



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA13/2022

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION**

**Appellant
(Applicant in court a**

quo)

and

**UASA (FORMERLY NAMED UNITED
ASSOCIATION OF SOUTH AFRICA)**

**First Respondent
(1st Respondent in court a**

quo)

THE FOOD ALLIED WORKERS UNION

**Second Respondent
(2nd Respondent in court a**

quo)

**SUGAR MANUFACTURERS AND REFINERS
EMPLOYERS ASSOCIATION**

**Third Respondent
(3rd Respondent in court a**

quo)

**NATIONAL BARGAINING COUNCIL FOR
THE SUGAR MANUFACTURING AND
REFINING INDUSTRY**

**Fourth Respondent
(4th Respondent in court a**

quo)

L SULLIVAN N.O.

**Fifth Respondent
(5th Respondent in court a**

quo)

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION (CCMA)**

Sixth Respondent

(6th Respondent in court a

quo)

Heard: 16 May 2023

Delivered: 17 August 2023

Coram: Waglay JP et Musi JA et Gqamana AJA

Summary: Agency shop agreement – Section 25 of the Labour Relations Act – Agency shop agreement concluded in terms of which majority unions deduct agency fees from employees in bargaining unit – Appellant admitted as bargaining agent – Agency shop agreement remained unchanged and appellant’s members were subjected to both ordinary union dues and agency fees – Agency fees are charged as representative trade unions fulfil a duty to bargain collectively on behalf of all employees in bargaining unit and fees are paid as minority union receive service from majority unions - No justification for majority union to receive fees from minority union’s members if minority union renders the service – Appellant’s members are not free riders as they pay to be represented by the appellant at the bargaining table – Agency shop agreement has a manifestly unfair and unbusiness-like result – Agreement must be interpreted in a manner which renders it fair, reasonable and business-like – Agency shop agreements are based on fairness – In agency shop agreements, it must be implied that when minority union becomes a bargaining agent, its members should not pay agency fees unless otherwise expressly set out in agreement – Appeal succeeds.

JUDGMENT

MUSI JA

- [1] This is an appeal against an order of the Labour Court. The appellant, (The Association of Mineworkers and Construction Union (AMCU)), sought to review and set aside an award by the fifth respondent (Commissioner), wherein the latter concluded that agency fees are payable by employees who

are members of a minority union, which is also a bargaining agent. The appellant applied, in the alternative, in the court *a quo*, for an order declaring the agency shop agreement invalid. The court *a quo* dismissed both applications. The appeal is with the leave of the court *a quo*.

- [2] The material facts are undisputed. The fourth respondent (The National Bargaining Council for the Sugar Manufacturing and Refining Industry (NBCS)) is a registered bargaining council in terms of the provisions of the Labour Relations Act¹ (Act). The employers in the industry have always been represented by the third respondent (The Sugar Manufacturers and Refiners Employer's Association (SMREA)). The first respondent (UASA, formerly known as the United Association of South Africa) and the second respondent (The Food and Allied Workers Union (FAWU)) are registered trade unions.
- [3] On 18 November 2004, SMREA on the one hand and FAWU, UASA and NASARAIEU (three other unions acting jointly) on the other, entered into a collective agreement which contained an agency shop agreement. In April 2017, NASARAIEU was deregistered. After NASARAIEU's deregistration SMREA's chairperson wrote a briefing note to its members wherein he stated the following:

'All ex NASARAIEU members are reminded that with effect from 7 April 2017, they have automatically defaulted to the Agency Shop and are paying the R120 per month agency fee.

The alternative to this is to join one of the other unions affiliated to the Bargaining Council, i.e. FAWU or UASA or any other registered trade union. However, choosing any 'other' union might mean that the Employee will have to pay the agency fee (R120) on top of the subscription of the union he/she has joined. This will be the case until the 'other' union has recruited enough members to join the Bargaining Council, at which stage the agency fee will fall away... [Own emphasis]

¹ Act 66 of 1995, as amended.

