Employment Law
ALERT

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CDH
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Agency shop agreements and the principle of fairness

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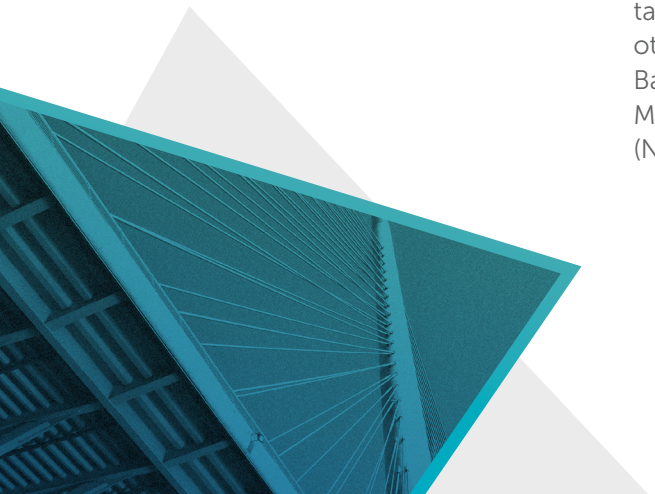

The facts briefly are that on 18 November 2004, the Sugar Manufacturers and Refiners Employer's Association (SMREA) and the Food and Allied Workers Union (FAWU), UASA (formerly known as the United Association of South Africa) and the National Sugar and Refining and Allied Industries Employees Union (NASARAIEU) entered into an agency shop agreement in terms of section 25 of the Labour Relations Act 66 of 1995 (LRA).

The deregistration of NASARAIEU in 2017 triggered a notice from SMREA to its members stating that all former NASARAIEU members had automatically defaulted to the agency shop fee in terms of the agency fee agreement and would be required to pay the monthly agency fee. The alternative to this was to take up membership with one of the other unions affiliated to the National Bargaining Council for the Sugar Manufacturing and Refining Industry (NBCS) that were signatories to the agency shop agreement. The notice also warned employees that choosing any non-signatory union would mean that the employees would have to pay the prescribed agency fee in addition to any subscription fees of a minority union. Furthermore, that this was to be the position "*until the 'other' union has recruited enough members to join the bargaining council, at which stage the agency fee will fall away*". The Association of Mineworkers and Construction Union (AMCU) seized the opportunity to fill the void left by NASARAIEU and started recruiting within the sugar industry. AMCU's membership grew to the extent that it was able to achieve representation in the NBCS. AMCU was eventually admitted as a member of the NBCS.

Days prior to AMCU's admission, SMREA, FAWU and UASA entered into an agency shop agreement wherein they agreed that the employer would deduct an agency fee constituting a percentage of the basic wages of employees in the bargaining unit.

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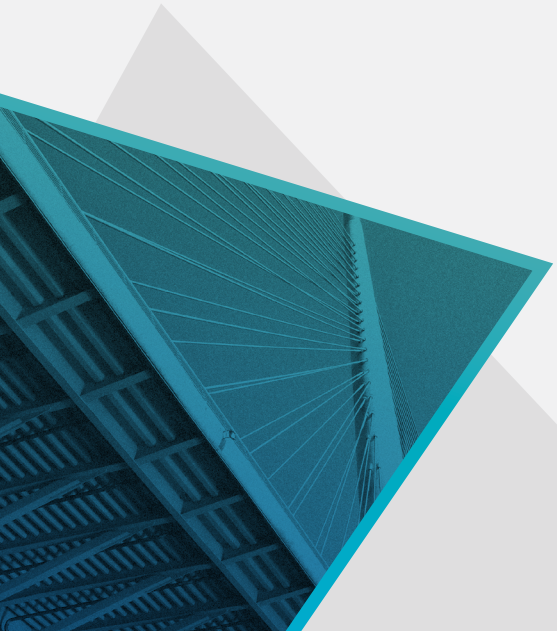

They further agreed that the agency fee would be a monthly deduction paid in to an account administered by the unions. Despite AMCU's admission, the agency shop fee agreement remained the same, resulting in AMCU's members still being compelled to pay the agency shop fee agreement on top of their union subscription. Aggrieved with the situation, AMCU referred an interpretation dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Ultimately, the dispute arbitrated was based on AMCU seeking a cessation of agency fee deductions from its members and that it be part of the NBCS's members who were excluded from paying agency fees.

