IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA6/2019

In the matter between:

MUNICIPAL AND ALLIED TRADE UNION OF

SOUTH AFRICA (MATUSA) **Appellant**

and

CENTRAL KAROO DISTRICT MUNICIPALITY

& OTHERS **Respondents**

Heard: **05 May 2020**

Delivered: **28 May 2020**

Summary: Agency shop agreement----interpretation -----whether in light of s 21(8C) of the LRA agency shop agreement may be interpreted to exempt minority union members from paying agency shop agreement fees---agency fees deriving from collective agreement and union membership fees diriving from employees' will both serving different purpose----s 21(8(C) permitting commissioner to grant minority union organisational rights ---s 21(8C) cannot be read down to mean that in granting organisational rights commissioner having the power to override agency fees in terms of s 25.---Agency fees deductible from employees identified in the collective agreement consonant with the Constitution and ILO recommendations. Appeal dismissed.

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant, the Municipal and Allied Trade Union of South Africa ("MATUSA"), appeals against the judgment of the Labour Court (Tlhotlhalemaje J) holding that an agency shop agreement is not unlawful or invalid on account of employees having to pay an agency fee to a majority trade union in addition to a subscription fee to the minority trade union of which they are members.

Background

[2] The seventh respondent, the Independent Municipal and Allied Trade Union ("IMATU"), the eighth respondent, the South African Municipal Workers Union ("SAMWU"), and the sixth respondent, the South African Local Government Association, ("SALGA") are parties to the South African Local Government Bargaining Council ("SALGBC") which is the registered bargaining council in respect of local government throughout the Republic, covering all 257 local municipalities. SAMWU represents 56% of employees and IMATU 36%. The rest of the employees are either non-union members or are members of minority unions such as MATUSA. In August 2015, SAMWU, IMATU and SALGA concluded a collective agreement which granted bargaining, organisational and other rights to the unions. Clause 11 of the collective agreement set a threshold of representativeness (as contemplated in section 18 of the Labour Relations Act[1] ("the LRA")) required in respect of one or more of the organisational rights referred to in Part A of Chapter III of the LRA at 15% of the total number of employees in the registered scope of the SALGBC.

[1] Act 66 of 1995.

[3] In September 2015, SAMWU, IMATU and SALGA concluded an agency shop agreement in terms of section 25 of the LRA, which was renewed in 2018, authorising the levying of a fee equivalent to 1% of all employees' salaries but not exceeding R75 for non-members of SAMWU and IMATU. MATUSA has been granted organisational rights at various municipalities, including the right in terms of section 13 of the LRA to deduct membership subscriptions from the wages of employees who are its members ("stop-order rights"). The first to fifth respondents (various municipalities) maintain that they are obliged in terms of the agency shop agreement and section 25 of the LRA to deduct the agency fee payable to SAMWU and IMATU in addition to the subscription fee payable to MATUSA. Some municipalities do not deduct both the subscription fee and the agency fee from MATUSA members.

[4] In the Labour Court, MATUSA claimed that it is unlawful for an employer to give effect to an agency shop agreement concluded under section 25 of the LRA by deducting an agency fee from the wages of members of a minority union to whom the Commission for Conciliation, Mediation and Arbitration ("the CCMA") has extended stop-order rights in terms of section 13 of the LRA. It relied on section 21(8C) of the LRA, which permits the CCMA to countermand the threshold requirements in a collective agreement for the grant of organisational rights, to argue that the CCMA's decision to extend stop order rights to MATUSA overrides the agency shop agreement. It maintains that from the date of the decision of the CCMA to extend stop-order rights, the employer's obligation to deduct an agency fee under the agency shop agreement was replaced with an obligation to deduct only subscription fees in favour of MATUSA. IMATU, the only respondent that opposes the appeal, contended that the employer is not merely entitled but in fact obliged to deduct agency fees from MATUSA's members, by virtue of a valid agency shop agreement lawfully concluded under section 25 of the LRA.

[5] The Labour Court dismissed MATUSA's claim, holding that, in the absence of a constitutional challenge to the provisions of section 23 (governing the legal effect of collective agreements in general) and section 25 of the LRA, there was no basis to find that the agency shop agreement was unlawful or invalid on

account of MATUSA members having to pay both an agency fee and a union subscription or membership fee.

