

IN THE LABOUR COURT OF SOUTH AFRICA

Sitting in Cape Town

Case No : C639/98

In the matter between :

NATIONAL MANUFACTURED FIBRES	First Applicant
SANS FIBRES (Pty) Ltd	Second Applicant
and	
COMMISSIONER M BIKWANI	First Respondent
SOUTH AFRICAN CHEMICAL WORKERS UNION	Second Respondent
SOUTH AFRICAN MANUFACTURED FIBRES BARGAINING COUNCIL	Third Respondent
SOUTHERN AFRICAN CLOTHING TEXTILE WORKERS UNION	Fourth Respondent

JUDGEMENT

ZONDO J :

Introduction

[1] In this matter the first applicant is the National Manufactured Fibres Employers' Organisation - an employers' organisation which represents certain employers in the South African Manufactured Fibres Bargaining Council ("**the Council**"). The second applicant is Sans Fibres (Pty) Limited ("**SANS**"). The second applicant is a member of the first applicant. The first respondent is a commissioner of the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**"). The second respondent is the

South African Chemical Workers' Union ("SACWU"). The third respondent is the bargaining council that I have already referred to above. The fourth respondent is the Southern African Clothing Textile Workers Union ("SACTWU").

This application

[2] The applicants have brought an application to this Court in terms of which they ask this Court to review and set aside an arbitration award which was issued by the first respondent under the auspices of the CCMA in arbitration proceedings conducted to resolve a dispute which existed between SACWU, on the one hand, and, the applicants and SACTWU on the other. Although a reading of the applicant's founding affidavit did not clearly reveal what the dispute was save that it was about the interpretation of a certain agreement, during argument, answers to questions I put to the parties' lawyers revealed what the dispute was. I will reveal shortly what its terms were.

The factual background to the dispute

[3] Apparently SANS has recognised SACTWU for many years as the collective bargaining agent of its employees. SACWU has been trying for many years to increase its membership at SANS and to be afforded organisational rights. On this it has not been very successful. It believes that SANS and SACTWU have colluded with each other to exclude it from SANS. SANS and SACTWU are part of the employer party and the employee party respectively in the bargaining council. SACWU is not part of that council. SANS and the first applicant say they don't understand why SACWU has so far not wanted to be part of the council.

[4] On the 18th December 1997 SACTWU and the first applicant signed an agreement on wages and conditions of employment for 1998. At that time the bargaining council did not exist as yet. However, it was understood that, once the council had come into existence, it would adopt that agreement as its own. The bargaining council came into existence on the 10th February 1998.

[5] Clause 10 of the agreement referred to in par 4 above reads:-

“10. Agency shop

For the purpose of this clause the employer shall mean the MFEA. An agency shop will be established, in accordance with the terms and provisions of the Labour Relations Act of 1995, at Employers where the Union has a membership level of 70% plus 1. All existing employees, who are non - union members as at 1 January 1998 shall be required to pay agency fees. The agency fee shall be equal to the monthly SACTWU membership fee and shall be deducted from their monthly pay.

The agency shop will be extended to all employees in the Man Made Fibres Industry when the Bargaining Council is registered and the Union attains 50% plus 1 at Industrial level.

Such agency fee will be paid into a separate account of the Bargaining Council to be administered by the Union and utilised for the purposes of Collective Bargaining expenses, training, and any other costs as agreed by the Bargaining Council unless otherwise stipulated in the LRA.

A ballot, to determine representivity levels, at Industrial and Plant, will be conducted simultaneously, every three years”.

[6] SANS and SACTWU also concluded a wage agreement. Clause 15 of that agreement was headed **“Agency Shop”**. The first sentence thereof says : **“The company agrees to apply and implement the agency shop agreement entered into between MFEA and the union at National level”**. Thereafter follows a quotation of clause 10 of the agreement between the first applicant and SACTWU which I have quoted above.

The dispute and the parties' positions

[7] Pursuant to the agreements between the applicants and SACTWU referred to above, SANS began making deductions from the wages of the affected employees. This meant that SACWU members were subjected to a double deduction, namely the payment of SACWU's dues as well as payment of the alleged agency fee. Deductions for the agency fees were also effected on the wages of other employees of SANS who were not members of SACWU but were also not members of SACTWU.