- [4] AMCU seized the opportunity and began recruiting within the sugar industry. In or around May or June 2017, AMCU's membership was such that it was entitled to representation in the NBCS, in terms of the NBCS' constitution. On 1 August 2017 AMCU was officially admitted as a member of the NBCS.
- [5] On 25 July 2017, a few days before AMCU's admission to the NBCS, SMREA, FAWU and UASA (acting jointly as the majority or representative union)² entered into an agency shop agreement. They, *inter alia*, agreed that the employer will deduct an agency fee of 1,4% of the basic wages of employees in the bargaining unit, provided that the agency fee must be equivalent to or no less than the highest amount of the subscription that would apply to a member of the union. They further agreed that the agency fee may be deducted without an employee's authorization and that such fee must be deducted monthly and paid into a separate account administered by the unions, provided that a conscientious objector may request that his or her fee should be paid into a fund administered by the Department of Labour. The rest of the provisions are a repetition of s 25 of the Act.
- [6] Notwithstanding AMCU's admission as a member of the NBCS, the agency shop agreement remained the same with the result that AMCU's members were still compelled to pay the agency fee. As a result of negotiations between the parties to the agency shop agreement and AMCU, a draft agreement was concluded. It, *inter alia*, stated that all AMCU members would pay both AMCU levies plus the agency fees for 9 months and that the agency shop funds would be determined by FAWU and UASA for two years. AMCU members were dissatisfied with the compromise and they refused to give their representatives a mandate to enter into the agreement. AMCU members, therefore, remained subject to double deductions: their ordinary union levies and the agency fees.
- [7] Since the parties reached an impasse, AMCU referred a dispute to the sixth respondent (The Commission for the Conciliation, Mediation and Arbitration

² As at December 2017, FAWU and UASA acting jointly represented 62,33% of the employees, AMCU represented 23,05% and the non-unionised employees were 14,62%.

(CCMA)). It stated that the dispute was about the interpretation and application of “*the main collective agreement and the council constitution to resolve the s 25 of the Labour Relations Act [agency shop] agreement*”. The dispute was conciliated on 10 November 2017, but could not be resolved.

- [8] AMCU thereafter referred the dispute to arbitration and stated that the relief it sought was the cessation of agency fee deductions from its members and that it be part of the respondent’s [NBCS] members who are excluded from paying agency fees.
- [9] During the arbitration hearing, AMCU expressly stated that it does not challenge the constitutionality of s 25 and that it accepts that the agreement complies with the provisions of s 25. It also accepted the legislature’s policy choice in favour of majoritarianism and did not challenge the majoritarianism principle.
- [10] It contended that the agency shop agreement should be interpreted in such a manner that its members should not be subjected to paying the agency fee because the effect of the agreement is unfair towards its members. It argued that its members are not free riders since they are represented at the NBCS. It further argued that it assumed that its admission as a bargaining agent would result in the cessation of the agency fee that its members are compelled to pay. It pointed out that since its members are compelled to pay the agency fee and the union levies of their bargaining agent, the agency fee is used as a discreet tool to induce AMCU members to join FAWU or UASA.
- [11] The second to fourth respondents argued that the closed shop agreement conformed with the requirements in s 25 and that textually, the section was clear and unambiguous. With regard to the briefing note, the third respondent argued that it had been ill-advised, and it does not align itself with Mr Lane’s view anymore. FAWU and UASA argued that the briefing note is not binding because it expresses the view of only one of the parties to the closed shop agreement.

[12] The Commissioner, in dismissing the application, found as follows:

‘Nowhere in the section is there any mention of unions that become bargaining agents having a special dispensation. Neither, with the greatest imagination, can it be said that any section even suggests, however obscurely, a special dispensation for unions who are bargaining agents. The agency shop agreement likewise does not give the bargaining agents any special dispensation...

[The CCMA] does not have the ability to make binding orders relating to the legislator’s intention...

In this matter the interpretation and application of the section has already been clearly set out: members of unions who are the majority or majority allied unions must pay the additional fee.’

[13] Dissatisfied with the arbitration award, the appellant approached the court *a quo* seeking to have it reviewed and set aside. In the alternative, it sought an order declaring the agency shop agreement null and void. It contended that the Commissioner misconstrued the nature of the enquiry because AMCU’s case was about the interpretation of the agency shop agreement rather than s 25 of the Act. It further contended that the Commissioner misdirected himself by applying his mind to an issue that was never before him.

[14] AMCU argued that the agency shop agreement is ill-conceived and it should, in good faith, have included AMCU. The effect of the agency shop agreement, so the argument went, was to drive AMCU members away from their union and to discourage the non-union employees from joining AMCU. It characterized the situation caused by the agency shop agreement as ‘absurd’, ‘punitive’, ‘unfair’, ‘unjust’, and ‘unenforceable’. It further argued that there is no rational basis why AMCU members should pay the agency fee because they are represented at the bargaining council and therefore not free riders.

[15] Only NBCS opposed the applications. It contended that the agency shop agreement was properly entered into by the majority union (FAWU and UASA

acting jointly) and that it was done in accordance with the majoritarianism principle. It submitted that no fault can be found with the commissioner's award and that he determined the issue that was referred to him.

