidavit and the contents

thereof are not in dispute. I have already held that the agreement is incapable of rectification and that there are no further tacit terms which ought to be incorporated into the agreement. In the absence of any additional terms or other new facts the validity of the agreement depends upon the contents of the agreement which are common cause. In these circumstances I fail to see how a consideration of the law point involves any unfairness to the respondent.

[16] The court is in any event bound by the provisions of s 25(3) and therefore not only entitled, but also obliged, to raise the point.

***Waiver*:**

[17] There is nothing to show that the appellant either expressly or by conduct waived or agreed to abandon the law point. Moreover, senior counsel for the appellant informed the court that the point did not occur to counsel who argued the matter for the appellant in the court below. The appellant could not have considered abandoning his rights if he (and his legal advisers) had not appreciated it. (See *Laws v Rutherfurd* 1924 AD 261 at 263; *Hepner v Roodepoort-Maraisburg Town Council* 1962(4) SA 772(A) at 778D-779A; *Borstlap v Spangenberg en Andere* 1974(3) SA 695 (A) at 704F-H.)

[18] In any case, a party cannot, by abandoning a law point as to statutory validity in effect compel the court to condone non-compliance with the statutory

requirements. (Cf *Paddock Motors, supra*, at 23G-H.)

[19] As pointed out above the appellant in the notice of motion, albeit on different grounds, asked for an order declaring the agreement to be unenforceable. I intend granting that order.

[20] There remains the question of costs. The appellant has been successful in this court and the general rule is that costs should follow the result. (*Mahomed v Nagdee* 1952(1) SA 410 (A) at 420D-E.) This is also the case where a court on appeal *mero motu* raises a new point which determines the outcome of the appeal. (*Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948(3) SA 353(A) at 355.)

[21] The respondent did not concede the law point and would in all probability have relied on the same defence if the point had been taken in the court *a quo*. But if the point had been raised there it would most likely have been the end of the matter. The question is whether the general rule that costs follow the event should be applied in such circumstances. In my view the order in this case

should follow the order as to costs which was made in the case of *Argus Printing and Publishing Co Ltd v Die Perskorporasie van Suid-Afrika Bpk; Argus Printing and Publishing Co Ltd v Rapport Uitgewers (Edms) Bpk* 1975(4) SA 814 (A) at 823E-824D, where the appellant succeeded in an appeal on a new ground not raised in the court *a quo*. In that case the court made no order as to the costs of appeal, but ordered that the costs in the court *a quo* be paid by the respondent. (See also *Estate Maree v Redelinghuis* 1943 AD 547 at 557-8.)

[22] The following order is made:

1. The appeal is upheld with no order as to the costs of appeal.

2. The order of the court *a quo* is set aside and replaced by the following order:

"(a) The agency shop agreement entered into between the first and second respondents on 2 July 1997 is declared to be unenforceable.

(b) The second respondent is ordered to pay the applicant's costs, such costs to include those consequent upon the employment of two counsel."

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F H GROSSKOPF
Judge of Appeal

Nienaber, JA)
Streicher, JA)
Zulman, JA)
Melunsky, AJA) concur