[8] The terms of the dispute that was before the first respondent were:

(a) whether clause 15 of the agreement between SANS and SACTWU referred to above applied to those employees of SANS which, although not members of SACTWU, were, nevertheless, members of another union at SANS, e.g. SACWU or whether it only applied to those employees of SANS who were not members of any union at SANS.

(b) whether clause 15 of the said agreement was an agency shop agreement as contemplated in sec 25 of the Labour Relations Act, 1995 ("**the Act**") - this part of the dispute was referred to by the parties' lawyers as the validity or otherwise of the alleged agency shop agreement.

[9] If the agreement was valid and it applied to all employees of SANS who were not members of SACTWU irrespective of whether or not they belonged to any other union, that would be the end of the dispute and SANS would be entitled to continue with the deductions. If, however, the agreement did not constitute an agency shop agreement, obviously SANS would have had to discontinue the deductions. The dispute also included the issue whether the first respondent should order that SANS pay back the deductions it had already effected from the wages of SACWU's members if the first respondent either found that the alleged agency shop agreement was not an agency shop agreement as contemplated in sec 25 of the Act or if he found that it did not apply to employees who were members of one or other union.

[10] With regard to par 8 (a) above, SANS' stance was that clause 15 applied to all employees who were not members of SACTWU irrespective of whether or not they belonged to any other union or to no union at all. SACWU contended that clause 15 only applied to employees who did not belong to any union at all- and that it did not apply to those employees who were members of one or other union at SANS - and therefore did not apply to those employees who were its members. As to par 8 (b) above, SACWU contended that clause 15 was not an agency shop agreement as contemplated in sec 25 of the Act. SANS argued that it was.

The first respondent's award

[11] In his award the first respondent concluded that the purported agency shop agreement applied only to those employees of SANS who did not belong to any union and not to those employees who belonged to another union such as SACWU. He therefore ordered SANS to repay to SACWU members at SANS the deductions it had already effected from their wages.

[12] The first respondent did not deal with that part of the dispute which related to whether or not clause 15 constituted an agency shop agreement as contemplated in sec 25 of the Act - probably because he was of the opinion that it was not necessary to do so once he had concluded in SACWU's favour that the purported agency shop agreement did not apply to SACWU members.

Consideration of the review application

[13] One of the issues which arise in this matter is whether the first respondent was correct in concluding that the parties to the agreement in question intended the agreement to apply only to those employees who were not members of any union and that they did not intend it to apply to those employees who, though eligible to be members of SACTWU, were not members of SACTWU and yet were members of

another union. When I say this is one of the issues, I do not mean it in the sense that, if the first respondent was wrong on that issue, his decision is necessarily reviewable and should be set aside. I say this because I cannot reach the conclusion that the first respondent was so wrong that his decision is reviewable unless I have first come to the conclusion that his decision is wrong. That I should first ascertain whether the conclusion reached by the first respondent was correct is also quite warranted because of the ground relied upon by the applicants to support the application for review which will be apparent below.

[14] One of the grounds relied upon by the applicants in support of the review application is that, in coming to the conclusion that he came to for the reasons that he gave, the first respondent exceeded his powers as contemplated in sec 145(2)(a)(iii) of the Act. It was submitted that this was so because the award the first respondent gave was not justifiable in relation to the reasons given for it and that it was not rationally justifiable. In proceeding to deal with this matter I will bear in mind that the question that needs to be answered ultimately in relation to this ground of attack is whether there is a rational and objective basis justifying the connection made by the commissioner between the material properly available to him and the conclusion he eventually arrived at. (**Carephone (Pty) Ltd v Marcus NO & Others 1998 19 ILJ 1425 (LAC)** at 1435B - F)

