IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J806/21

In the matter between:

SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION **Applicant**

And

SERVEST SECURITY (PTY) LTD – a division of SERVEST GROUP **First Respondent**

KUNGWINI AMALGAMATED WORKERS UNION (KAWU) **Second Respondent**

Heard: **6 July 2023**

Delivered: **14 March 2024(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 14 March 2024.)**

JUDGMENT

BOTES, AJ

Introduction

[1] What are the legal requirements for validity of a closed shop agreement? Does a contractual provision requiring membership of a trade union (as a prerequisite for the validity of the employment contract) result in a pre-entry closed shop agreement prohibited in terms of section 26(3)(c) of the Labour Relations Act (LRA)?[1] May an employer deduct agency fees from employees belonging to a trade union absent a provision in the closed shop agreement permitting such deduction? These and other interesting questions arose during the course of the present dispute.

[2] Following an urgent application in 2021, this court (per Tlhotlhalemaje, J) granted interim relief to the South African Transport and Allied Workers Union (SATAWU) to prevent Servest Security from deducting agency fees from its members in favour of Kungwini Amalgamated Workers Union (KAWU), the trade union who is a party to the closed shop agreement. It interdicted Servest Security from dismissing SATAWU members not belonging to KAWU. Such dismissals would have ensued on the basis that the SATAWU members were in contravention of the closed shop agreement which required membership of KAWU as an employment condition with Servest Security.

[3] The parties now return for the determination of Part B of the same application. SATAWU seeks to have the closed shop agreement declared invalid, obtain a final interdict against the double deductions, and refund all such deductions from the wages of its members (from Servest or from KAWU, whomever received the payments).

[4] The validity of the closed shop agreement is thus paramount to the final adjudication of this dispute.

[5] For ease of reference, I repeat the background to the dispute as set out in Part A of the judgment:

> ‘[1] The applicant, SATAWU is a founding party to the National Bargaining Council for Private Security Sector (NBCPSS). It is also the majority trade union within the private security industry. SATAWU is however a minority union at the first respondent (Servest), where the second

[1] Act 66 of 1995.

respondent (KAWU), enjoys majority representation. Despite all the three parties being parties to the NBCPSS, Servest has since August 2020, concluded a *closed shop agreement* with KAWU.

[2] As a consequence of the conclusion of the closed shop agreement, SATAWU's members, who were previously members of KAWU, find themselves in an unenviable position, where they have to pay double subscriptions to both unions. It is as a result of Servest insisting on compliance with the closed shop agreement, that SATAWU has approached this Court on an urgent basis, seeking an order to interdict and restrain Servest from *unilaterally making further double deductions* from the wages of its members, pending the final determination of Part B of this application. In Part B, which shall be enrolled in the ordinary course, SATAWU seeks an order declaring the closed-shop agreement entered into between Servest and KAWU invalid *ab initio*. Only Servest has opposed the application before the Court.

<u>Background</u>:

[3] The background to [the initial] application is hardly contested, and may be summarised as follows;

3.1 Servest provides private security services and is a division of the Servest Group. Between May 2020 and August 2020, SATAWU recruited a number of employees at the workplace and a significant number had resigned from KAWU. On 21 August 2020 SATAWU had sent a notice in terms of section 21(1) of the Labour Relations Act[2] (LRA) requesting that it be afforded recognition and organisational rights, and sought a meeting in that regard;

3.2 Following another request by SATAWU on 28 September 2020, Servest agreed to a meeting scheduled for 7 October 2020. At that meeting, Servest had placed it on record that it had a closed-shop agreement in place between itself and KAWU since 25 August 2020. A copy of the agreement was furnished

[2] Act 66 of 1995, as amended.

to SATAWU on 26 October 2020. SATAWU contends that until then, it was not aware of the existence of this agreement.

3.3 On 9 October 2020, SATAWU referred a dispute in terms of section 21 of the LRA to the Commission for Conciliation Mediation and Arbitration (CCMA). When attempts at conciliation failed, a certificate of non-resolution was issued on 2 November 2020, and the dispute was referred to arbitration;

3.4 At the arbitration proceedings held on 25 January 2021, the appointed Commissioner had directed the parties to hold a pre-arbitration conference and to further undertake a verification exercise in respect of trade union membership figures. Following a verification exercise, it was recorded that Servest had a workforce of approximately 6 342 employees, of which 310 were members of SATAWU.

3.5 At subsequent arbitration proceedings held on 19 March 2021, Servest challenged the jurisdiction of the CCMA on the grounds of the existing closed-shop agreement with KAWU. The Commissioner in a ruling issued on 29 March 2021 dismissed the preliminary point, and after hearing the merits of the dispute on 20 April 2021, had issued an award on 7 May 2021, and upheld SATAWU's rights in terms of section 12 and 13 of the LRA;

3.6 On 31 May 2021, SATAWU sent correspondence to Servest to demand that all monies deducted in favour of KAWU from its members ought to be refunded, and moreover that all future double deductions ought to cease with immediate effect;

3.7 On 1 June 2021, SEESA, an employer's organisation acting on behalf of Servest responded to SATAWU's letter of demand and essentially refused to accede on the grounds that;

3.7.1 In accordance with the closed shop agreement, all employees including SATAWU members are required to be members of KAWU and thus, union subscription fees were payable to it. In this regard, the resignations from KAWU submitted by SATAWU members would not affect that position.

