NOTES / AANTEKENINGE

USE OF AGENCY FEES FOR UNION'S POLITICAL CAUSES: DOES OUR LAW ADEQUATELY PROTECT RIGHTS OF NON-MEMBERS OF A REPRESENTATIVE TRADE UNION AGAINST ITS UNSCRUPULOUS USE OF AGENCY FEES FOR POLITICAL IDEALS?

1 Introduction

The inclusion of a fundamental right to conclude agency-shop agreements in section 23(6) of the Constitution of the Republic of South Africa, 1996 (Constitution) places beyond dispute the issue regarding the constitutionality of such agreements. This is in recognition of the crucial role that agency shops play in facilitating collective bargaining, which is fundamental to advancing peace in the workplace. This legitimate and worthwhile purpose justifies the limitation (in accordance with section 36 of the Constitution) of non-members' right to freedom of association.

Agency-shop agreements are defined by section 25 of the Labour Relations Act (66 of 1995) (LRA). This provision requires employers to deduct an agreed-upon agency fee from the wages of non-union workers and pay it to the representative union to cover expenses related to collective bargaining. The purpose is to maintain parity in collective bargaining by bolstering the financial power of unions, thereby balancing the bargaining power between unions and economically advantaged employers. In essence, this eliminates the risk of employers using their economic superiority to determine unilaterally the outcomes of collective bargaining.

Agency fees assist unions in appointing highly skilled negotiators to match those appointed by employers, ensuring equality in the bargaining process. Furthermore, agency shops make it easier for workers to organise themselves under a single union, which is crucial for reducing conflicts and rivalry among members of different unions and non-members, thereby promoting a healthy collective-bargaining environment (see Budeli "Understanding Freedom of Association at the Workplace: Components and Scope" 2010 31 *Obiter* 16 31).

The essence of this note is an examination of the legislature's failure to adequately regulate a union's use of agency fees for political activities under section 25 of the LRA. The key object is to demonstrate that South Africa's

failure to regulate the use of agency fees for political activities undermines the reformed labour law's intention to protect the constitutional rights of workers. It argues that this ideal is compromised when, owing to such omission, unions can use agency fees for political activities under section 25(3)(*d*) without regulation.

This omission has significant implications, as the use of agency fees for political purposes can lead to problematic and disappointing consequences. In particular, it infringes on non-members' rights to freedom of association and to make political choices. The use of agency fees for political activities is thus of serious concern.

The need for legislative regulation of the use of agency fees for political activities is informed by the fact that major trade unions in South Africa are aligned with political parties, working together to advance shared political ideals. (The Congress of South African Trade Unions (COSATU), presently the country's largest trade union federation, is an alliance partner of both the African National Congress and the Communist Party. Similarly, the founders of the South African Federation of Trade Unions (SAFTU), the second largest trade union federation, created a socialist-orientated political party (Social Revolutionary Workers Party) to work in conjunction with the union to promote workers' welfare. However, there are instances where unions that are not affiliated with a political party may work together with a party to advance shared political ideals. This happened between the Solidarity union and the political party, Freedom Front Plus, when together they worked to challenge the Tourism Ministry's use of Black economic empowerment criteria to award relief to ailing business in the tourism sector from the Tourism Equality Fund as unlawful and irrational (see Afriforum and Solidarity's press statement "Success: Solidarity and Afri-forum Stop Racist Tourism Fund in Con Court" (08/02/2023) https://solidariteit.co.za/en/success-solidarity-afriforum-stop-racist-tourism-fund-in-con-court/ (accessed 2023-04-12).) It is for this reason that section 25 should be amended to ensure adequate regulation of a union's use of agency fees for political causes, so as to protect the rights of non-members of a representative union from being unjustifiably compromised by unscrupulous trade unions.

