

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

CASE NO **J648/03**

DATE OF HEARING: 2003/12/09

DATE OF JUDGMENT:

In the matter between:

SOLIDARITY AND OTHERS Applicants

and

**MINISTER OF PUBLIC SERVICE
AND ADMINISTRATION** Respondent

**JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE NGCAMU
ON**

ON BEHALF OF APPLICANTS: ADV J G GROGAN

ON BEHALF OF RESPONDENT: ADV M S M BRASLEY SC

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBANJUDGMENTNGCAMU AJ

[1] This is an application brought by the applicants to declare null and void the agency shop agreement concluded by the parties to the Public Service Co-ordinating Bargaining Council. The applicant has not pursued the second order prayed. The application is opposed by the second respondent.

[2] During May 1998 eleven registered trade unions entered into an agency agreement with the State as the employer. Resolution No 1 of 1998, creating the agency, was signed on behalf of the unions and the State as the employer on 26 May 1998. The agreement was effective from 1 July 1998.

[3] In terms of the agreement the employer was required to deduct an agency fee equal to 1% of the employees' basic salary to a maximum of R60. Since 1998 the employer has been deducting the amount of R60 per month from the employees who are not members of the unions party to the agency agreement. The money is deducted and transmitted monthly to the second respondent who, in turn, distributes it amongst the unions who are party to the agreement.

[4] The majority of the State employees pay subscriptions to their unions and therefore are not affected by the agency agreement.

[5] The second respondent has, in addition to its opposition on the merits, raised two points *in limine*. The first point is that the applicants have no *locus standi* to bring this application. The second point is that no basis has been made out for the exercise of the discretion sought by the applicants.

[6] I now deal with the question of the *locus standi*. The first applicant, a trade union, is not a party to the agency agreement. It was submitted that the payment of the agency shop agreement creates problems for the workers. This results from the fact that a worker would have to pay his normal subscription fee, as well as the agency fee. It has not been suggested that the payment of the double fee is unlawful and/or illegal. I therefore need not deal with this.

[7] The respondent has submitted that the first applicant has failed to establish that it acts on behalf of any of its members or that it seeks to vindicate any rights enjoyed by its members. It is common cause that the first applicant is a registered trade union. Section 200 of the Labour Relations Act entitled a registered trade union to intervene on behalf of its members and also act in its own interest. The interest of the first applicant in this application has not been demonstrated on the papers before the Court.

[8] The second and the third applicants are members of the first applicant. The first applicant is entitled to act on behalf of these members. Section 200(2) of the Labour Relations Act entitles a registered trade union to be a party to any proceedings if one or more of its members is a party to those proceedings. Accordingly, the first applicant does not have to prove any harm in order to have *locus standi*.

[9] The second applicant was a member of one of the unions who are signatories to the resolution. He resigned from that union and joined the first applicant. As a result of this he is paying his normal subscription fee, as well as the agency fee. The second applicant accordingly has *locus standi* as the agency agreement affects him.

[10]The position of the third applicant is different. The third applicant is a member of SAPU. SAPU is a beneficiary to the agency agreement. As the third applicant is still a member of SAPU, he is bound by the agency agreement in terms of section 23(2) of the Labour Relations Act. This section provides:

"A collective agreement binds for the whole period of the collective agreement every person bound in terms of sub-section 1(c) who was a member at the time it became binding or becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employees organization for the duration of the collective agreement."

In the light of this, the third applicant has no *locus standi* to bring this application. The third applicant has not paid any agency fee.

[11]The next question that the Court has to decide is whether resolution No 1 of 1998 is invalid. Section 25(3) sets out the requirements for the agency agreement to be binding and it provides,

"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."

[12]The agency shop agreement is annexed to resolution No 1 of 1998 as schedule No 1. Clear provisions have been made in the agreement to comply with section 25(3)(b),(c) and (d). What is in issue is whether it complies with section 25(3)(a) of the Act.