3.7.2 Should the resignation of SATAWU members be valid, which was denied, then an agency fee equal to union subscription would be applicable.'

Closed shop agreement

[6] A closed shop agreement is a specific contract[3] between a registered trade union and an employer which requires any employee (covered by the agreement) to be a member of the trade union. Such trade union membership thus becomes a pre-condition for employment with the employer. The shop (workplace) is thus closed to non-members – only members of that trade union may work at that particular business.

> 'A closed shop is an arrangement whereby a place of employment requires current membership in a specific union as a condition of employment.'[4]

[7] The purpose of a closed shop agreement is to guarantee that all workers observe the union rules, such as paying monthly dues, taking part in strikes and work stoppages, and accepting the terms of wage and working conditions approved by the union leaders in collective bargaining agreements with company management.[5]

[8] Closed and agency shops are thus vehicles to facilitate majoritarianism in the workplace. A closed shop is the more draconian of the two mechanisms in that it compels membership to a trade union as a prerequisite for employment. The shop (business) is thus closed to non-union members, with only members allowed to work at the shop. Looking at it from an exclusion or exclusivity perspective, it is arguably the workplace equivalent of a country club – only members are allowed to enter, with non-members denied access as entry and other benefits are reserved for members only.

[3] A collective agreement is a specific type of contract on matters of mutual interest concluded between one or more registered trade unions, and one or more employers or registered employers' organisation(s). See section 213 of the LRA.
[4] https://www.law.cornell.edu/wex/closed_shop.
[5] Longley R, April 3, 2021 https://www.thoughtco.com/closed-shop-definition-4155834.

[9] Closed shops have been a part of the labour market for over a century in various jurisdictions, including South Africa. In 1922, the Appellate Division (AD) (as it then was) considered a claim for damages arising out of the dismissal of an employee following his expulsion from the trade union in the case of *Matthews and Others Appellants v Young Respondent*[6]

> 'It is common cause that it was a condition of plaintiff's employment with the municipal council that he should be and continue a member of a trade union. In consequence of his expulsion from the union the plaintiff was at once given the usual 24 hours notice and dismissed from his employment by the municipal council.'[7]

[10] We distinguish between two types of closed shop agreements: pre-entry and post-entry.[8] Pre-entry closed shop agreements apply prior to commencement of employment whilst post-entry arrangements kick in after employment has taken effect. A pre-entry closed shop agreement is identifiable in that it is a pre-

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[6] 1922 AD 492.

[7] Ibid at 499. See also *R v Daleski* 1933 TPD 47 where the court considered the validity of a closed shop agreement at common law.

[8] See also *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd (Veldspun (Pty) Ltd)* [1993] ZASCA 158; 1994 (1) SA 162 (AD) where the AD, as it then was, records synonymous references to pre- and post-entry closed shops as hard and soft closed shops at para 13.

> 'This issue turns on the meaning, in the submission to arbitration, of the phrase "closed shop agreement". On behalf of the employer it was contended that this was a reference only to what is known in the field of labour relations as a "hard" closed shop, that is the kind of closed shop where the employee must be a trade union member to be employed. The arbitrator's award, on the other hand, provided for a type of "soft" closed shop, where the employees were required to join the union within a certain period after being employed or to authorise their employer to deduct from their wages and pay to an agreed charity an amount equal to the trade union's dues.'

And at para 14, with reference to the decryption provided in Kahn-Freund's Labour and the Law3 ed 240-242

> 'In the first place we must distinguish the pre-entry and the post-entry closed shop (called 'union shop' in America). The pre-entry closed shop is the agreed practice whereby no one can apply for a job unless he is a member of a particular union. ... The post-entry closed shop arrangement imposes no restriction on application for jobs and no condition on the making of the contract of employment, but makes it incumbent on every worker to join the union (or a specified union) within a stated period after having taken up the job: union membership is a term of the contract of employment, not a condition of its making.'

condition towards the conclusion of a contract of employment. A post-entry closed shop agreement is a term of the contract of employment.[9]

[11] Closed shop agreements are not without controversy. These types of union security arrangements have, for instance, been banned in the United States of America since 2017.[10] However, trade union security arrangements (such as closed shop agreements) are still in conformity with critical provisions relating to freedom of association established by the International Labour Organisation.[11]

[12] In promulgating the LRA and sections 25 and 26 of the LRA (agency and closed shops), the legislature gave effect to section 23(6) of the Constitution. Section 23(6) of the Constitution states:

> 'National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).'

[13] Section 1 of the LRA confirms its purpose as follows:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
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> a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
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> b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.'

[9] *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1993] ZASCA 158; 1994 (1) SA 162 (AD).
[10] The Labor Management Relations Act of 1987 (better known as the Taft-Hartley Act), prohibits a 'closed shop', a union security agreement whereby an employer agrees to employ only union members. See: *Morrisey v. West Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017).
[11] The ILO is an agency of the United Nations tasked with the protection and promotion of workers' rights. The Republic of South Africa is a member country of the ILO.

[14] In *Municipal and Allied Trade Union of South Africa (MATUSA) v Central Karoo District Municipality and Others*[12] *(MATUSA)* the Labour Appeal Court (LAC) confirmed as follows:[13]

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

[15] In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*[14]*,* the Constitutional Court (CC) confirmed that the decisions of the Freedom of Association Committee of the Governing Body of the ILO are:

> '[30] … authoritative development of the principles of freedom of association contained in the ILO conventions. The jurisprudence of these committees too will be an important resource in developing the labour rights contained in our Constitution.'