The Commissioner dismissed the application and found that nowhere in section 25 of the LRA is there mention of unions that become bargaining agents having a *"special dispensation"*, and that the CCMA did not have the *"ability to make binding orders relating to the legislator's intention"*. Dissatisfied with the conclusion, AMCU approached the Labour Court to review and set aside the Commissioner's findings or, in the alternative, to declare the agency fee agreement null and void. AMCU contended that the Commissioner misconstrued the nature of the enquiry as its case was about the interpretation of the agency shop agreement and not section 25 of the LRA.

The Labour Court

In arriving at its decision, the Labour Court posed the question: *"Where a majority union (or alliance of unions) is present in a bargaining council, how effective is the service provided by a minority union?"*

The Labour Court was not convinced that the plain meaning of section 25 created an absurdity which could tempt it to rewrite the provisions of the law under the guise of a purposive interpretation. It agreed with the Commissioner's conclusion and found that the agreement complied with section 25. Accordingly, AMCU's application was dismissed.

The Labour Appeal Court

The Labour Appeal Court held that section 25 of the LRA is rooted in the principle of fairness and that AMCU had not sought to benefit without carrying a concomitant burden that comes with a union's duty to bargain on behalf of its members. Agency fee agreements aim to cure the situation of free riders; where non-union or minority union members benefit from the services of the majority union without being members of the union.

AMCU achieved the status of a bargaining agent and was further prepared to fulfil its concomitant duty in this regard. It sat with the majority unions and the employers' representatives around the same

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bargaining table. It incurred the same expenses as majority unions to enable it to efficaciously represent its members. Its members were therefore not free riders.

The Labour Court's question about effectiveness of the service provided by a minority union where a majority union (or alliance of unions) is present in a bargaining council was, in the court's view, irrelevant. It found that this was an inappropriate yardstick. At the negotiating table, the minority union presents a different perspective which is advantageous to employees.

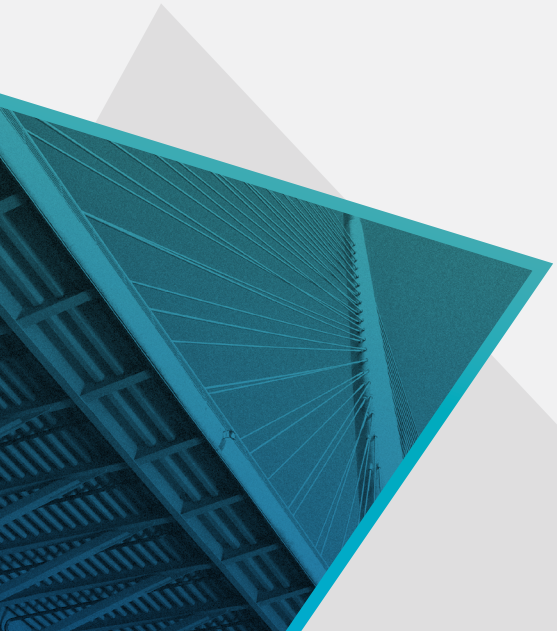
In addressing the appeal, the court clearly held that *"generally, in agency shop agreements, it must be implied that when a minority union becomes a bargaining agent, its members should not pay an agency fee unless there are express terms to the contrary."*

Ultimately, the appeal court found that by finding that AMCU wanted words read into section 25 of the LRA, both the commissioner and the Labour court misconstrued AMCU's case. AMCU's appeal therefore succeeded.

Conclusion

This judgment confirms that agency shop agreements are based on fairness. The reason an agency fee is paid is because the minority union members receive a benefit from the service of the majority union. In the case where the minority union is rendering this service, there is no justification for the majority unions to continue to receive agency fees.

Jean Ewang, Sashin Naidoo and Iva Babayi



Take note of your vows: A couple's transfer of employment and enforceability of restraint of trade agreements

In August 2020, CDH discussed the decision in *Slo Jo Innovation (Pty) Ltd v Beedle and Another* (J737/22) [2022] ZALCJHB 212 (*Beedle*), regarding the transfer of restraint of trade agreements in employment contracts. The court ruled that a restraint of trade agreement included in a contract of employment was transferable under section 197 of the Labour Relations Act 66 of 1995, as amended. The decision in Beedle was upheld by the Labour Appeal Court in *Beedle v Slo-Jo Innovations HubHub (Pty) Ltd* [2023] JOL 60553 (LAC).