- [16] The court *a quo*, rhetorically asked: “*where a majority union (or alliance of unions) is present in a bargaining council, how effective is the service provided by a minority union?*” It stated that it is not convinced that the plain meaning of s 25 leads to such an absurd or iniquitous result that it should be tempted to rewrite the provisions of the law under the guise of rendering a purposive interpretation. It concluded that in wording, content and format the agreement complies with s 25 and that is all that is required.

- [17] Section 25 provides:

- ‘(1) 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.
- (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.
- (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*.
- (4)(a) Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an *employee* without the *employee's* authorisation.
- (b) Despite subsection (3) (c), a conscientious objector may request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.'

[18] Section 25 recognises agency shop agreements as a form of union security arrangement based on the majoritarianism principle. The section deliberately does not provide for all kinds of manifestations of agency shop agreements. This is so because the legislature cannot make laws that make provision for all eventualities. It therefore enacted a general or framework section and left it to the parties to craft the specific terms of their agreement. The section contains, at once, prescriptive and proscriptive norms.

- [19] It, *inter alia*, prescribes that only a majority union or two or more unions acting jointly and whose members are the majority and the employer or employers' organisation may enter into an agency shop agreement, requiring the employer to deduct an agency fee from the wages of employees identified in the agreement who are not members of the majority union but are eligible to become members thereof. It further prescribes what the agreement should provide and for the maximum agency fee. It, *inter alia*, proscribes the utilization of agency fee collected from non-union members for political party affiliation or as a contribution to a political party or a person standing for political office.
- [20] Although the section is prescriptive and proscriptive it is not exhaustive and by-and-large leaves it to the parties to agree about their respective rights, duties and responsibilities within the permissible parameters set out by the section. The parties may, for example agree on exclusion and exclusivity: that unions other than the majority union will be excluded from the bargaining table and that the majority union would be the exclusive bargaining agent for the employees in the bargaining unit. Members of minority unions will therefore pay an agency fee until they or one of them become the majority union. They may agree that a minority union will be excluded from the bargaining table until it achieves a specified threshold of members, in which case it will become a bargaining agent or that members of the minority union will cease to pay an agency fee when it becomes a bargaining agent. Why should non-members of the minority union pay agency fees?
- [21] The legal philosophy behind making agency fees compulsory is to address the free-rider problem: those who receive a benefit without the concomitant burden of paying therefor. Making those who receive a benefit pay a consideration for enjoying the benefit is rooted in the fairness or fair-play principle.
- [22] The political philosophers, Hart and Rawls explained it differently. Hart characterised it as the principle of mutual restriction and explained it thus:

‘... when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who benefited by their submission.’³

- [23] In terms of Hart’s mutual restriction principle, those who make a sacrifice that benefits others have a right to insist that the beneficiaries make a corresponding sacrifice. Put differently, those who benefit from a sacrifice by others have an obligation to make a corresponding sacrifice. Rawls restated the mutual restriction principle as the principle of fairness as follows:

‘... when a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission.’⁴

- [24] Lowe⁵ summarizes and locates the fair-play principle in Labour Relations and points out that if the benefits of collective bargaining could be had without paying the costs of such collective bargaining, it would be in an employee’s rational self-interest not to join the union responsible for the benefits. He further states:

‘It is clear that union fare share fees are an application of the principle of fair play. The arguments in support of imposing fair share fees certainly share features central to the principle of fair play in their appeal to fairness, in their being required in response to the production of benefits (at least legally) fall on all alike, and in their concern with avoiding free riding.’⁶

³ H L T Hart, “*Are there any natural rights?*”, *Philosophical Review* 64 (1955) 175 at 185.

⁴ J Rawls “*A Theory of Justice*”, (Harvard University Press: Cambridge), 1971.

⁵ S C Lowe, “*Free Riders, ‘Fair Share,’ and the Principle of Fair Play*”, *Public Affairs Quarterly* vol. 10, No 1 January 1996.

⁶ *Ibid* at p 59.

[25] One of the first judicial pronouncements of the fairness principle in Labour Relations was by Justice Rand of the Canadian Supreme Court, in an arbitration, where he said:

'24 ...the employees as a whole become the beneficiaries of union action, and I doubt if any circumstance provokes more resentment in a plant than this sharing of the fruits of unionist work and courage by the non-members...

...

26 I consider it entirely equitable then that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit.⁷

[26] Locally, in *National Manufactured Fibres Employers Association and Another v Bikwani and others*⁸ (*Bikwani*), the Labour Court explained that non-members of the representative union pay agency fees as a contribution towards the representative trade union's costs incurred in connection with collective bargaining. The Labour Court put it thus:

'[20] 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

⁷ *Ford Motor Co of Canada v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W. – C.I.O.) (Union Security Grievance)* [1946] O.L.A.A. No 1 at paras 24 and 26.