[13]The applicants submit that it does not and is therefore invalid. It is necessary for me then to set out what the resolution provides:

"Agency Shop Agreement

- (1) Noting that section 25 of the Labour Relations Act No 66 of 1995 (the LRA) enables an employer and the representative trade union/unions to conclude an agency shop agreement;
- (2) The parties to the Public Service Co-ordinating Council (the PSCBC) hereby resolved to conclude an agency shop agreement which is attached to this resolution (schedule 1).
- (3) This agreement binds:
 - (i) the employer;
 - (ii) the employees of the employer who are members of the trade union parties to this agreement; and
 - (iii) the employees of the employer who are not members of any trade union parties to this agreement but who fall within the registered scope of the council;
 - (iv) this agreement shall come into effect on 1 July 1998."

The resolution is signed by eleven trade unions. Clause 1 of schedule 1 to the resolution provides that:

"This is an agency shop agreement for the purposes of section 25 of

the Labour Relations Act. The object of this agreement is to ensure that all employees who receive the benefits of collective bargaining contribute towards its cost."

[14]I have mentioned that the agreement makes reference to the provisions of section 25(3)(b), (c) and (d). Besides this reference to section 25 in paragraph 1 of the resolution in clause 1 of schedule 1, there is no other reference to section 25(3)(a) of the Act. It is for this reason that the applicants submit that the resolution is void *ab initio*.

[15]It was submitted on behalf of the respondent that there is substantial compliance with section 25(3) of the Act. It was further submitted that if the agreement was invalid it was capable of rectification.

[16]Resolution No 1 of 1998 has since been amended by resolution No 4 of 2003 dated 19 June 2003. The amendment was effected after the applicants had launched this application. The amendment has been made to clause 3 of schedule 1 by the insertion of clause 3(2), which provides:

"No employee is or can become obliged to join a trade union that is or becomes a party to this agreement. Employees who are not members of a trade union party to this agreement are not compelled to become members of any trade union party to this agreement."

[17]Paragraph 1.2 of the introduction of resolution 4 of 2003 states that the parties intended to comply with all the applicable requirements of section 25 of the Act. It further states that the parties believe that the agreement properly interpreted makes this clear. It further acknowledges that some employees appear to doubt that the agreement provides that the employees who are not members of a

trade union party are not compelled to become members of any trade union party.

[18]Mr *Brasley*, who appeared for the respondent, submitted that clauses 1 and 5 of the agreement make it clear that no one is forced to become a member of the union. Clause 5 provides:

"Each month the employer must deduct the agency fee from the basic salary of each of its employees who are not members of any one of the trade union parties to the council."

[19]Clause 1 and clause 5 of resolution 1 of 1998 do not make this clear. These two clauses cannot be interpreted to mean that members are not compelled to join unions. The agency agreement is an agreement *sui generis*, in that it is an agreement entered by two or more parties but also binding on parties not parties to it. It is therefore necessary that its terms be made clear.

[20]In *Greathead v SA Commercial Catering and Allied Workers Union* 2001 (3) SA 464 (SCA), the Court was confronted with section 25(3) of the Act. In that case the agency agreement did not make provisions for the requirements of section 25(3). The Court held that the contract was invalid for want of compliance with the statutory formalities. The Court further held that the contract was incapable of rectification.

[21]The respondent in the present matter submitted that the Court has to see if the agreement produces the message intended by the parties, either expressly or impliedly. Differently put, the Court has to see if the agreement substantially complies with section 25 of the Act.

[22]I have stated that the clauses 1 and 5 do not expressly refer to section 25(3)(a) and that the agreement expressly made provisions for the requirements of section 25(3)(b), (c) and (d). The agreement

contained in schedule 1, clause 1, makes reference to section 25. The agreement goes on to set out what the parties agreed. They clearly expressed what they had agreed upon. The terms agreed fully complied with section 25(3)(b), (c) and (d). The terms were fully set out.

