IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 3319/17

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **Applicant**

and

TRANSNET (SOC) LIMITED **First Respondent**

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **Second Respondent**

UNITED NATIONAL TRANSPORT UNION **Third Respondent**

TRANSNET BARGAINING COUNCIL **Fourth Respondent**

Delivered: **29 November 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant (NUMSA) approached this Court in terms of the provisions of section 158(1)(vi) read with section 158(1)(j) of the Labour Relations Act

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(LRA)[1] to seek declaratory orders that the agency shop agreement concluded between the first, second and third respondent is unlawful and invalid for want of compliance with the provisions of section 25(2) of the LRA; any deductions of agency fees from its members as a result of the agreement to be unlawful; directing the first respondent to refrain from deducting agency fees from its members, and ordering the first to third respondents to repay the agency fees already deducted from its members between May 2017 to date, plus interest thereon.

[2] The first respondent, (Transnet (SOC) LTD), and the third respondent, United National Transport Union (UNTU) opposed this application.

Background:

The Agency Shop Agreement:

[3] On or about 15 May 2017, Transnet, SATAWU and UNTU entered into an agency shop agreement which is envisaged to bind all the employees, including members of other registered trade unions other than the *representative unions* within the Transnet Group.[2] Under clause 1 of the agency shop agreement, its purpose was to replace *Annexure E* of the Recognition Agreement entered into between Transnet, SATAWU and UNTU in November 2016.

[4] The agency shop agreement contemplated an agency fee to be levied against the salaries of *affected employees*[3]. *Affected employees*[4] are defined as

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[1] Act 66 of 1995 (as amended)

[2] 2. **SCOPE**

2.1 This agreement binds:

2.1.1 Transnet as Employer;

2.1.2 All employees of Transnet as Employer who are members of the trade union parties to this agreement;

2.1.3 All employees of Transnet as Employer who are not members of trade parties to this agreement, but who fall within the registered scope of the TBC.

[3] **4. PARTIES TO THE TRANSNET BARGAINING COUNCIL AGREE AS FOLLOWS**:

4.1 The agency fee is an amount equivalent to one percent (1%) of each affect *employee's* monthly wages, but not more than R90.00 per month and not less than R35 per month, as amended and agreed between the parties from time to time.

[4] 3. **Definitions**

3.1 **Affected employee**: means an employee who is not a member of any one of the trade union parties, and is eligible for membership of the trade union

'employees who are eligible to be members of the trade unions which is party to the agency agreement, but are nevertheless not members of the representative union'.

[5] A *Representative Union* is defined in the agency shop as *'trade union parties that meet the threshold of recognition in terms of the Recognition Agreement'*. Clause 2.16 of Recognition Agreement in turn defines *representative union* as a union that '*complies with the threshold requirements of 25% (twenty five percent) paid up membership of employees in the bargaining unit across the whole of Transnet.*

[6] Clause 2.2 of the recognition agreement defines a *bargaining unit* to mean all permanent and fixed-term contracts employees who fall within the salary scales L – G. The agreement further defines the operating divisions of Transnet to include Transnet Pipeline, Port Terminals, Freight Rail, Engineering, Group Capital, Corporate Centre and Property.

[7] The significance of reference to *'bargaining unit'* will become clearer in this judgment, as it is central to the question of the validity of the agency shop agreement.

[8] Under clause 5 of the recognition agreement, Transnet recognises and accords '*representative union'* the rights to deduct union subscription from the employees' wages, in accordance with section 13 and 25 of the LRA[5].

[9] Clause 2.25 of the recognition agreement defines a *'workplace'* as a *'workplace as defined in the Labour Relations Act 66 of 1995, as amended from time to time. For the purpose of this agreement, Transnet shall be regarded as the workplace'*.

3.9 **Representative union**: means the trade union parties that meet the threshold of the recognition agreement in terms of the recognition agreement

[5] **Organisational Rights Overview**

5.1 Transnet recognises the rights of a representative union in the manner set out below

5.2 The following rights apply to a representative union across Transnet irrespective of whether the union is representative in any particular operating division:

…

5.2.2 Deduction of union subscription from employees' wages, in accordance with section 13 and 25 of the LRA, and on terms and conditions set out in this agreement.