[15] Mr Niewoudt, who appeared for the applicants, referred to the evidence that was led by SACWU before the first respondent and submitted that that evidence should have driven the first respondent to conclude that there was no way that the parties could have intended the agreement not to apply to employees who were members of one or other union and yet apply to those employees who were not members of any trade union at all. When both categories of employees were not members of SACTWU. Mr Niewoudt also pointed out certain areas in the agreement which, he submitted, demonstrated that the parties were not consistent in using small letter - u in non - union members when

referring to employees who were not members of any union and in using capital letter - U in non - Union members (with capital letter - U) when referring to employees who were not members of SACTWU. If it becomes necessary I will consider this later but I am of the opinion that the starting point should be whether the conclusion reached by the first respondent is compatible with the notion of an agency shop agreement as contemplated by sec 25 of the Act. If the first respondent's conclusion is not compatible with the notion of an agency shop agreement in terms of the Act, it may well be that the first respondent exceeded his powers which would render his award susceptible to being reviewed and set aside.

[16] Mr Bozalek, who appeared for SACWU, sought to defend the first respondent's award on the basis that there was nothing in the Act which says it can only be those employees who are not members of the representative trade union who could be required to pay agency fees. He submitted further that a requirement that employees who did not belong to any union should pay agency fees and that those who belonged to one or other union were not required to pay was compatible with the notion of an agency shop agreement. I asked Mr Bozalek what purpose he was submitting the parties to the **“agency shop agreement”** could be said to have intended to achieve by seeking to have the agency fee deducted only from the wages of those employees who were not members of any union but to have no deductions effected from the wages of those employees who were members of one or other union. In particular I asked him why the representative trade union would have found it in its interests to be party to such an agreement because, surely, that would be a sure way to raise the membership of its rivals as all that the employees would need to do in order to avoid such deductions would be to join the rival(s) of the representative trade union.

[17] If employees joined a rival union, not only would they continue to enjoy the **“free ride”** but also they would be entitled to other benefits flowing from their membership of that other union. e.g. representation by that union in grievance and disciplinary

proceedings - representation they probably would not have been entitled to if they just paid the agency fee but did not join the union. Once such minority union received more members, its level of representativeness would rise. At that stage the minority union may well unseat the representative trade union. Mr Bozalek was not able to give any reason why a representative trade union would do this but he continued to maintain his submission referred to earlier.

[18] The first respondent viewed his task as one of establishing whether the parties to the agreement intended by the **“agency shop”** clause to bind those employees at SANS who were not members of SACTWU or whether they intended to bind only those employees who were not members of any union at all. The first respondent concluded that the parties intended the latter. He based his conclusion simply on what the phrase **“non-union members”** in the second sentence of clause 10 of the agreement means. That is the sentence where it is said that all **“existing employees who are non-union members as at 1 January 1998 shall be required to pay agency fees”**. The first respondent had regard to the definition clause of the agreement. In that clause there is a definition of **“the Union”**. It reads **“the Union”** means the **“South African Textile Workers Union (SACTWU)”**.

[19] The first respondent concluded that in clause 10 of the agreement the reference to employees who are non - union members was a reference to employees who were not members of any trade union. The suggestion by the first respondent was that, if the parties had intended to refer to employees who were not members of SACTWU, the reference would have been to **“non - Union members”**.

[20] Collective bargaining is a very important process in the modern workplace. A trade union and its members usually work hard before such trade union can acquire collective bargaining rights as well as the status of a representative trade union. 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 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. A reading of the first respondent's award gives one the impression that up to a point, he understood this. However, from a certain point the first respondent appears to have thought that, if employees were members of unions other than the representative union and they pay their union dues to those unions, they cannot be said to be free riders. The first respondent erred in a serious way in this regard. Such employees 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.

[22] That the first respondent erred in the above regard would not by itself be a sufficient ground for this Court to interfere with his award because this is not an appeal. However, when, in giving such award, the first respondent commits a defect such as is contemplated in sec 145, this Court will be justified in reviewing and setting that award aside. I now turn to consider whether a defect as contemplated in sec 145 has been proved. Such a defect will be proved if it is found that, as contended by the applicant, the first respondent exceeded his powers in that he gave an award which was not justifiable in relation to the reasons given for it. It is appropriate to begin by referring to

the provisions of the Act which govern agency shop agreements.

[23] Sec 25(1), (2) and (3) of the Act read thus:-

“25 Agency shop agreements

(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*".