[23]In the circumstances, the question is whether the Court can assume that the inclusion in the agreement of other requirements of section 25 includes the others not specifically mentioned. Alternatively, can the Court assume that the inclusion of other requirements automatically excludes the others? The respondent has submitted that the provision has been made in substance and not in the express manner. Clause 1 of the schedule merely states that the agency shop agreement is for the purposes of section 25 of the Labour Relations Act. Clause 5 states that the agency fee must be deducted from the employees who are not members of any one of the trade union parties to the council. This cannot be relied upon when the agreement goes further to specifically set out what has been agreed.

[24]I therefore cannot agree that this reference to section 25 is sufficient. In my view, the setting out of specific terms agreed leads to the conclusion that what has not been spelled out has not been agreed. What was therefore agreed and intended is what appears in the body of the agreement. The Act specifically requires the agreement to provide for what is set out in section 25(3). It goes further to state that the agency shop agreement is binding only if it makes provision for what is set out therein. Consequently an agreement not complying with section 25(3) is not valid and therefore not binding.

[25]In my view the agreement substantially complied with statutory

requirements. However, that does not make the agreement valid for reasons that the agency agreement interferes with a person's constitutional right of freedom of association, as contained in section 18 of chapter 2 of the Bill of Rights. It therefore becomes an unfair labour practice to force the employee to join a trade union by making deductions on his salary to make him join the union. The Legislature was aware of this and therefore sought to provide that the agreement should make provision for the fact that non-union members are not compelled to become members. This is a fundamental requirement necessary to make the agreement valid.

[26]The requirements of section 25(3) are few and are clearly set out in the Act. What the Act requires is that they have to be included in the agreement. These requirements are compulsory and need not be discussed or agreed by the parties. Full compliance is therefore a necessary requirement. As the agreement does not comply fully with section 25(3), the agreement is not binding. The Act does not make the agency agreement not complying with section 25(3) invalid but merely states that it is not binding. In other words, it cannot be enforced in a court of law. If therefore it is only not binding, it is capable of being amended or supplemented to make it binding.

[27]In the present case the agency agreement after the amendment by resolution 4 of 2003, in my view, complies with section 25(3) and is therefore valid. Having said that, I am bound by the judgment in the *Greathead* case in which the Court held that non-compliance with the provisions of section 25(3) gives rise to an agreement which is formally invalid and rectification is not competent when the agreement is invalid for want of compliance with the statutory formalities. (See paragraph 13 of the judgment.) In other words, the failure to comply with section 25(3) does not only make the agreement not binding but

also invalid. If the agreement is invalid *ab initio*, there can be no rectification.

[28]It was submitted on behalf of the respondent that the only basis for the declaratory order will be for the purpose of claiming the past payments. Counsel relied on the case of *NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C). On page 125, paragraphs C to E the Court stated:

"A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. (*Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Beperk v Van den Berg en 'n Ander* 1976 (1) SA 602 (A).) A declaratory order need have no claim for specific relief attached to it but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy."

[29]The applicants have not indicated in these papers what they would like to claim, whether they would like to claim the past payment. I would not want to speculate about their next line of action. The dispute which caused the applicant to approach the Court is that resolution 1 of 1998 is invalid *ab initio*. The order they seek is for the resolution of this dispute. The dispute still exists despite the alleged amendment of resolution 1 by the respondent. The applicants do not have to attach a specific relief to the declaratory order they seek.

[30]In the light of the view I hold in regard to the agency agreement, I am of the view that the Court is not dealing with an event that happened in the past. In the circumstances, I am satisfied that the applicants have made a case for the relief sought in prayer 1 of the

order prayed.

[31]In the circumstances I make the following order:

- (a) The first and second respondents have *locus standi* to bring this action.
- (b) The third respondent has no *locus standi*.
- (c) Resolution No 1 of 1998 concluded between the State, as employer, and the representative unions, signed on 26 May 1998 is void *ab initio*.
- (d) The respondent is ordered to pay the costs.

DATE OF HEARING:

9 DECEMBER 2003

DATE OF JUDGMENT:

21 APRIL 2004

FOR APPLICANTS:

ADV J G GROGAN

FOR RESPONDENT:

ADV M S M BRASLEY SC