2 The current legal position of a union's use of agency fees for political activities in South Africa

At present, our labour law, the LRA, lacks provisions to regulate the union's use of agency fees for political activities. Although section 25(3)(*d*) of the LRA prohibits the use of agency fees to pay affiliation fees to political parties or to contribute to political parties or candidates standing for election to a political office, it does not explicitly regulate the broader use of agency fees for political activities. Landman has pointed out that section 25(3)(*d*) need not be seen as seeking to regulate unions' use of agency fees for political activities, but rather as a measure to define what agency fees may not be used for (see Landman "Hey Ho Silver and the 'Freerider' Rides Free Again – A Note on Greathead v SACCAWU (2001) 22 ILJ 595 (SCA)" 2001 22 *Industrial Law Journal* 856 860).

On the basis of legislature's omission to engraft a provision in section 25(3)(*d*) that is aimed to explicitly regulate a union's use of agency fees for political activities, it is lamentable that section 25(3)(*d*) is misconstrued to be relevant provision that must give effect to union's use of agency fees for its political ideal. This raises questions about the rationale for the legislature's decision not to regulate explicitly the union's use of agency fees for political activities. In other words, does this omission serve a legitimate and justifiable purpose that warrants protection under labour law, which is intended to uphold constitutional values and principles?

The legislature's rationale for not seeking to regulate unions' use of agency fees for political activities is informed by the need to allow unions to engage in political activities. This recognition stems from the understanding that disputes in the public sector are often political in nature. Consequently, unions may need to direct their disputes towards the government as an employer, and potentially require political decisions to influence budget allocations and accommodate union demands (see Clark "Politics and Public Employee Unionism; Some Recommendations for an Emerging Problem" 1975 44 *U Cincinnati Law Review* 680 680; Kupferberg "Political Strikes, Labour Law and Democratic Rights" 1985 71 *Virginia Law Review* 685 690; and Hatch "Union Security in the Public Sector: Defining Political Expenditure Related to Collective Bargaining" 1980 *Wisconsin Law Review* 134 145, where the authors state that unions in the public sector need to be seen as part of political interest groups that are competing for a share of government's unit budget as they bargain with the State to ensure that it allocates a portion of the budget to satisfy the demands of workers).

Secondly, the legislature acknowledges the role unions play as participants in the National Economic Development and Labour Council (NEDLAC), where they represent workers in promoting sustainable economic growth and participating in economic decision-making at national, company and shop-floor levels. This necessitates their engagement in political activities.

The third reason is informed by the political role South Africa's trade unions have played in the country's struggle for democracy. They used the collective power of their membership to influence the political processes without legislative interference (Cheadle "Labour Relations" in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 2ed (2007) 18–34; Finnemore *Introduction to Labour Relations in South Africa* 9ed (2006) 79). To that end, the legislature felt impelled to recognise unions' role as one of the primary drivers of social transformation; unions use concerted worker action to influence social and political processes aimed at improving workers' lives (see Hepple "Role of Trade Unions in a Democratic Society" 1990 11 *Industrial Law Journal* 645 646; Van Jaarsveld and Van Eck *Principles of Labour Law* 2ed (2002) 265; Cheadle in Cheadle *et al South African Constitutional Law: The Bill of Rights* 32 and Cassim "The Legal Status of Political Protest Action Under the Labour Relations Act 66 of 1995" 2008 29 *Industrial Law Journal* 2349). In other words, the legislature did not seek to prevent unions from engaging in political activities to address the aftermath of apartheid – namely, the patriarchal and colonial legal systems. Union activities are intended to challenge the government to repeal

or pass legislation that improves working conditions, secures conducive working hours, ensures safe work environments, promotes better and equitable salaries and benefits, and advances gender equality in the workplace (see Finnemore *Introduction to Labour Relations in SA* 82).

Although the legislature's decision to abstain from regulating unions' use of agency fees for political activities seems genuine and justifiable, it falls short of adequately protecting non-members' fundamental rights to freedom of association and political choice. This omission creates a loophole, which unscrupulous unions could manipulate under section 25(3)(*d*) in order to use agency fees to fulfil ulterior political objectives at the expense of non-members. Reforming the law, particularly amending section 25 to include provisions regulating unions' use of agency fees for political activities, is crucial to prevent non-members' rights in question from being unjustifiably overridden under the guise of facilitating workers' participation in economic decision-making and societal transformation.