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The dispute:

[10] On 11 December 2017, NUMSA's attorneys of record (Cheadle Thompson & Haysom Inc.) addressed correspondence to Transnet and recorded the following;

10.1 The agency shop agreement entered into with SATAWU and UNTU defined a *'representative union'* as the *'trade union parties that meet the threshold of recognition in terms of the recognition agreement*'.

10.2 The recognition agreement defined a representative trade union that has 25% of paid up membership in the bargaining unit of Transnet across the whole of Transnet including its operating divisions and internal operations.

10.3 As a result of the agreement, Transnet had been deducting agency fees from NUMSA's members since May 2017 to date.

10.4 In terms of section 25(2) of the LRA the definition of a representative union includes a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed by an employer in a workplace.

10.5 Accordingly, the agreement did not comply with the requirements of section 25(2) of the LRA, and was therefore unlawful and invalid. Consequently, all agency fees deducted from members of NUMSA were unlawful.

10.6 NUMSA sought an undertaking from Transnet that it would refund the agency fees unlawfully deducted since May 2017 to date and refraining from making any further deductions[6].

[11] Transnet's response by way of an email on 18 December 2017 was that notwithstanding the definition of 'representative union' in the agency shop

[6] Annexure 'EM3' to the Founding Affidavit.

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agreement (which referenced to the recognition agreement), the agreement did in fact comply with the provisions of section 25(2) of the LRA on the basis that the recognised unions, acting jointly, represented the majority employees in the workplace and not in the bargaining unit. To that end, the agency shop was not unlawful and invalid, and the agency fees deducted in terms thereof were lawful.

[12] NUMSA's contentions in these proceedings is that the agency shop agreement read with the recognition agreement fell short of the requirements of the provisions of section 25(2) of the LRA, in that, the recognition agreement only required the majority membership in a *bargaining unit* while the provisions of section 25 of the LRA required the majority membership in the *workplace* and in that respect, the agency shop agreement was in conflict with the provisions of section 25 of the LRA, and was thus unlawful and void.

[13] In opposing the application, Transnet contends that;

13.1 During 15 May 2017, its workforce consisted of 52 956 employees inside and outside of the bargaining unit. 26 107 (or 49%) of those employees were members of UNTU and a further 16 300 (or 30%) were members of SATAWU.

13.2 At the conclusion of the agency shop agreement, UNTU and SATAWU had more than the 50% plus one threshold as required in terms of the provisions of section 25(2) of the LRA.

13.3 The objective facts in this case were that UNTU and SATAWU not only represented the majority of the employees in the *bargaining unit,* but also represented the majority of employees in the *workplace*.

13.4 The term *bargaining unit* in the recognition agreement was erroneously inserted, but that error did not necessarily render the agency shop agreement void.

13.5 Central to NUMSA's application was whether the substantive requirements of section 25(1) of the LRA had been met, with the

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enquiry being whether UNTU and SATAWU factually represented the majority of the employees in the workplace.

13.6 The objective facts of this dispute revealed that UNTU and SATAWU represented the majority of employees in the *workplace* and therefore by implication, there was compliance with the requirements of section 25(2) of the LRA notwithstanding, the *patent error* in the recognition agreement.

13.7 The *representative* scheme of the provisions of section 25(1) of the LRA was aimed at circumventing non-unionised employees from unjustly receiving benefits from the bargaining processes which they did not financially contribute towards.

[14] UNTU in alliance with Transnet denied that the agency shop agreement did not comply with the provisions of section 25(2) of the LRA, particularly since the two trade union parties to the agency shop agreement were in fact the majority unions in both the *bargaining unit* and *workplace,* in strict compliance with the requirements of section 25(2) of the LRA. It was argued that the agency shop agreement replicated all the provisions of section 25(3) of the LRA, and that to the extent that reference in the agreement was made to '*bargaining unit*' instead of *'workplace'*, this was in error, which in any event, has since been corrected by way of an amendment to the agreement, and NUMSA had not challenged those amendments.

Evaluation:

[15] Section 25 of the LRA 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.

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(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;

[16] As it was correctly pointed out on behalf of the applicants, an agency shop is an extraordinary form of contract in terms of which an employer agrees with a third party to make deductions from an employee's salary for the benefit of the third party with whom the employee has no relationship.

