IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J 1898/02

In the matter between:

ANNANDALE BUILDING MATERIALS (PTY) LTD
First Applicant

SOUTH AFRICAN BUILDING AND ALLIED
Second Applicant

and

Respondent

–

JUDGMENT

–

FRANCIS J

Introduction

1. This is an unopposed application to rectify an agency shop agreement that was entered into between the applicants. The respondent ("NUM") was cited as an interested party and no relief is sought against it.

Background

2. The first applicant ("the company") manufactures cement brick from ash and fly-ash at two factories situated in Vereeniging and Vanderbijlpark respectively. The company produces approximately 650 000 bricks per day.

1.

3. The relationship between the second applicant ("SABAWO") and the company has matured and the parties have entered into numerous collective bargaining agreements governing salaries and conditions of employment of all employees employed in the bargaining unit.

4. During 1996 the company and SABAWO entered into a Recognition and Procedural Agreement in pursuance of their joint support for the principles of collective bargaining and with a view to supporting industrial stability and favourable conditions of employment.

5. The company's view is that a union wishing to be recognised by it should acquire an appropriate level of representativity amongst the company's employees so that it, *inter alia*, during collective bargaining, can place demands in respect of significant groups of employees. The company is of the view that it is impracticable and inefficient for it to have to deal with as many unions as may manage to secure one or more members, but whose representativity in the workplace is insubstantial.

6. The bargaining unit for purposes of the company's collective bargaining arrangements with SABAWO consists of the hourly paid employees employed by the company at its two factories. The company employs 233 hourly paid employees and 13 monthly employees. SABAWO currently has members

comprising approximately 74% of the company's hourly paid employees. The respondent is a minority union and has organised approximately 56 members or 24% of the company's hourly paid employees.

7. Initially, during or about 1996, the Construction and Allied Workers' union ("CAWU") organised and recruited a number of hourly paid employees employed by the company. More recently CAWU's members were taken over by NUM in terms of arrangement and agreements between the two unions ("the takeover").

8. The company previously granted CAWU and had, since the takeover, granted NUM, limited recognition in specific instances and circumstances. However, neither CAWU, nor since the takeover, NUM has had sufficient support to warrant the granting of collective bargaining rights to it. NUM's shop stewards are entitled to represent its members during the course of any grievance raised by that member or during the course of disciplinary proceedings instituted by the company against a member.

9. The company supports the policy that it is preferable and in the interest of sound collective bargaining that there should exist only one union per industry for purposes of centralised bargaining. The company has at all relevant times adopted the collective bargaining practice that the outcome of collective bargaining with SABAWO is extended to all employees in the bargaining unit, including NUM

members. In the company's experience, its collective bargaining system is efficient and obviates the necessity for the company to engage in collective bargaining in a multitude of collective bargaining fora.

10. The company and SABAWO during 1998 negotiated an agency shop agreement which was signed on 4 May 1998. At that time, SABAWO had more than 80% of the company's hourly paid employees as its members. SABAWO was the only union that enjoyed check-off facilities in respect of its members. The company had at that stage not been approached by any other union for such check-off facilities in the bargaining unit consisting of the hourly paid employees.

11. SABAWO furnished the company with its proposals on the broad principles of such an agency shop agreement, which principles were accepted by the company. The company and SABAWO agreed that the agency shop agreement would only cover the bargaining unit and would not affect monthly paid employees employed by the company. Throughout the negotiations that culminating in the signing of the agency shop agreement, it was both parties intention that the hourly paid employees who were not SABAWO members, would be obliged to make agency shop contributions. The rationale for this approach was that SABAWO would otherwise be providing non-members in the bargaining unit with the benefits of its collective bargaining on their behalf, without receiving any membership dues in return for its efforts.

12. During the course of July 1998, CAWU approached the company and requested stop order facilities in respect of members recruited by the union. The company subsequently implemented stop order facilities in favour of CAWU members. The company currently affects stop order facilities in respect of such former CAWU members, who are now members of NUM, in favour of NUM.

13. At the first meeting held between the company and CAWU on 28 September 1998, the company indicated that SABAWO as majority union had entered into an agency shop agreement with it and that the terms of that agreement covered CAWU members. During subsequent meetings and discussions CAWU was supplied with a copy of the agency shop agreement.

14. At a meeting with the company during May 1999 CAWU questioned SABAWO's spending of the agency shop fees. CAWU was subsequently furnished with the auditor's statement on agency shop funds and did not take the issue any further.

15. At a meeting in April 2000 with the company, CAWU indicated to the company that it required assistance from SABAWO for training expenses of five CAWU shop stewards from the agency shop fees. SABAWO refused to make any agency shop funds available to CAWU for that purpose.