[24] It is clear from the provisions of sec 25(1), that the employees from whose wages an employer who is a party to an agency shop agreement must make deductions in respect of agency fees are the **"employees . . . who are not members of the trade union but are eligible for membership thereof"**. (sec 25(1)). In my view the trade union referred to immediately before the word **"but"** towards the end of sec 25(1) is the trade union previously referred to in the section. That is the representative trade union.

(Such representative trade union is a representative trade union as defined in sec 25(3)). I say this because of the use of the definite article **“the”** just before the words **“trade union”** in sec 25(1). The only prior reference to a trade union in sec 25(1) is a reference to a representative trade union. If I am correct in this, as I think I must be, then it stands to reason that in terms of sec 25 an agency shop agreement is directed against employees who are not members of the representative trade union irrespective of whether or not they are members of any other trade union.

[25] Furthermore if the legislature had intended that the target of an agency shop agreement should be employees who did not belong to any unions as opposed to employees who did not belong to the representative trade union, the provisions in sec 25(3) would have been differently worded at least in one respect. In so far as sec 25(3) says an agency shop agreement will not be binding if it requires employees to be members of the representative trade union, if the test as to whether an employee pays or does not pay agency fees was whether or not he was a member of one or other union then in my view, sec 25(3) would, in all probability, have said an agency shop agreement will not be binding if it requires employees to join a trade union. It was not drafted so as to say this because that is not supposed to be the focus of an agency shop agreement as contemplated in sec 25. It refers to a representative trade union because its concern is the fact that only members of the representative trade union foot the collective bargaining bill of the representative trade union and that it's unfair for those who are not members of the representative union to receive the benefits free of charge.

[26] In the light of the above, the submission by Mr Bozalek, who appeared for SACWU, that there was nothing in the Act that said an agency shop agreement could only be directed against employees who are not members of the representative trade union is simply not correct. That submission overlooks that part of sec 25(1) which I have referred to above. Accordingly the notion of an agency shop agreement the target of which is employees who do not belong to any union as opposed to employees who do

not belong to the representative trade union is inconsistent with the idea of an agency shop agreement as contemplated by sec 25 of the Act.

[27] In dealing with the matter, the first respondent assumed, I think without deciding, that the agreement was an agency shop agreement as contemplated by sec 25. This assumption was made in the applicants' favour. Once the first respondent made that assumption, he could not, in the light of sec 25(1), (2) and (3) of the Act, reach the conclusion that he reached without acting incongruously. I say this because making that assumption necessarily meant, in the light of sec 25(1), (2) and (3), that the employees from whose wages the agreement said deductions had to be made had to be those who were not members of the representative trade union. If an employee was a member of the representative trade union, no deductions for the agency fee were to be made. If he was not, deductions would have to be made from his wages even if he was a member of one or other union.

[28] By dealing with the matter in the manner that he did, the first respondent arrived at a conclusion which is at complete variance with the very essence of an agency shop agreement as contemplated by sec 25. In other words, if his conclusion were correct, then the agreement would not be an agency shop agreement as contemplated in sec 25. If the agreement was an agency shop agreement, then his conclusion makes absolutely no sense. When a commissioner makes an award which is so inexplicable, in my view, he exceeds his powers in terms of sec 145(2)(a)(iii) of the Act and his award should be reviewed and set aside.

[29] It is true, as the first respondent correctly pointed out, that in making provisions as to which employees would be required to pay agency fees, the clause purporting to constitute an agency shop agreement refers to **“non-union members”** (with a small letter-u). It is also true that in the definition clause there is a definition of **“the Union”** (with a capital letter - U) and that that definition says **“the Union”** means SACTWU. It is also true that, literally, when reference is made to **“non - union members”** (with a

small letter -u) , that would be a reference to people who are not members of any union. However, the first respondent should have borne in mind the context in which the agreement had to be interpreted as well as the essence of an agency shop agreement contemplated by sec 25 of the Act.