[16] In the context of collective bargaining, the court stated that:

> '[31] … an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.'

[17] The apex court also had opportunity to consider workplace and trade union majoritarianism in *Association of Mineworkers and Construction Union and*

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[12] [2020] ZALAC 20; (2020) 41 ILJ 1918 (LAC) at para 33.
[13] This was in the context of section 25 of the LRA.
[14] [2002] ZACC 30; [2003] 2 BLLR 103 (CC) at paras 30–31. See also *Solidarity v South African Police Service and others* [2019] 2 BLLR 187 (LC) at paras 16–18.

Others v Chamber of Mines of South Africa and Others[15]*.* It referenced, with approval, the judgment of Zondo JP (as he then was) in *Kem-Lin Fashions CC v Brunton*[16]:

> '[43] Majoritarianism is both a premise of and recurrent theme throughout the LRA. Our case law has long recognised this, from at least the judgment in *Kem-Lin*, but probably earlier. In *Kem-Lin*, Zondo JP said:
>
> > "The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism."[17]
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> Zondo JP instanced various LRA provisions that illustrate the legislative policy choice.[18] Two of the most obtrusive suffice. It is majoritarianism that underlies the statute's countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members),[19] and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union).[20]'

[18] In *SATAWU obo Mathiso and Others v Pride Bulk Logistics (Pty) Ltd*[21] (*Mathiso*) this court, per La Grange J, stated as follows in respect of the interpretation of section 26:

> '… The employer appears to be of the view that before a closed shop agreement could be concluded, the requirements of section 26(3) of the

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[15] [2017] ZACC 3; [2017] 7 BLLR 641 (CC) at para 43.
[16] [2000] ZALAC 25; (2001) 22 ILJ 109 (LAC).
[17] *Ken-Lin* at para 19.
[18] *"These included sections 14(1), 16(1), 18(1), 32(1)(a) and (b), 32(3)(a), (b), (c) and (d); 32(5) and 78(b)."*
[19] *"Section 25".*
[20] *"Section 26".*
[21] [2018] ZALCJHB 200; [2019] JOL 44286 (LC).

> Labour Relations Act, 66 of 1995 ('the LRA') had to be met and believed that the union had to conduct a ballot before it could demand a closed shop agreement. However, it would seem that the requirements of s 26(3) simply state that a close shop agreement will not be binding before they are met and not that a close shop agreement cannot be concluded before they are met.'[22]

[19] The provisions of section 26 must be interpreted in accordance with the established approach to statutory interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[23]

<u>The validity of the closed shop agreement between KAWU and Servest Security of 25 August 2023</u>

[20] SATAWU claims that this closed shop agreement is invalid for various reasons. I deal with these in turn.

Limitation on use of union fees deducted

[21] In terms of SATAWU's claim, the closed shop agreement is invalid as it does not expressly provide for aspects contained in section 26(3)(d) of the LRA, namely that no union levy may be deducted, may be:

21.1. Paid to a political party;

21.2. Contributed in cash or kind to a political party or person standing for election to any political office, or

21.3. Used for expenditure that does not advance or protect the socio-economic interests of employees.

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[22] Ibid at para 19.

[23] In *Natal Joint Municipal Pension Fund* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) the Supreme Court of Appeal held at para 18:

> "consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production… A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

This approach was approved by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) at para 29 and *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) at para 29.

[22] Clause 4.1.6 of the closed shop agreement states as follows:

> ‘No amount of membership fee may be paid to a political party as an affiliation fee or contributed in cash or kind to a political party or person standing for election to any political office, or uses (sic) any expenditure that does not advance or protect the socio-economic interests of employees." (own emphasis)

[23] The prohibition in section 26(3)(d) relates to both any *"… membership subscription or levy deducted…"*. Does anything hinge on whether the Agreement makes provision for membership fees, rather than a membership *subscription*s or *levies*? I cannot see how it could.

[24] In this context, membership subscriptions, fees or levies are synonymous and the provisions of clause 4.1.6 complies with the requirements of section 26(3)(d) in respect of members of the majority trade union, a party to the agreement. I am unable to accept the submissions regarding the invalidity of the agreement for want of compliance with section 26(3)(d). The reference to membership fee in clause 4.1.6 of the Closed Shop Agreement satisfies the requirement in section 26(3)(d), with union levies and membership fees addressing the same deduction. But this does not end of our consideration of the wording of this clause. We later deal with further objections where the relevance of this clause comes into play.

[25] The next criticism against the Agreement is that it allows for the deduction of union membership fees from all employees in the Bargaining Unit. Clause 6.1 of the Agreement provides for a monthly deduction of *"… Union membership fees…"*.

> ‘6.1. The Company will on a monthly basis deduct from the salaries of all employees in the Bargaining Unit, Union membership fees, which will not exceed R40,00 (forty rand) per employee per month.’

[26] This clause warrants consideration of union subscriptions, fees or levies, on the one hand, and an agency fee, on the other hand. These are two dissimilar fees which arise from diverse obligations or entitlements and are subject to different legal provisions.

[27] Union membership fees are deductible from the salaries of employees who are members of a registered trade union. The arrangement to allow the employer to deduct such a membership fee from those salaries (and pay it to the trade union) arises from an agreement with the registered trade union,[24] or consent of or authorisation from the employee member,[25] or an arbitration award on this right issued in terms of section 21. Section 26, on its own, neither compels nor permits the employer to deduct union subscriptions or levies from the salaries of its employees and pay it over to the trade union without any further steps or requirements. There must be further agreement (with the union or employees), consent from the employees, or an award allowing for the deduction of union subscription or levies.