16. During the course of February 2002 and acting on a complaint from NUM on behalf of its members employed by the company, the Department of Labour, notified the company that its deductions made from NUM members were unlawful in terms of section 34 of the Basic Conditions of Employment, Act 1997.

17. During the course of March 2002, NUM's members employed by the company, participated in an unprocedural and unprotected industrial action in support of a demand that the agency shop deductions be discontinued. Thereafter NUM declared a dispute against the company with the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for unlawful and irregular deductions of agency fee contributions. NUM requested the company to suspend the deductions of agency fee contributions from its members pending the resolution of the dispute. The company informed NUM by letter on 15 March 2002 that it would not comply with its demand.

18. On 27 March 2002 the Department of Labour informed both the company and NUM that after further consideration the deductions of agency shop contributions from the wages of NUM members did not constitute unlawful deductions.

19. This dispute has since been conciliated by the CCMA, but no resolution was possible and NUM has requested arbitration.

20. The applicants have entered into an agreement to effect certain amendments to the agency shop agreement ("the addendum"). The purpose and scope of the addendum included the correction of those clauses which did not correctly record the common intention of the parties and the correction of certain typographical and related inaccuracies in the agency shop agreement. The applicants did not intend that hourly paid employees who may have been or would in the future become members of another trade union, would be excluded or exempted from the agency shop agreement. There was no reason to exempt members of other unions, who fell within the bargaining unit, from paying an agency fee to SABAWO. Such employees would be beneficiaries of SABAWO's collective bargaining arrangements. The common intention of the parties was that the non-SABAWO members employed in the bargaining unit would be covered by the agency shop agreement.

21. The applicants are seeking the relief that is set out in the Notice of Motion.

The applicants contentions

22. The applicants contended that certain of the wording of the agency shop agreement *prima facie* not their true intention.

23. The term "Agency Fee" is defined in the agency shop agreement as follows: *"the fee deducted from the remuneration of employees who are not members of*

the majority union as defined in the Act and employed by the company excluding, other union members, fixed term contract employees and casual employees."

24. Clause 3.1 of the agency shop agreement, *inter alia,* provides that:

"39.1 The company will deduct an agency fee from basic wages of identified non union members in the SABAWO bargaining unit."

25. Clause 3.2 of the agency shop agreement, *inter alia*, provides that:

"40.1 When increased, the agency fee for non-union members will be increased by an equivalent amount as for union members, after written notification has been received by the company from an union official in terms of its constitution."

26. Clause 4.1 of the agreement, *inter alia*, provides that:

"38.1 <u>*Agency Shop Trust Account/Fund*</u>

The agency fee deductions will be made from the identified non-union member employees on a monthly basis and will be paid into a separate trust account/fund."

27. The applicant contended further that the reference to "other union members" in the definition of "Agency Fee" quoted above was in all probability a reference to employees who fell outside the bargaining unit, since those were the only other employees, who, to the knowledge of the parties, were members of one or more other unions.

28. Further that the reference to “non-union members” in clause 3.2, quoted above, was to employees who were not members of SABAWO but who did not fall within the bargaining unit. At the time and to the knowledge of the parties, there were no unionised employees in the bargaining unit who did not belong to SABAWO.

29. The reference to “non-union members” in clause 38.1 and “identified non-union member employees” in clause 4.1, was intended to have the same import as in clause 3.2, referred to above.

30. The wording adopted in the clauses of the agency shop agreement as reflected above do not correctly reflect the common intention of the parties at the time of entering into the agreement.

31. The parties at the relevant time understood and were of the *bona fide*, but mistaken belief, that the wording of the abovementioned clauses in the agency shop agreement would give effect to the common intention of the parties that non-SABAWO members employed in the bargaining unit, would be obliged to make agency fee contributions, notwithstanding such employees becoming a member of a union other than SABAWO.

32. It was further contended that the agency shop agreement, if rectified in accordance with the notice of motion in this application, would reflect the true common intention of the parties at the time of concluding the agreement.

Analysis of the facts and arguments raised

33. The first question that needs to be determined is whether the agency shop agreement that is sought to be amended complies with the provisions of section 25(3) of the Act. The second issue is whether this Court has jurisdiction to grant the relief sought.

34. In *Greathead v SA Commercial Catering and Allied Workers Union* (3) SA 464 (SCA), the Court heard an appeal from a decision of the High Court concerning the validity of an agency shop agreement. The applicant had sought an order declaring that the agency shop agreement infringed certain of his constitutional rights. The Court found that the agency shop agreement was invalid *ab initio* want of compliance with section 25(3) of the Act. It found that the agreement did not expressly provide for the matters referred to in section 25(3)(a) and (c), and that the agreement appeared to be silent on the matters referred to in section 25(3)(d(i) and (ii). The result of the aforegoing omissions was that the agreement was invalid, and as such it was incapable of the rectification sought by the respondent at the appeal hearing.