⁸ [1999] ZALC 78; (1999) 20 ILJ 2637 (LC) at para

them pay without compelling them to join the representative trade union.

[21] 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.⁹

[27] In *Bikwani*, the minority union was not a bargaining agent. Its members would therefore receive a benefit from the representative union's collective bargaining efforts, enabled by the representative union's members' levies, without the concomitant burden.

[28] The reasoning in *Bikwani* was approved by this Court in *Municipal & Allied Trade Union of SA v Central Karoo District Municipality and Others*¹⁰ (*MATUSA*). In *MATUSA*, this Court found that s 25 advances the policy of majoritarianism and is in compliance with the Constitution, the Act and International law and Conventions. AMCU properly accepted the correctness of *Bikwani* and *MATUSA*. *Bikwani* and *MATUSA* were not confronted with the controversy that we are faced with: should members of a minority trade union that is a bargaining agent pay agency fees? I now pass to look at the specific agreement in this matter.

[29] In *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*,¹¹ the Supreme Court of Appeal reiterated the unitary approach to interpretation of documents. It said:

⁹ Ibid paras 20 to 21.

¹⁰ [2020] ZALAC 20; (2020) 41 ILJ 1918 (LAC).

¹¹ [2018] ZASCA 176; [2019] 1 All SA 291 (SCA).

'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach.'

¹²

- [30] I have illustrated above that s 25 is rooted in the fairness or fair play principle. In *Bikwani*, this principle was not implicated because the minority union wanted to benefit without carrying the concomitant burden. Generally, the majority union receives the agency fee because it fulfils a duty to bargain collectively for all the employees in the bargaining unit. In this matter, however, AMCU is a bargaining agent. It sits with the majority unions and the employers' representatives around the same bargaining table. It, like the majority unions, incurs expenses to enable it to efficaciously bargain on behalf of its members. Its members are not free riders, because they pay to be represented by their union at the bargaining table.
- [31] The court *a quo*'s question about the effectiveness of the service provided by a minority union where a majority union (or alliance of unions) is present in a bargaining council is, in my view, irrelevant. It is an inappropriate yardstick. The minority union can bring a fresh perspective to the negotiations which may be beneficial to all the employees in the bargaining unit. The fact of the matter is that the minority union will also utilize money, effort, research and other activities connected to collective bargaining in order to strike a good deal for its members.

¹² At para 61.

- [32] I agree with the court *a quo* that textually, the collective agreement passes muster. However, when one has regard to the purpose of agency fee arrangements it becomes manifestly clear that the collective agreement in this matter is utterly unfair. It offends the principle on which it is based. The majority unions receive money for a service which they do not provide for AMCU's members. AMCU is there to negotiate on behalf of its members. Why should they pay the majority unions whilst they are not free riders? The mischief of free riding is eliminated by AMCU's presence at the bargaining table. There seems to me to be no fair justification for the majority unions in this case to receive any fair share contributions from AMCU members.
- [33] It is common cause between the parties that the collective agreement does not expressly exclude a minority union from becoming a bargaining agent, after meeting the threshold determined by the parties in the constitution of the bargaining council. Why would the constitution allow a union to become a bargaining agent on behalf of its members and then still burden them with the obligation to pay agency fees? The added burden is, in my opinion, manifestly unconscionable. How should this unfairness be addressed?
- [34] The collective agreement has a negative and prejudicial effect on AMCU's members. Although they are not parties to the agreement, it affects them directly. The textual interpretation of the agreement does not yield a sensible result, in fact, it has a manifestly unfair and unbusiness-like result.
- [35] I disagree with AMCU's contention that the briefing note penned by Mr Lane evinces a practice in the NBCS. In my view, it, at least, indicates that one of the contracting parties (the employer's association) interpreted their arrangement in a manner consistent with AMCU's contention. Likewise, the draft agreement does not point to a practice in the industry but is indicative of the fact that the parties were of the view that exempting AMCU's members from paying the agency fees is not expressly excluded by their agreement and can be accommodated. These indicators are, significant because they set the surrounding circumstances that ought to be considered when interpreting the contract.

[36] Importantly, these factors point to the fact that no violence would be done to the agreement if it is interpreted in a manner which renders the agreement fair, reasonable, business-like and in conformity with the purpose of this kind of union security arrangement. In my view, the only way to give business efficacy which does not contradict the express terms of the agreement and addresses the free rider problem is as follows: once AMCU became a bargaining agent its members were no longer free riders and they should therefore not pay agency fees. This is how the agreement should be interpreted, because all the parties to the contract knew why agency fees are paid. They were aware that the *raison d'être* (reason for the existence) of the agency fee would dissipate when AMCU becomes a bargaining agent. It was clearly within their contemplation. The agreement does not expressly prohibit such an arrangement. The same result is achieved if a term were to be implied in this contract.