In the recent judgment of *Avis Southern Africa (Pty) Limited and Others v Porteous and Another* (2023/0817898) [2023] ZAGPJHC 1160, Bester AJ in the High Court, arrived at a different conclusion. In this matter, the first and second respondents were married to each other. The applicants were Avis Southern Africa (Pty) Ltd, (Avis), Zenith Car Rental (Pty) Ltd (Zenith), and Zeda Car Rental (Pty) Ltd, (Zeda).

Although the matter was brought under one case number, it really concerned two applications with discrete restraint covenants arising from the employment relationship with each respondent based on their own set of facts and the adjudication of separate heads of relief.

The first respondent (David Porteous) commenced his employment with Avis on 1 October 1988. Avis was later acquired by Barloworld South Africa (Pty) Limited. By the time of his resignation on 31 May 2023, which took effect on 31 August 2023, he held the position of Chief Operations Officer of the Avis car rental and leasing business.

The second respondent (Belinda Porteous) assumed employment with Zeda in 1999 and on 10 December 2008, she became the Manager of International Sales for the Avis Rent-a-Car business of Barloworld, a position which she retained until the transfer of her employment to Zenith with effect from 7 September 2021. She remained in the employ of Barloworld until her resignation on 26 April 2023, which took effect on 31 May 2023. Upon resignation, she did not seek employment from a direct competitor of the applicants but rather commenced the process of registering a company in Mauritius with the intention of providing consulting services in the mobility and tourism industry. The first respondent intended to provide consulting services through this entity to the likes of Dollar Thrifty on a contract basis.

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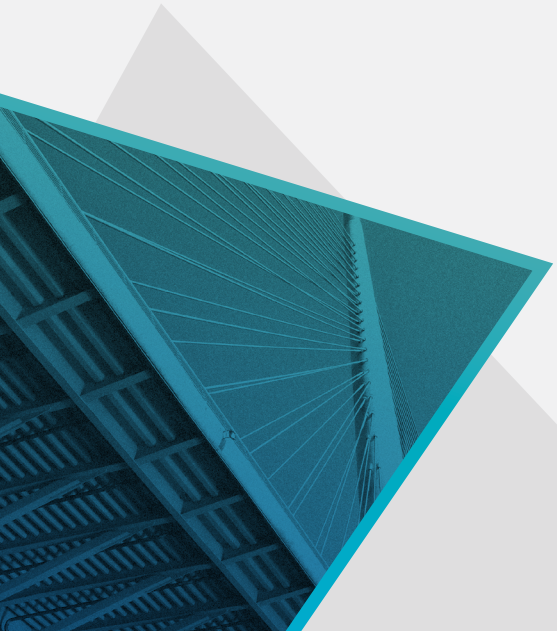

The urgent application against the first respondent was dismissed with costs, on account of a lack of urgency. Regarding the second respondent, the applicants filed an urgent application, seeking to prevent her from breaching a "*non-compete*" clause for a period of 12 months. The main issue before the court was whether the benefit of the restraint of trade undertaking was transferred to Zenith.

When the second respondent transferred to Barloworld, she signed a new employment contract. The contract included a confidentiality agreement, but not any restraint undertakings – her employment was subsequently transferred to the second applicant (Zenith) with effect from 7 September 2021 until her resignation on 31 May 2023. The new contract recorded that it superseded all previous contracts of employment. The applicants argued that the restraint of trade undertakings were included in the second respondent's contract of employment with Zeda, and continued to apply when she was employed by Zenith in 2021.

Findings

Bester AJ disagreed and held that the cession of rights was a factual question. The applicants had to prove that the terms of the agreement between Avis and Barloworld included the restraint undertakings. The restraint of trade undertakings were part of Avis's goodwill. The intention of the parties must be determined by the vows they took, i.e. the wording of the agreement they concluded. Bester AJ was not persuaded that the applicants had proven that there was cession of the restraint of trade undertakings to Barloworld.

Bester AJ also considered the Labour Appeal Court in *Beedle* and distinguished it from the Avis case. He held that on the facts of the matter before it, the Labour Appeal Court found that there was no transfer of a business to a third party – thus it did not have to consider whether the restraint of trade undertakings was ceded from employer A to B.

As discussed in the previous alter on *Beedle*, the legal debate about transfers of restraint of trade undertakings is developing. *Avis* is important for all employers who seek to enforce restraint of trade agreements in cases where the new contracts do not specifically include a restraint of trade clause. To succeed, employers must prove that the parties intended to cede the restraint of trade undertakings as part of goodwill.

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