35. The agency shop agreement that the applicants seek to rectify must be examined to ascertain whether it complies with the provisions of section 25(3) of the Act. Section 25(3) sets out what it is that an agreement must provide for. In terms of section 25(3)(a) employees who are not members of a representative trade union like SABAWO is not compelled to become members of that trade union. Clause 6(1) of the agency shop agreement states that the agreement does not compel any employee to become a member of the union.

36. Section 25(3)(b) of the Act sets the limitation on the agreed agency fee. This is also reflected in clause 3.1 of the agency shop agreement which states that the company will deduct an agency fee from basic wages of identified non-union members in the SABAWO Bargaining Unit. This deduction will be the equivalent to the union subscriptions paid by union members as may be determined from time to time.

37. Section 25(3)(c) of the Act provides that the amount that is deducted must be paid into a separate account which is administered by the representative trade union. Clause 4.1 of the agency shop agreement states that the agency fee deduction will be made from the identified non-union employees on a monthly basis and will be paid into a separate trust account/fund.

38. The provisions of section 25(3) of the Act specify the purposes for which the

agency fee may be used. Clause 4.2 of the agency shop agreement states that no moneys from the agency shop account will be used toward the payment of political party affiliation, contributing in cash or kind to a political party or a person standing election to a political office, any expenditure that does not advance or protect the socio-economic interest of employees.

39. I am satisfied that the agency shop agreement complies fully with the provisions of section 25(3) of the Act. It is therefore valid and capable of rectification.

40. This brings me to the question whether this Court does have jurisdiction to rectify the agency shop agreement. In terms of section 24(6) of the Act, a dispute over the interpretation of an agency shop agreement must be referred to the CCMA which must attempt to conciliate the dispute and if it fails to do so, the dispute must be resolved by the CCMA in arbitration. Where it is the validity of an agency shop agreement that is challenged, the CCMA would lack jurisdiction to entertain the dispute. The Labour Court would have to exercise jurisdiction over that dispute in terms of section 157(1) of the Act. That section confers on the Labour Court "exclusive jurisdiction of all maters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court". The Labour Court has general supervisory powers and appellate jurisdiction in terms of section 24(7) of the Act in regard to some portions of an award dealing with an agency shop agreement. It follows that it may pronounce on the validity of the

agreement.

41. I am of the view that the Labour Court does have jurisdiction to rectify an agency shop agreement if it is capable of rectification. An invalid agency shop agreement cannot be rectified if it falls foul of section 25(3) of the Act. Even if section 157(1) of the Act, concerning the exclusive jurisdiction of the Labour Court, is not sufficiently broad to confer upon the Labour Court the right to rectify an agency shop agreement, such power are also derived from section 158(1)(j) of the Act which provides that the Labour Court may deal with "all matters necessary or incidental to performing its functions in terms of this Act or any other law". The power to rectify such agreements on application by the parties thereto is a matter of incidental to the performance of its supervisory and appellate functions in terms of the Act.

42. I am satisfied that it was the common intention of the parties that non-SABAWO members employed in the bargaining unit would be covered by the agency shop agreement, regardless of whether they actually were, or may become members of another union. The parties signed the agency shop agreement on 4 May 1998 in the *bona fide* mistaken belief that the document recorded the true agreement between the parties. The wording adopted in the clauses of the agency shop agreement referred to in paragraphs 23 to 26 above do not correctly reflect the common intention of the parties at the time when the agreement was concluded.

The parties at the relevant time understood and were of the *bona fide*, but mistaken belief, that the wording of the abovementioned clauses in the agency shop agreement would give effect to the common intention of the parties that non-SABAWO members employed in the bargaining unit, would be obliged to make agency fee contributions, notwithstanding such employees becoming a member of a union other than SABAWO.

43. In the circumstances it is ordered that:

1 The agency shop agreement entered into between the first and second applicant is rectified as follows:

1.1 By the substitution of the words “monthly paid employees” for the words “other union members” contained in clause 2.3 of the agency shop agreement;

1.2 By the substitution of the words “hourly paid employees who are not SABAWO members” for the words “identified non-union member in the SABAWO Bargaining Unit” in clause 3.1 of the agency shop agreement;

1.3 By the substitution of the words “hourly paid employees who are not SABAWO members” for the words “non-union members” in clause 3.2 of the agency shop agreement.

1.4 By the substitution of the words “hourly paid employees who are not SABAWO members” for the words “identified non-union member employees” contained in paragraph 4.1 of the agency shop agreement.

2. There is no order as to costs.

_____

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

PLICANTS : P R JAMMY INSTRUCTED BY J D VERSTER LABOUR LAW OFFICES

SPONDENT : NO APPEARANCE

ARING : 18 JULY 2002

DGMENT : 20 AUGUST 2002