The relevant statutory provisions

[6] The appeal accordingly requires consideration of the scope and application of three sections of the LRA; namely, sections 13, 25 and 21(8C).

[7] Section 13(1) of the LRA provides that an employee who is a member of a representative trade union may authorise the employer in writing to deduct "subscriptions or levies" payable to that trade union from the employee's wages. The right is one of the organisational rights afforded to trade unions in terms of Part A of Chapter III of the LRA. It is not necessary for the trade union to represent a majority of employees to acquire stop-order rights. They may be granted to a minority union that is sufficiently representative.[2] If the employer and trade union seeking this organisational right cannot agree as to the manner in which the trade union will exercise the right, or if there is a dispute about whether the trade union is sufficiently representative, either party may refer the dispute to the CCMA for conciliation and arbitration.[3]

[8] Section 25 of the LRA governs collective agreements incorporating a union security arrangement in the form of an agency shop agreement. This provision falls within Part B of Chapter III of the LRA dealing with collective agreements. Section 25(1) of the LRA provides that a representative trade union (in this section meaning a majority union[4]) 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. Agency shop agreements are a lesser form of union security arrangement, and unlike closed shop

[2] Section 11 of the LRA provides that a representative trade union means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by the employer in a workplace.
[3] Section 21(4)-(7) of the LRA.
[4] For the purposes of section 25 of the LRA, a representative trade union is defined to mean a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed by the employer in a workplace or by members of an employers' organisation in the relevant sector and area – section 25(2) of the LRA.

agreements, do not compel employees to belong to the trade union recognised by the employer as the bargaining agent of the employees. Agency shop agreements require the so-called free riders among the employees (the non-members of the bargaining agent) who benefit from the efforts of the bargaining agent to pay an agency fee for the fruits of collective bargaining. Disputes about the interpretation and application of an agency shop may be referred to the CCMA for resolution by conciliation and arbitration.[5]

[9] Section 21(8C) of the LRA is one of various amendments introduced into the LRA in 2014. In relevant part, it reads:

> '[A] commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if –(a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.'

[10] Section 18 of the LRA permits the so-called threshold agreements in relation to organisational rights and provides *inter alia* that an employer and a majority trade union may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12 (access), 13 (stop-orders) and 15 (leave for trade union activities) of the LRA. Section 21(8C) of the LRA permits a CCMA commissioner in a dispute regarding these organisational rights to override a threshold agreement between an employer and a majority trade union in order to grant the relevant organisational rights to a minority union that represents a significant interest or a substantial number of employees in the workplace.

<u>The appellant's argument on appeal</u>

[11] MATUSA repeats the arguments it made before the Labour Court and contends that the amendment to section 21 of the LRA introducing subsection 21(8C) in

[5] Section 24 of the LRA.

2014 heralded a new era under which certain organisational rights, including the right to stop-orders, could be granted to minority trade unions that did not meet the threshold for representativeness which constrained minority unions in their quest to organise at the workplace. The extension of stop-order rights to MATUSA, it argues, should be allowed to limit the effect of the agency shop agreement. Stop-order rights are fundamental for the operations and further growth of an emerging minority union in order to fund its activities and to properly organise. To provide for the extension of stop-order rights to a sufficiently representative minority union, where its members are compelled to pay an agency fee to the majority unions, MATUSA submits, results in the benefit of stop-order rights being more illusory than real. Members of MATUSA cannot afford to pay two "subscriptions" to two different unions, one of which is foisted upon them by a pre-existing collective agreement between the majority unions and the employer's organisation.

[12] MATUSA places reliance upon the fundamental rights in the Bill of Rights in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Constitution). It does not argue that the relevant provisions of the LRA are unconstitutional. Rather, in terms of section 39(2) of the Constitution, it seeks an interpretation of them (a reading down) which will ensure consistency with the Bill of Rights. Section 39(2) of the Constitution requires that when interpreting any legislation a court must promote the spirit, purport and objects of the Bill of Rights. The effect of the agency shop agreement, MATUSA submits, does not serve to enhance the constitutional values in question nor the purpose of the amendments to the LRA.