[28] In *MATUSA* the LAC stated as follows:

> '[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.
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> [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

[24] A collective agreement, including the closed shop agreement, may cater for this obligation and right.
[25] Section 13(1) of the LRA provides that an employee may authorise an employer, in writing, to deduct union subscription or levies.

> Conditions of Employment Act[26] - 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.'

[29] Servest may not deduct union fees from employees who are not members of KAWU. The employer may deduct union fees from trade union members (where permitted to do so via a collective agreement, including a closed shop [agreement, or consent of the employee, or required by law] and agency fees (where permitted to do so in an agency shop or closed shop agreement).

[30] Where the employer deducts trade union subscriptions or levies in the context of a closed shop agreement, the limitations in section 26(3)(d) discussed above apply. Whilst those same restrictions can be found in section 25(3)(d) – in respect of agency shop agreements – as well, in section 26(3)(d) the prohibition is in using union memberships fees deducted for the listed purposes, whilst section 25(3)(d) prevents agency fees from being used for the same prohibited reasons.

[31] The legislature thus clearly distinguishes between the use of agency fees and trade union fees when considering limitations on how such monies may be used. In the context of an agency shop agreement, the legislature limits the use of agency fees. In agency shop agreements, employees are not compelled to join the trade union. If they do not join the trade union, they must pay an agency fee commensurate with the union membership fee.

[32] In a closed shop agreement, all employees must join the trade union at risk of dismissal, save for limited exceptions.[27] The employer thus deducts from the

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[26] Act 75 of 1997.

[27] Section 26(5): "No trade union that is party to a closed shop agreement may refuse an employee membership or expel an employee from the trade union unless —

(a) the refusal or expulsion is in accordance with the trade union's constitution; and

(b) the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights."

employee's salary the trade union subscription which arises due to the employee's membership of the trade union. Only in respect of those employees covered under the exceptions would the employer not deduct and pay over the trade union fees, but rather an agency fee in accordance with the provisions of section 25(3)(b) – (d), (4) – (7).

[33] It is this incorporation into section 26 of the section 25 limitation on agency fees which then makes these limitations applicable to the use of trade union fees in terms of section 26. Thus, any deductions made by an employer from conscientious objectors or employees who refused to join the trade union but were already in service at the time of the conclusion of the closed shop agreement are subject to the same limitations as agency fees in terms of section 25. The distinction between sections 25 and 26 in relation to these restrictions is that these restrictions apply to union membership fees and agency fees payable in terms of section 26, whilst trade union fees are not covered by the limitations in section 25.

[34] Servest may not deduct union fees from employees who are not members of KAWU. The employer may deduct union fees from trade union members (where permitted to do so via a collective agreement, including a closed shop [agreement, or consent of the employee, or required by law] and agency fees (where permitted to do so in an agency shop or closed shop agreement).

[35] Where an employer deducts trade union subscriptions in the context of a closed shop agreement, the limitations in terms section 26(3)(d) in respect of how those fees may be used, apply.[28] Whilst those same limitations are also be found in section 25(3)(d) in respect of agency shop agreements, the distinction lies in that in section 26(3)(d) the limitations applies in respect of union memberships fees for those prohibited causes, whilst section 25(3)(d) prevents agency fees from being used for the same prohibited reasons.

[28] In terms of section 26(3)(d) of the LRA, no union levy may be deducted may be *"paid to a political party, contributed in cash or kind to a political party or a person standing for election to any political office, or used for expenditure that does not advance or protect the socio-economic interests of employees"*.

[36] The legislature thus clearly distinguishes between the use of agency fees and trade union fees when considering limitations on how such monies may be used. In the context of an agency shop agreement, the legislature limits the use of agency fees. In agency shop environments, employees are not compelled to join the trade union. However, if they do not join the trade union, they must then pay an agency fee commensurate with the union membership fee.

[37] In a closed shop agreement, all employees must join the trade union at risk of dismissal, save for limited exceptions.[29] The employer thus deducts from the employee's salary the trade union subscription which arises due to the employee's membership of the trade union. In respect of those employees covered under the exceptions, the employer may not deduct and pay over the t*rade union fees*. It could deduct an *agency fee* in accordance with the provisions of section 25(3)(b) – (d), (4) – (7) if the closed shop agreement allows for such a deduction.

[38] It is this incorporation into section 26 of the section 25 limitation on agency fees which then makes these agency fee limitations applicable to the use of trade union fees in terms of section 26. Thus, when considering a section 26 closed shop agreement, deductions made by an employer in respect of excluded employees[30] are subject to the same limitations as applicable in respect of agency fees in terms of section 25.

[39] Sections 25 and 26 differ (in relation to these restrictions) in that in section 26, the restrictions to the use of the deducted fees apply to both union membership fees and agency fees payable, whilst only agency fees are covered by the limitations in section 25, not trade union fees as well.

[40] Is the closed shop agreement invalid because it does not provide for the limitations in respect of agency fees but only in respect of union subscriptions or levies? SATAWU submits that the Agreement does not require employees

[29] Section 26(5) provides that *"No trade union that is party to a closed shop agreement may refuse an employee membership or expel an employee from the trade union unless —*
(a) the refusal or expulsion is in accordance with the trade union's constitution; and
(b) the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights".