[37] In *Alfred McAlphine & Son (Pty) Ltd v Transvaal Provincial Administration*,¹³ Corbett AJA, in a minority judgment, eloquently explained the expression 'implied term' as follows:

'In legal parlance the expression "implied term" is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus*: it is imposed by the law from without. Indeed, terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract.'¹⁴

¹³ 1974 (3) SA 506 (AD).

¹⁴ At 531D-F.

[38] In *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*¹⁵ (*BP Refinery*), Lord Simon, speaking for the majority, summarised it as follows:

‘[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that “it goes without saying”; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.’¹⁶

[39] In *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and Another*,¹⁷ Lord Neuberger, speaking for the majority, reviewed academic writings and judicial precedent and qualified what was said in *BP Refinery* and other cases. He, *inter alia*, emphasised that implication of a term is not critically dependent on the intention of the parties, when negotiating the contract. Further that a term should not be implied in a detailed commercial contract merely because one considers that the parties would have agreed it, if it had been suggested to them.

[40] As pointed out above, agency shop agreements are based on fairness. The agency fee is paid because the minority union receives a service from the majority union or unions. When no service is rendered or it is rendered by the minority union, there is no justification for the majority union to receive agency fees from such minority union’s members.

[41] Generally, in agency shop agreements, it must be implied that when a minority union becomes a bargaining agent, its members should not pay an agency fee unless there are express terms to the contrary in the contract between the parties. The implied term, in this matter, is clear. It is necessary and obvious to give business efficacy to such agreements.

¹⁵ (1977) 52 ALJR 20 at para 21.

¹⁶ At p 26.

¹⁷ [2015] UKSC 72.

- [42] It is manifestly clear in the contract under consideration that a term such as the one in the preceding paragraph gives obvious business efficacy to the agreement. Without it, the agency fee agreement 'would lack, commercial or practical coherence'.¹⁸
- [43] At our request, the parties submitted supplementary heads of argument on whether the contract is in consonance with public policy. As a result of the conclusions reached above, I do not deem it necessary to deal with this aspect.
- [44] Although the unitary approach to interpretation and the implication of a term lead to the same conclusion in this case, they are governed by different rules. In most cases there would be no need to imply additional words in the contract after a contextual and purposive interpretation. Both processes, construing the words which the parties used in the contract and implying terms into the contract, involve determining its scope and meaning.¹⁹
- [45] It therefore entails the interpretation and application of a contract (collective agreement). The commissioner and the court *a quo* misconstrued AMCU's case. They both erred in finding that AMCU wanted them to read words into s 25 of the Act.
- [46] AMCU prayed that the money paid by its members be reimbursed. Its individual members were not cited. The money was paid by AMCU members in their individual capacities. The agency fees paid by them post 1 August 2017 should be repaid. This is something that can be debated and settled by the parties, hopefully, without further litigation.
- [47] The commissioner should have found in AMCU's favour. The appeal ought to succeed.
- [48] I therefore make the following order:

¹⁸ Ibid para 21.

¹⁹ Ibid para 26.

- (i) The appeal succeeds with no order as to costs.
- (ii) The order of the court *a quo* is set aside and replaced with the following:
 - 1. The arbitration award is reviewed and set aside.
 - 2. The award is substituted with the following order:

2.1 The agency shop agreement entered into between the First, Second and the Third Respondents dated 17 July 2017 ("**Agency Shop Agreement**") is interpreted and applied such that:

- a) The deduction of the agency fee in terms of the Agency Shop Agreement shall not be made from employees, subject to the Agency Shop Agreement who are members of the Applicant for so long as the Applicant remains a bargaining agent in accordance with the Fourth Respondent's Constitution.
- b) Any and all agency fee deductions made from the members of the Applicant ostensibly in accordance with the Agency Shop Agreement post 1 August 2017 be refunded to such members by the First and Second Respondents within 2 (two) calendar months from the date of this order.
- c) The First and Second Respondents must, with the assistance of the Applicant, design and implement a claim mechanism in order to give effect to paragraph b) of this order.

Waglay JP *et* Gqamana AJA concur in the judgment of CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT: Mr M Futchter of Futchter & Poppesgou Inc

FOR THE FOURTH RESPONDENT: Mr J Whyte of Norton Rose Fulbright SA