[13 The relevant provisions of the Bill of Rights upon which MATUSA relies are sections 18 and 23. Section 18 of the Constitution provides that everyone has the right to freedom of association. The constitutional right to freedom of association is the touchstone for other fundamental labour rights. The rights of trade unions to organise and bargain are entrenched by section 23 of the Constitution. It provides that every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to

strike.[6] It further provides that every trade union has the right to organise;[7] that every trade union, employers' organisation and employer has the right to engage in collective bargaining;[8] and that national legislation may be enacted to regulate collective bargaining and may recognise union security arrangements (closed shop and agency shop agreements) contained in collective agreements.[9]

[14] To the extent that national legislation (the LRA) regulating collective bargaining and recognising union security arrangements may limit a right in the Bill of Rights, the limitation must comply with section 36(1) of the Constitution, which requires any limitation of a constitutional right to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation should not invade rights any further than necessary in order to achieve its purpose and there must be proportionality between any restriction and the benefits to be achieved.

[15] Section 3 of the LRA likewise requires courts applying the LRA to interpret its provisions to give effect to its primary objects; in compliance with the Constitution; and in compliance with the public international law obligations of the Republic. The purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which include giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution and giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation (ILO) and the promotion of orderly collective bargaining at sectoral level.

[16] MATUSA's essential argument is that on a contextual and purposive interpretation of section 21(8C) of the LRA, the CCMA's decision to extend stop order rights to MATUSA overrides the agency shop agreement and the employer was restricted to deducting only the subscriptions fees due to MATUSA. The assertion is essentially that section 25 of the LRA must be read

[6] Section 23(2) of the Constitution.
[7] Section 23(4) of the Constitution.
[8] Section 23(5) of the Constitution.
[9] Section 23(5) and (6) of the Constitution.

down in terms of section 39(2) of the Constitution in order to promote the spirit, purport and objects of MATUSA's right to organise and collectively bargain, and so as not to apply any existing agency agreement to employees in the position of its members. In support of this contention, it avers in addition that the ILO's Freedom of Association and Right to Organise Convention 87 of 1948 ('the Convention'), as interpreted by its Committee on Freedom of Association, establish that the deduction of both an agency and a membership fee is impermissible.[10]

[17] A purposive interpretation consistent with the Bill of Rights and our public international law obligations, MATUSA believes, is one that has the outcome that only one union "subscription" is payable by its members, being the one they have authorised be paid to their union, and their union alone, as provided for in section 13 of the LRA, in consequence of the extension of those rights to MATUSA by section 21(8C) of the LRA. To hold otherwise, it submits, would be anomalous and defeating of the purpose of amending the LRA to include section 21(8C).

[18] At the inception of any trade union, the focus is on the recruitment of employees and organising them into a functioning establishment. It is only after growing into a position of strength in numbers that the union will be able to contest first for fuller recognition in the workplace and ultimately to engage in collective bargaining on behalf of its members on the grounds that it is now sufficiently representative of them. Therefore, thresholds set by majority unions and the employer, MATUSA submits, are not desirable when it comes to the granting of minimal organisational rights. In order to give proper recognition to the extension of stop-order rights, once these rights have been granted to a minority union, those rights must override another unions' pre–existing rights to "subscriptions" from non–unionised members under an earlier agency shop agreement.

[10] MATUSA's submissions regarding international law are discussed more fully later in this judgment.

Evaluation

[19] MATUSA's argument is not sustainable for the various reasons put forward by counsel for IMATU, Mr. Freund SC, during his argument before us.

[20] Since MATUSA does not challenge the constitutionality of the relevant provisions of the LRA, the appeal turns on a proper interpretation of sections 25 and 21(8C) of the LRA. The inevitable point of departure is the language of the provisions concerned. 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.'

[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. The provision in section 25 of the LRA for any agency fee to be deducted "from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof" cannot be interpreted textually, at least without doing violence to the language, to exclude employees who belong to and pay subscriptions to another union.