[17] Recently, the Labour Appeal Court reiterated in *Solidarity obo Members employed in Motor Industry v Automobile Manufacturers Employers Organisation (AMEO) and Others*[7] *(Solidarity)*, that agency shop agreements are less intrusive than closed shop agreements which compel employees to be members of majority trade unions, and do not compel membership of the union, but only required employees who benefitted from the fruits of collective bargaining achieved by the majority union to pay an agency fee.

[7] (JA11/17) [2019] ZALAC 63 (16 October 2019) at para 7

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[18] It is in the light of this peculiar nature of such agreements that the principle that such agreements are binding only if they comply with all the requirements of section 25(3) of the LRA as reiterated in *Greathead v SA Commercial Catering and Allied Workers Union*[8] should be appreciated.

[19] The dispute in this case however turns on the consequences of the definition of '*representative union'* in the recognition agreement, which definition was referenced in the agency shop agreement. Aligned to this issue is that of the subsequent amendments made to the agency shop agreement by Transnet, SATAWU and UNTU, and the legal effect of that amendment in relation to the relief that NUMSA seeks.

[20] It is significant to note that NUMSA's application was filed and delivered on 8 January 2018. In its answering affidavit filed and served on 17 January 2019, Transnet acknowledged that the agency shop made reference to representativeness threshold which was based on an agreed bargaining unit and threshold, and averred that it was initiating the necessary steps to amend the wording of the agency shop so as to bring it in line with section 25 of the LRA.

[21] On 28 February 2019, some few days prior to the hearing of the application, Transnet filed and served a supplementary affidavit, in which it averred that the process embarked upon of amending the wording of the agency shop agreement so as to bring it in line with the provisions of section 25 of the LRA had taken place and was concluded. A copy of an amended agency shop agreement agreed upon with SATAWU and UNTU and signed on 14 February 2019 was attached to the affidavit. In the amended agreement, the definition clause 3.9 of the original agreement is amended to read;

> *"Representative Trade Union – For the purposes of this agreement means a registered trade union, two or more trade unions acting jointly, whose members are the majority of employees employed by Transnet in the workplace"*

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[8] (2001) 22 ILJ 595 (SCA) at para 8

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[22] Mr Orr on behalf of NUMSA had submitted that the fact that the agency shop agreement was subsequently amended could only be an admission that it was invalid in the first place. He further argued that the amendment was in any event not before this Court, and that even if it were, in the absence of strict compliance with the provisions of section 25, the initial agreement was invalid *ab initio*. This contention was premised on the authority of *Greathea*d, wherein it was held that a rectification could not cure an agreement that was void for want of compliance with statutory formalities[9]. It was further argued that even though *Greathead* dealt with the requirements set out in section 25(3) of the LRA, its reasoning was applicable to the entire provisions of section 25 of the LRA.

[23] Mr Hutchinson for NTU submitted that NUMSA's case was merely based on incorrect use of terminology in the agreement, and that to the extent that the agreement has since been amended, which amendment NUMSA had not challenged, there was no basis for the relief sought to be granted.

[24] The submissions made by Mr Maserumule on behalf of Transnet were that to the extent that SATAWU and UNTU enjoyed majority membership of 50% plus one of all employees at the workplace as contemplated in section 25(1) of the LRA, NUMSA's case must fail. He further submitted that the erroneous reference to 'bargaining unit' in the agreement did not render it invalid, particularly since on the objective common cause facts, all the requirements of section 25(3) of the LRA were complied with, and that the facts of this case were distinguishable to *Greathead*[10].

[25] Mr Maserumule further disputed the contention that the amendment to the agency shop agreement was an admission that the agreement was invalid, and argued that as a matter of fact, the requirements of section 25(1) were met, and that the amendment was merely meant to remove an ambiguity that created the wrongful impression that the union parties did not meet the threshold of representativity when in fact they did.

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[9] *Greathead* at para 9 - 13

[10] *supra*

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[26] The LAC in *Solidarity*[11] was confronted with an almost similar scenario, where in the face of the validity of a collective agreement being challenged (for non-compliance with section 25(3) of the LRA), an amendment was made to that agreement. In this case, and as correctly pointed out on behalf of UNTU, the amended agreement was not challenged as at the hearing of this application, and there is clearly no basis for any conclusion to be reached that it is not properly before the Court.