[30] Conscientious objectors or employees who refused to join the trade union but were already in service at the time of the conclusion of the closed shop agreement.

who are not members of KAWU to pay an agency fee. They are correct because clause 4.1.6 of the closed shop agreement records limitations to the use of membership fees deducted. The clause is silent on any limitations that will apply to agency fees.

[41] Section 26(7) envisages that there may be employees who, even where they are not required to pay trade union membership fees, would remain in service of the employer despite refusing to join the trade union.[31] These employees would then have to pay an agency fee. The provisions pertaining to an agency fee are incorporated in section 26 by means of section 26(8).[32]

[42] However, there is nothing in section 26 that suggests that the deduction and payment of an agency fee is compulsory, or a prerequisite for the validity of a closed shop agreement. Section 26(8) does no more than permit the parties to the closed shop agreement to reach a consensus on the payment of an agency fee. They may do so in respect of conscientious objectors or employees in service (at the time of the conclusion of that Agreement).

[43] Permitting the parties to a closed shop agreement to agree on the deduction of an agency fee does not elevate deduction of an agency fee to a legal requirement. This is clear from contrasting the wording of section 26(8) with that used by the legislature in 26(3). The former indicates that employees may be required to pay an agency fee in terms of a closed shop agreement, whilst the latter holds that a closed shop agreement will only be valid if it contains listed provisions.

[44] It seems clear to me that the requirements in respect of agency fees will only apply where the closed shop agreement requires or permits agency fees to be deducted from non-members. If the closed shop agreement does not so provide, then the employer would neither be permitted nor required to deduct agency fees from the salaries of non-members nor would it be able to pay it

[31] See fn 25 above.

[32] Section 26(8): “The *employees* referred to in subsection (7) may be required by the closed shop agreement to pay an agreed agency fee, in which case the provisions of section 25(3)(b), (c) and *(d)* and (4) to (7) apply.”

over to the trade union (into a separate account established for that purpose). But failing to agree on the deduction of an agency fee, on its own, does not invalidate a closed shop agreement as this provision is not a pre-requisite for the validity of such a collective bargaining agreement.

[45] To me, this reasoning is analogous to that adopted by this court, per La Grange J, in the *Mathiso* case**.** There is a difference between factors required to establish the validity of an agreement and provisions that will allow a party to the agreement to take steps permitted under the contract, but where such steps are not prerequisites for the validity of the agreement. Agreeing that the employer may deduct an agency fee from non-members is neither an *essentialia* nor a requirement laid down by law for the validity of a closed shop agreement. By the same token that the parties may agree not to deduct such an agency fee without impacting the validity of a closed shop agreement, omitting to create an entitlement to so deduct an agency fee similarly does not impact the validity of the agreement. it merely means that the employer may not deduct an agency fee from non-members. The agreement remains effective absent agreement on the deduction of an agency fee.

[46] SATAWU claims that clause 4.1.6 of the closed shop agreement violates sections 26(7) and (8) in it requires all employees in the bargaining unit to pay union membership fees, rather than catering for the exceptions in sections 25(3)(b), (c), (d) and (4) to (7).

[47] I agree with SATAWU's submission. The Agreement permits membership fees to be deducted from all employees in the bargaining unit. This is clearly wrong as union membership fees may only be deducted in respect of union members, as discussed in paragraph **Error! Reference source not found.** above. There is nothing in the Closed Shop Agreement empowering Servest to deduct an agency fee from employees who may legitimately be employed without being members of the trade union.[33] The Closed Shop Agreement does not permit Servest to deduct agency fees from non-members, or to pay such amounts over to KAWU (whether into a separate account managed by that union or

[33] Conscientious objectors or employees who refused to join the trade union but were already in service at the time of the conclusion of the closed shop agreement, as per section 26(7).

otherwise). The closed shop agreement is not capable of an interpretation that will see Servest in compliance with its obligations in respect of non-members arising from sections 26(8) as read with sections 25(3)(b), (c), (d) and (4) to (7).

[48] Does this invalidate the agreement, though? No, in this respect the agreement merely does not include the empowering provisions that would allow it to deduct and pay over agency fees. Parties to a closed shop agreement may agree that in respect of the limited exceptions applicable to compulsory membership, they will not enforce payment of an agency fee in respect of such non-members. The absence of provisions in a closed shop agreement dealing with agency fees means that the employer may not deduct such fees from non-members as an automatic right. But by the same token, that lack of such a provision would not invalidate that Agreement either. It will merely make the deduction of agency fees otherwise unlawful.

[49] I do not understand SATAWU's complaint to be in relation to agency fees deducted from non-members falling within the exceptions. Their unhappiness stems from the fact that Servest is continuing to deduct union fees for KAWU even after their SATAWU members resigned from KAWU. Servest has continued to deduct monies from those members, albeit the employer agreed to cease such deductions where they have resignation forms (resigning membership from KAWU) in respect of those SATAWU members.

[50] I partially agree with SATAWU's contention that an employer may not deduct double membership fees in terms of a closed shop agreement, where an employee resigned union membership with the majority union (that is a party to the Agreement). The employer may only deduct the union membership fee where membership persists, and an agency fee if the closed shop agreement permits for the deduction of an agency fee. If a member resigns membership of a trade union and revokes the right to deduct membership fees in accordance with section 13(3),[34] the employer may not continue to deduct union

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[34] Section 13 of the LRA:

> *"(1) Any 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."*

membership fees from the employee's remuneration. The employee may authorise the employer to deduct and pay over subscriptions in respect of another trade union where the employer has granted that latter trade union such rights in terms of section 13, or in an agency shop or closed shop agreement.