[22] Moreover, MATUSA's argument conflates union membership or "subscription" fees and agency fees. An agency fee is due by virtue of statute. Section 25 of the LRA permits the conclusion of an agency shop agreement, the effect of which is to impose a legal obligation on the identified employees in terms of

section 23 of the LRA. 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 meeting the requirements of section 25 of the LRA has been concluded. A union membership fee, on the other hand, is due in terms of an agreement between the trade union and the member. It is a fee for the services offered by the trade union to its members. In theory, it may be paid to the trade union in different ways including by way of authorising the employer to deduct it from remuneration.

[23] Thus, the source of the employee's obligation to pay a membership fee is different from the source of the obligation to pay an agency fee. Both deductions are lawful in terms of section 34 of the Basic Conditions of Employment Act[11] - a subscription fee because the employee authorises the deduction; and an agency fee because a collective agreement requires or permits it. The respective obligations in respect of union membership fees and agency fees thus arise in different ways, are for different purposes, and are differently regulated. Union membership fees being distinct from agency fees, there is no double payment, or any question of MATUSA members being forced to pay double "subscriptions" to IMATU and SAMWU.

[24] 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*)[12] the Labour Court set out the rationale for the agency shop agreement as follows:

> '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

[11] Act 75 of 1997.
[12] (1999) 20 ILJ 2637 (LC) paras 20-21.

> 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.
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> The fact that such workers may be members of another union in the workplace to which they pay union dues does not turn them into paying riders. They remain free riders. … because they make no contribution towards the collective bargaining costs of the representative union and yet they receive and enjoy the benefits of that union's efforts in the same way as that union's members who foot the bill thereof.'

[25] 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.

[26] As Mr Freund SC correctly submitted, the purpose underlying section 25 of the LRA will not be advanced by reading in a proviso to the effect that the agency fee will not be payable by an employee who belongs to another union which has stop order rights. On the contrary: the purpose of funding the collective bargaining costs of the union or unions which actually do the collective bargaining would be undermined.

[27] MATUSA's argument that section 21(8C) of the LRA, enacted after the decision in *Bikwani*, must be interpreted to permit overriding an agency shop collective agreement is without merit. It is abundantly clear from the wording of section 21(8C) of the LRA that it empowers a commissioner only to override a section 18 threshold agreement setting a threshold for minority unions seeking the

organisational rights in sections 12, 13 and 15 of the LRA. It gives a commissioner no power at all to do anything in relation to a pre-existing agency shop agreement.

[28] Section 21(8C) was enacted in response to the decision of the Labour Court in *Western Cape Workers Association v Gansbaai Marine*[13] which held that a section 18 threshold agreement prevailed over a CCMA's decision granting stop-order rights to a trade union whose membership did not reach the agreed threshold of representativeness. The amendment reverses this position. Section 21(8C) permits a CCMA commissioner to override a section 18 threshold agreement. As a consequence, a commissioner may now grant section 12, 13 or 15 rights to trade unions who do not meet the threshold established in a section 18 agreement. The amendment expressly alters the effect of section 18 of LRA but has no effect on section 25 of the LRA. The plain language of the provision confines it to authorising the granting of access, stop-order and time-off rights to unions which are precluded from eligibility for those specific rights by reason of a section 18 threshold. Had the legislature intended to empower commissioners arbitrating organisational rights disputes equally to override any existing agency shop agreement it would have done so expressly. Prior to the amendment of section 21 of the LRA, the provisions of section 25 of the LRA were indisputably clear in scope and effect. Had the legislature when amending section 21 of the LRA intended to amend the unambiguous scope of section 25 of the LRA it would have introduced a consequential amendment to effectuate that result. It did not do so.