[27] A second consideration is that in line with *Solidarity*, it can be accepted that the agency shop agreement was amended to ensure the correct wording as required in the provisions of section 25(2)(a) of the LRA in particular. In *Solidarity*, it was stated that there is no express statutory prohibition on the retrospective operation of collective agreements, and as such, it is possible for the parties to a collective agreement to make it applicable from a date earlier than its conclusion. This is so in that although imposing reasonable limitations on other rights, retroactive operation will promote the purpose of orderly collective bargaining[12].

[28] Whether the amended agency shop agreement has retrospective effect needs to be gleaned from its wording. The amended version does not make any reference to retrospectivity, as its effective date is from 'the date on which the last signing party signs the agreement', which in this case is 14 February 2019. Its purpose as per its clause 1 is 'to replace Annexure E of the Transnet Recognition Agreement entered into on 16 November 2016 and to introduce a new agreement on the Transnet Agency Shop Agreement as contemplated in section 25 of the LRA'.

[29] It is my view that the arguments advanced on behalf of Transnet and UNTU have merit, whilst those advanced on behalf of NUMSA seek to elevate form over substance. The facts in *Greathead* are clearly distinguishable from those in *casu*. In *Greathead*, it was common cause that the impugned agreement did not expressly provide for the matters referred to in section 25(3)(a) and

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[11] supra

[12] At para 36 - 37

(c), and was also silent about the requirements stated in section 25(3)(d)(i) and (ii) of the LRA[13].

[30] In this case however, the common cause facts are that SATAWU and UNTU enjoyed a majority representation of 50% plus one in both the bargaining units and the workplace as a whole, and further that no issues were raised in regard to compliance with the provisions of section 25(3) of the LRA. There can therefore be no doubt that the agency shop met all the requirements set out in section 25 of the LRA, and the only difference and bone of contention was the reference in the initial agreement to 'bargaining unit', rather than to 'workplace' as contemplated in section 25(2)(a) of the LRA.

[31] The question that arises then is whether that omission, which Transnet and UNTU had attributed to a mere error was of such a nature that it can be said to have invalidated the whole agency shop agreement. In other words, can it be said that it was void *ab initio* in any event despite the agency shop agreement being substantially compliant with the provisions of section 25 of the LRA?

[32] It is my view that given the common cause facts, which when objectively considered points to a substantial compliance with the provisions of section 25 of the LRA as a whole, the error pointed out in the initial agreement cannot be of such a nature that it can be said that it invalidated the whole agreement. To the extent that it was argued that an amendment in line with *Greathead* was not competent, again, the distinguishing feature in this case is that the alleged invalidity emanated from the referencing to 'bargaining unit', rather than the wholesale non-compliance with statutory formalities as was the case in *Greathead*. The amendment as correctly pointed out on behalf of Transnet, was merely to correct any ambiguities in the agreement, rather than to rectify any glaring non-compliance *per se*. To this end, the issue of the amendment in my view, does not take NUMSA's case any further.

[33] In summary, I am satisfied that even with the incorrect referencing to 'bargaining unit' in the initial agency shop agreement, that agreement cannot

[13] At para 8

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be said to have been invalid *ab initio* for the purposes of the relief that NUMSA seeks. It therefore follows that NUMSA's application ought to fail.

[34] I have further had regard to the requirements of law and fairness insofar as both UNTU and Transnet sought a costs order. Given the facts and circumstances of this case, there is no basis for any conclusions to be reached that NUMSA's application ought not to have come before the Court. The fact that NUMSA was made aware of the impending amendments to the agency shop agreement did not on its own make its case moot, as the issues raised in the application were indeed important to it and its members, in the light of the extraordinary nature of agency shop agreements.

[35] Accordingly, the following order is made;

Order:

1. The Applicant's application is dismissed.

2. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: C Orr, instructed by Cheadle Thompson & Haysom Incorporated

For the First Respondent: P. Maserumule of Maserumule Attorneys

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For the Third Respondent: W Hutchison, instructed by Fluxmans Incorporated

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