[30] To give the words “**non - union members**” (with a small - u) the meaning that the first respondent attributed to them is to give them their grammatical and ordinary meaning in circumstances where giving them that meaning would lead to inconsistency as well as absurdity. Inconsistency - because an agency shop agreement as contemplated by sec 25 is not concerned with whether an employee is or is not a member of a minority union but is concerned with whether or not the employee does or does not contribute towards the collective bargaining costs of the representative union the fruits of whose sweats he enjoys. Absurdity - because it is an interpretation which would necessarily entail that the employees to whom, on that interpretation, the agreement was directed could easily evade paying the agency fee by joining the representative trade union’s rival in which event the representative trade union would not only not get the agency fees but also it would be helping its rivals unseat it as a representative trade union in the workplace.

[31] As Lord Wilberforce said in **Reardon Smith Line v Hansen - Tangen; Hansen - Tangen v Sanko Steamship [1967] 3 All ER 570 (HL)** no contracts are made in vacuum. In deciding whether to give the phrase in question its grammatical and ordinary meaning, the correct approach the first respondent should have adopted should have been the one given by Joubert JA in **Coopers & Lybrandt & Others v Bryant 1995(3) SA 761 (A)** at 768A - E. There the learned Judge of Appeal said the following :-

“The correct approach to the application of the ‘golden rule’ of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the

contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ *supra*;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Delmas milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454G - H; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 305 C - E; Swart's case *supra* at 200 E - 201A and 202C; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180I - J;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. *Delmas milling case* at 455A - C, *Van Rensburg's case* at 303A - C, Swart's case at 201B, *Total South Africa (Pty) Ltd v Bakker NO* 1992 (1) SA 617 (a) at 624G, *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 10C - D.

In this case it is clear from the first line of clause 10 that the agency shop agreement that the parties sought to conclude was one which was to be **"in accordance with the terms and provisions of the Labour Relations Act of 1995"** - which means an agency shop agreement as contemplated by sec 25 of the Act. By virtue of the provisions of sec 25(3) (a) parties who purport to, or intend to, conclude an agency shop agreement such as is contemplated in sec 25 of the Act, as was the case with the parties to the agreement in this case, must necessarily be intending that it is whether an employee is or is not a member of the representative trade union that will determine whether or not he must pay agency fees.

[32] The first respondent interpreted the phrase in question in isolation which he should not have done. (*Coopers & Lybrandt supra* at 767H - J) quoting Rumpff CJ in Swart

en ‘n Andere v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202C). He decided what the parties intended without regard to the true essence of an agency shop agreement as contemplated in sec 25 and despite even the fact that such meaning would lead to absurdity and inconsistency which he should not have done. (**Coopers & Lybrandt & Others v Bryant 1995 (3) SA 761 (A)** at 767E - F).

[33] In the light of all the above I conclude that the first respondent's award is not justifiable in terms of the reasons given for it. Accordingly the first respondent exceeded his powers. That justifies that his award be reviewed and set aside. As the order for the repayment of the money deducted already from the wages of employees was based on the conclusion reached by the first respondent referred to above, obviously that order also cannot be allowed to stand and will fall away. It seems appropriate to remit the matter back to the CCMA for the first respondent to arbitrate that part of the dispute which relates to whether the agreement is an agency shop agreement as contemplated in sec 25 of the Act.

[34] With regard to the issue of costs, this Court may make an order of costs if to do so would be in accordance with the requirement of law and fairness. I do not think that in the circumstances of this case it would be in accordance with the requirements of law and fairness to make a costs order.

Order

[35] In the premises the order I make is that:-

- 1.The arbitration award issued by the first respondent in the dispute under the CCMA case no WE 10622 is hereby reviewed and set aside.
- 2.The dispute referred to in 1 above is hereby referred back to the CCMA to be arbitrated upon by the first respondent in the light of this judgement.
- 3.There is to be no order as to costs.

R. M. M. ZONDO

Judge in the Labour Court of South Africa

Date of Hearing :22 April 1999

Date for the submission of supplementary Heads of Argument :30 April 1999

Date of Judgment :25 May 1999

For the Applicant :Mr H. Niewoudt

Instructed By :Jan s De Villiers & Son

For the 2nd Respondent :Mr L. Bozalek

Instructed By :Davout Woolhuter & Associates