[29] The argument that the Constitution requires section 25 to be read down so as to exempt from an agency fee minority union members who pay subscription fees to their union is also not legally tenable. Section 23(6) of the Constitution expressly authorises national legislation to recognise union security arrangements contained in collective agreements. To the extent that section 25 of the LRA may limit a constitutional right, it must comply with section 36(1) of the Constitution. As stated earlier, there is no challenge to the constitutionality

[13] Unreported judgment of the Labour Court per Stelzner AJ case no. J190/99 - date of judgment 19 August 1999.

of section 25 of the LRA or the agency shop agreement. But the arrangement here appears to meet the standard of reasonable limitation - at least *prima facie*. Adequate safeguards ensure the proportionality of the agreement. Agency shop agreements, in general, may only be concluded between the employer and majority unions and do not compel union membership but only the payment of a fee. The agency fee, which may be no higher than the majority unions' subscription, must be paid into a separate account administered by the union and may not be used for party-political purposes or any purpose other than one advancing the socio-economic interests of the employees. Any limitation of constitutional rights is therefore narrowly tailored in a manner which advances the legitimate object sought to be advanced (orderly collective bargaining with majority unions), without undue prejudice to employees obliged to pay the agency fee. The agency shop agreement advances the legitimate legislative policy of majoritarianism in collective bargaining as the preferred option for orderly collective bargaining at sectoral level. Allowing a minority union stop-order rights permits a measure of pluralism and healthy competition. That provision, however, was not intended to dilute the value of the agency shop or to exempt members of minority unions from paying the bargaining agent for the benefits they receive from collective bargaining, as described in *Bikwani*.

[30] Section 25 of the LRA is consistent with the Constitution, and it cannot be said that a majoritarian agency shop agreement does not promote the spirit or objects of the constitutional rights to organise and collective bargaining. There is accordingly no reason to strain the plain language of the section and to read it down to give it the limited meaning proposed by MATUSA. Hence, the Labour Court did not err in holding that the legal position stated in *Bikwani* continues to apply.

[31] MATUSA maintains that paragraphs 695 and 696 of the ILO's Freedom of Association Digest[14] are authority for the proposition that it is contrary to the ILO's Freedom of Association and Right to Organise Convention 87 of 1948 for their members to be obliged to pay the agency fee to the majority union as well paying their membership fees to it. Paragraph 695 of the Digest provide that

[14] Compilation of Decisions of the Committee on Freedom of Association 6th Ed 2018.

workers should have the possibility of opting for deductions from their wages under the check-off system to be paid to trade union organizations of their choice, even if they are not the most representative. Paragraph 696 notes that the Committee has requested "a government" to take the necessary steps to amend the legislation for this purpose.

[32] The case referred to in Paragraph 696 of the Digest concerned a complaint against Argentina.[15] The relevant statute only permitted stop-order rights equivalent to section 13 of the LRA to the "most representative" union, unlike in South Africa where the LRA permits stop-order rights to be granted to all sufficiently representative unions in a workplace or sector. A complaint by a union which was not the most representative union led to a recommendation by the Committee that deductions under the check-off system should be paid to trade union organisations of workers' choice "even if they are not the most representative". Thus, the case was concerned with the right of sufficiently representative unions to gain stop-order rights. It had nothing at all to do with an agency shop agreement or whether payment of an agency fee could be required to be paid by an employee belonging to a union with stop-order rights.

[33] On the contrary, union security arrangements are in conformity with ILO principles and standards on freedom of association.[16] The ILO Committee of Experts has ruled that union security clauses may be permitted, but should not be imposed, by law.[17] Union security clauses should be agreed freely,[18] and agency fees levied on non-members benefiting from collective agreements should only take effect through collective agreements.[19] Section 25 of the LRA is in compliance with these principles and standards.

[34] The Labour Court accordingly did not err in refusing to declare unlawful that which the LRA, the Constitution and international law clearly permit. The appeal should accordingly be dismissed. This is a case in which the costs legitimately

[15] Paragraph 696 cites as authority for its conclusion paragraph 477 of the 2006 edition of the Digest which in turn, cites the 304th Report, Case No. 1832, paragraph 38.
[16] ILO Digest at par 554.
[17] ILO Digest at par 551.
[18] ILO Digest at par 555.
[19] ILO Digest at par 700.

should follow the result. The matter was complex and of importance thus warranting the employment of senior counsel.

[35] In the result, the appeal is dismissed with costs, including the costs of two counsel.

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JR Murphy

Acting Judge of Appeal

I agree

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M Phatshoane

Acting Deputy Judge President

I agree

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DM Davis

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:	Adv R Stelzner SC and Adv A Montzinger
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