[51] A closed shop agreement compels membership with a trade union, with an agency fee payable in respect of statutorily permitted non-membership. The employer will deduct a trade union subscription from an employee's remuneration based on the employee's membership to the (closed shop) trade union. Where the employee refuses to join the trade union, resigns membership from the union, or is expelled by the trade union, the employer no longer has a legal entitlement to deduct the union membership fee from the employee's salary. Instead, if the employee's lack of union membership falls outside of the limited permissible statutory exceptions, the employer may fairly dismiss the employee in terms of section 26(6).

[52] This does not prevent an employee from being a member of more than one trade union at the same time, even if one of them is the party to a closed shop agreement at the employee's workplace. If the employee is willing to pay membership fees to their preferred trade union, whilst also paying membership to the majority trade union (party to the closed shop agreement), that would not be in contravention of section 26. The employee may belong and pay membership to both unions, but may not refuse a deduction to a closed shop agreement union on the basis of membership with a non-closed shop agreement union. Whilst considered in the context of an agency shop agreement, the LAC came to this same conclusion in *MATUSA* above. It stated as follows at paragraph 21 of that judgment:

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(2) An employer who receives authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.

(3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.

(4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.

> '… 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, <u>to exclude employees who belong to and pay subscriptions to another union</u>.' (own emphasis)

[53] The gravamen of SATAWU's complaint is that they and their members are prejudiced in that the employer deducts membership fees in respect of KAWU from the salaries of the SATAWU members, notwithstanding the employees having resigned from KAWU.

[54] The deduction of union fees, unlike agency fees, is not automatic. Union membership deductions are permitted based on the agreement between the employer, the employee as a member, and the trade union. The employee grants the employer consent for the deduction of their union fees, and for payment of this to the trade union, with the employer and trade union agreeing on the process and requirements for giving effect to such an arrangement. Where an employee resigns their membership with the union or is expelled by it, the underlying right to deduct union fees falls away. SATAWU is correct in contending that the double deductions were in contravention of sections 13 and 26 of the LRA, and section 34 of the Basic Conditions of Employment Act[35] (BCEA) in respect of those employees who have resigned their KAWU membership and notifies Servest in compliance with the employee's prior commitment to KAWU in respect of such membership termination. KAWU is neither entitled to an agency fee in respect of such an employee nor is Servest able to make a deduction of an ongoing union membership fee in respect of KAWU pertaining to such a member.

[55] As stated above, I agree that the closed shop agreement does not permit for the deduction of an agency fee. But it also does not prohibit (if it even could) deduction of union fees to SATAWU where the employer is authorised to deduct and pay such fees in respect of SATAWU members. An employer may deduct and pay union fees to the majority union under a closed shop

[35] Act 75 of 1997.

agreement, and also to a minority union where it has members at the same workplace and the employer is authorised by either a collective agreement or individual employee agreement to do so. The deduction and membership to the minority union does not invalidate the closed shop agreement. This means that the employer may, even has to, give effect to the closed shop agreement in respect of those employees who are non-members of the majority union, and who do not fall within the statutory exceptions providing them protection against dismissal.

[56] It is not inconsistent with section 26 for an employee to be a member of KAWU and a member of SATAWU, and to give Servest permission to deduct union levies in respect of both trade unions and pay it over to them.

[57] The employee does not enjoy protection against dismissal, though, where the employee is no longer a member of KAWU and has joined SATAWU, under circumstances where (1) the closed shop agreement is valid and enforceable, and (2) where the employee is neither a conscientious objector nor an employee who refused to join KAWU at the time of the conclusion of the closed shop agreement between Servest and KAWU.

[58] Thus, we have to evaluate the remainder of SATAWU's claims in respect of the validity to determine the position with respect to the employees and the deductions made from their salary.

[59] SATAWU objects to the closed shop agreement in that they dispute that (1) KAWU is the majority union in the workplace, (2) that a ballot was held, and (3) that two-thirds of the employees voted in favour of the closed shop agreement.

[60] It is a pity that KAWU did not join proceedings as they would clearly have been in a position to provide great clarity on a of the aspects raised. However, that does not prevent this court from being able to consider the issues based on the evidence placed before it by SATAWU and Servest.

[61] As of 11 February 2021, SATAWU and Servest agreed that the union had 228 members amongst its employees. It is not in dispute that Servest employs around 6,000 employees. The membership of KAWU is disputed, but on

consideration of SATAWU's submissions, as read with the responses from Servest, I am willing to reject SATAWU's contention that KAWU did not have as members 5963 of the Servest employees. On the facts before me, I conclude that KAWU was indeed the majority trade union at the time of concluding the agreement.

[62] I am unable to conclude that there has not been compliance with section 26 insofar as it relates to whether a ballot was not held, or that two-thirds of the employees balloted were not in favour of the closed shop arrangement. Stated differently, as per the test below, I am not satisfied with the inherent credibility of SATAWU's factual averments in this regard.

[63] In *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[36] the Appellate Division (as it then was) stated as follows in relation to considering disputes of facts in motion proceedings.

> ‘It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163–5; Da Mata v Otto NO, 1972 (3) SA 858 (A) at p 882D – H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf. Peterson v Cuthbert & Co Ltd, 1945 AD 420, at p 428; Room Hire case, supra at p 1164) and the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg. Rikhoto v East Rand Administration Board, 1983 (4) SA 278 (W), at p 283 E – H).

[36] [1984] ZASCA 51; 1984 (3) SA 623 at paras 8-9.

> Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[64] In *Young, James and Webster v The United Kingdom* the court held that *'[a] threat of dismissal involving loss of livelihood is a most serious form of compulsion'*.'[37]

[65] The factual disputes in relation to the balloting does not allow me to conclude that there had not been compliance with the balloting requirements in section 26. I do not find that there had been compliance, but with the onus borne by SATAWU as an applicant, I find that they had not proffered evidence to allow me to find in their favour in regard to the balloting contentions affecting the validity of the Agreement. There are various avenues open to SATAWU to compel disclosure of the balloting process and results in order to have that disputed aspect determined should it wish to do so, rather than for this court to attempt to do so in motion proceedings.

[66] The last challenge to the Agreement is that it is prohibited as it is a pre-entry closed shop agreement and not a post-entry closed shop agreement.

[67] SATAWU's contention in this regard is that clause 4.1.5 of the agreement constitutes a pre-entry requirement. In terms of section 26(3)(c) of the LRA, a closed shop agreement is only valid if there is no provision in the agreement requiring membership of the representative trade union before employment commences.

[68] Clause 4.1.5 states that *"[t]he Company may not employ any person to render services in the Bargaining Unit unless such person becomes a member of the Union and the Bargaining Unit"*.

[69] The contracts of employment template provide as follows:

> 'The company has a closed shop agreement with KAWU (Kungwini Allied Workers Union) effective 28 August 2014. A close (sic) shop agreement is a

[37] *Young, James and Webster v The United Kingdom* 1981 IRLR 408.

> type of collective agreement that requires non-union workers to join the union. As per this agreement on commencement of employment automatically you will fall under this union and a monthly fee of R40,00 will be deducted of (sic) your salary. Should you refuse/decline to be part of this collective agreement automatically your contract of employment is deemed null and void.'

[70] Do these provisions amount to a prohibited pre-entry closed shop?

[71] Pre-entry closed shops require membership of a trade union as a pre-requisite for employment. It is a more draconian limitation on the freedom of association. As stated by the AD in paragraph 33 in *Veldspun (Pty) Ltd* above:

> 'It should be mentioned that the European Court of Human Rights held in *Young, James and Webster v The United Kingdom* 1981 IRLR 408 that a pre-entry closed shop was hit by Article 11 of the European Human Rights Convention which guarantees, inter alia, freedom of association 'including the right to form and to join trade unions for the protection of his interests.'

[72] In the seminal work, Kahn-Freund's Labour and the Law (referenced with approval in *Veldspun (Pty) Ltd above*), Davies and Friedland state as follows in relation to pre-entry closed shops:

> 'The pre-entry closed shop is the agreed practice whereby no one can apply for a job unless he is a member of a particular union. This may (but need not) mean that the union actually supplies the applicants condition for the making of the contract of employment. The post-entry closed shop arrangement imposes no restriction on application for jobs and no condition on the making of the contract of employment, but makes it incumbent on every worker to join the union (or a specified union) within a stated period after having taken up the job: union membership is a term of the contract of employment, not a condition of its making.'

[73] In the present matter, Servest and KAWU agreed that Servest will not employ an applicant for employment unless they become a member of KAWU. Whilst the language used is not a model of clarity, it is capable of a construction that allows one to conclude that union membership is a term of employment, not a pre-condition to concluding the contract. This interpretation is reinforced as

membership of KAWU is not required in order to apply for employment with Servest.

[74] We then turn to the wording of the template employment contract. In essence, the employment contract provides that failure to join the trade union means that no agreement comes into being. Does this cross the line and make the closed shop arrangement one where membership is required in order to become employed, rather than a condition of employment as a term?

[75] The employment contract requires membership of KAWU as a condition for the employment contract to come into being. In *Chester v Snowy Owl Properties and Another*[38] the Supreme Court of Appeal (SCA) concluded that the plain wording of a condition precedent in the contract in question should be interpreted that, absent fulfilment of the condition,[39] there could be no valid agreement between the parties.

[76] This seems to me to be the case with respect to the template employment contract wording. If the employee is not amenable to being part of the closed shop arrangement, the employment contract is null and void.

[77] The author R.H. Christie[40] states as follows in respect of conditions precedent and resolutive conditions:

> 'The difference between a condition precedent (also known as a suspensive condition) and a resolutive condition (also known as a condition subsequent) is easy to state. A condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event. When the condition governs the whole contract there is usually little difficulty in deciding whether it is a condition precedent or a resolutive condition, but when it governs only part of the contract there may be considerable difficulty in classifying it, and correct classification may be important in order to decide the rights and duties of the parties. Thus in a sale

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[38] [2021] ZASCA 30; [2021] JOL 49983 (SCA).
[39]. *"[t]he whole of this agreement is subject to the following conditions precedent being met prior to the transfer date…".*
[40] Christie *The Law of Contract in South Africa*, 5th ed (LexisNexis, Cape Town) at p 139.

> with a *lex commissoria* attached, the proper classification of the condition will decide whether risk and advantage, ownership and the right to fruits lie with the buyer or seller.
>
> Whether a condition is precedent or resolutive is a matter of construction, the words "subject to" being the normal way of indicating a suspensive condition, and the mere fact that some terms of the contract are to be performed immediately upon the conclusion of the contract does not necessarily make a condition governing other parts of the contract resolutive rather than precedent. In such a case it is obviously arguable that the condition is resolutive in respect of those terms which were performed before it was fulfilled, and this fruitful source of disputes is the inevitable result of our ingrained habit of describing a contract as conditional when it is only partly subject to a future uncertain event.'

[78] In *Wyeth SA (Pty) Ltd v Manqele and Others*[41] the LAC confirmed that employment rights accrue upon conclusion of an employment contract, not only when the employee is expected to perform work or becomes entitled to receive remuneration for such work (performed).[42] An applicant for employment thus acquires protection afforded to employees upon the conclusion of a valid employment agreement. This includes the right to challenge the fairness of a dismissal.

[79] In making membership to the trade union a prerequisite for the conclusion of a valid employment contract, rather than a condition to avoid termination of the contract, strikes me as a mechanism that deprives an employee in this case from the right of challenging the fairness of such termination. Whilst such clauses may be permissible in the conclusion of a typical employment contract, in the context of the prohibition on pre-entry closed shops, such a condition

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[41] [2005] ZALAC 1; (2005) 26 ILJ 749 (LAC).

[42] Ibid at para 45:

"… I am of the view that this Court is thus entitled to depart from such a literal and ordinary construction and extend the literal construction of the definition as including a person who has concluded a contract of employment which is to commence at a future date."

See also para 52:

"The ultimate conclusion this Court arrives at is that the definition of employee in s 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates."

precedent tilts the balance to a conclusion that the closed shop arrangement requires membership of the trade union as a precondition for employment.

[80] This takes us from the safe harbour of a post-entry closed shop into the forbidden land of the pre-entry closed shop. The closed shop landscape at Servest (the collective agreement read with the employment contract template) may not impose any union membership restriction on the application for jobs, but it imposes it as a condition on the making of the contract of employment. It does not make it incumbent on every worker to join the trade union (within a stated period after having taken up the job), but instead makes union membership a condition for the making or conclusion of the contract of employment, not merely a term of the employment contract. This is the prohibited area identified by Kahn-Freund and the restriction on closed shops imposed by the legislature in section 26(3)(c) of the LRA.

[81] I thus conclude that the closed-shop agreement between KAWU and Servest is not binding as it fails to meet the threshold requirements for validity in section 26(3)(c) by requiring membership of KAWU in order for a valid employment contract to come into being or exist. The closed shop agreement, read with the provisions of clause 34 of the employment contract template, constitutes a prohibited pre-entry closed shop agreement.

Deductions

[82] SATAWU seeks an order interdicting double deductions from their members' salaries. In the light of the finding regarding union fees and agency fees above, an employer may not deduct an agency fee from the remuneration of an employee where the employee is not a member of the trade union that is a party to a closed shop agreement unless the closed shop agreement permits such agency fee deduction.

[83] In general terms, Servest may also not deduct union fees in favour of KAWU where the employees are no longer members of KAWU. Where employees are still members of SATAWU and KAWU, and there are valid permissions in terms of section 13 to deduct and pay over membership fees in respect of both unions, which consent cannot arise from the non-binding closed shop

agreement, then Servest may continue to deduct union fees and pay this over to the two unions.

[84] The closed shop agreement between KAWU and Servest is invalid, but where there is a standalone consent for Servest to deduct union fees from the salaries of KAWU members, it may do so. Such an obligation may exist independent from the now impugned closed shop agreement. The same is true in respect of SATAWU and its members.

[85] There are insufficient facts placed before this court to allow me to make a determination on the repayment of specific deductions made. The parties may take steps in respect of monies deducted from remuneration in terms of the closed shop agreement that was not binding. It would appear to me that such deductions would have been in contravention of section 34 of the BCEA unless there were independent authorisation in terms of section 13 or in a separate collective agreement, for instance. The parties may exercise their rights to recover such deductions, but in motion proceedings and on the facts before the court, I cannot conclude that all payments were irregular and have to be repaid, let alone in respect of whom and the quantum payable. It may well be, for instance, that some employees were and remain members of KAWU and permitted deductions from their remuneration in terms of section 13 as a standalone authorisation for such deduction. In the light of my conclusion in respect of costs, it would seem to me to behove the parties involved in this ongoing relationship to attend to the reconciliation of fees paid and agree on any remedial steps to be taken, if any.

<u>Costs</u>

[86] In *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*[43] the court stated as follows:

> 'The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost

[43] [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC) at para 19.

> orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes.'

[87] Having considered the novel nature of the application, the dearth of authority on the topic, the ongoing relationship between the parties and the mixed results in respect of the claims and defenses raised, I am not persuaded that awarding costs will be appropriate in this matter. Parties should feel at liberty to approach this court to ventilate matters especially where the issues are complex, not previously covered at length by courts and tribunals, and have a significant impact on employees, trade unions and employers. Neither the application nor the opposition thereof warrants a cost order.

[88] Accordingly, I make the following order:

Order

1. The closed shop agreement between KAWU and Servest Security is not binding in that it contravenes the limitation in section 26(3)(c) of the Labour Relations Act and is hereby set aside.

2. There is no order as to costs.

J Botes

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. M.D. Maluleke
Instructed by:	M.M. Baloyi Attorneys
For the Respondents:	JM de Villiers
Instructed by:	De Villiers & Du Plessis Attorneys