3 Critique of the legislature's failure to regulate unions' use of agency fees for political activities

The legislature's failure to regulate the use of agency fees for political activities leaves this matter to be dealt with in terms of section 25(3)(*d*) of the LRA, which produces anomalous and disappointing results. Section 25(3)(*d*) was introduced to facilitate the use of agency fees for purposes that, although unrelated to collective bargaining, are minimally invasive of non-members rights and unlikely to raise controversy. For instance, section 25(3)(*d*)(iii), in particular, is ideal for facilitating the use of agency fees to cover expenses relating to first-aid training for workers, disseminating information about chronic illnesses affecting workers (such as HIV/Aids and asthma). As a result, applying section 25(3)(*d*)(iii) of the LRA to legitimise a union's use of agency fees for political activities that are not a minimal use, and which affect non-members' rights to freedom of association and political choice, is irrational and antithetical to the country's commitment to constitutional principles. This is informed by the fact that the regulation of unions' use of agency fees in terms of section 25(3)(*d*) of the LRA is overly relaxed, focusing only on determining whether the union adhered to the proscription against using or donating these fees for party-political activities.

The use of section 25(3)(*d*) to legitimise the use of agency fees for a union's political activities results in non-members' rights to freedom of association and political choice being overlooked. This stems from the fact that the enquiry into the legitimacy of such use is restricted to determining whether the union adhered to the proscription against using or donating these fees for party-political activities. It would be anomalous and disappointing to legitimise the use of agency fees for political activities merely by proving that the representative union did not pay the agency fee as an affiliation fee to a political party and did not contribute agency fees to a political party or candidate standing for election. The magnitude of right to freedom of association and right to make apolitical choices in the democratic

society demands that the legitimacy of their limitation be subjected to constitutional analysis in terms of section 36 of the Constitution.

It is argued that the legislature's inclusion of section 25(3)(*d*)(i) and (ii) in the LRA to proscribe unions from using the agency fees for party-political activities produces undesirable results. Although the legislature intends to prevent unions from contributing agency fees to political parties or candidates standing for national presidential or municipal elections, section 25(3)(*d*)(i) and (ii) impedes unions from using agency fees for political activities that are in the best interests of workers, including non-members. Of interest is the use of the term "political office" in section 25(3)(*d*)(ii), which effectively proscribes unions from using or contributing agency fees to facilitate the appointment of individuals to hold office in government or public institutions (see the dictionary meaning of "politics", defined as involvement in using the public sphere to influence decisions that affect a country or society, and of "political," in respect of action, defined as actions connected with the State, government or public affairs (Hornby *Oxford Advanced Learner's Dictionary of Current English* (2015) 1150)). This prevents unions from using agency fees to fund the lobbying of individuals they believe have the credentials to serve workers' interests. For example, a union might want to support a candidate for the Private Security Regulation Board who would protect the welfare and interests of workers in the security industry. The prohibition could stunt such efforts, ultimately harming the very workers the union represents.

Using section 25(3)(*d*)(iii) in the LRA to allow the use of agency fees for political activities may compound the anomaly, as it could be read to allow unions to use agency fees for those political purposes that serve the socio-economic interests of workers. The crucial question to grapple with concerns whether the labour law's objective of advancing social justice, as contained in section 1 of the LRA, constitutes a compelling and legitimate reason to limit non-members' rights to freedom of association and political choice. Put differently, should non-members be compelled, through the use of their agency fees, to participate in social activities aimed at improving the lives of indigent people within their communities? Proponents of using agency fees for political activities that promote the socio-economic interests of workers may argue that the Constitution's Preamble emphasises social justice as a fundamental principle to heal the divisions of the past and create a society founded on the values of human dignity, equality and freedom (Van Staden "Towards a South African Understanding of Social Justice: The International Labour Organization Perspective" 2012 1 *Tydskrif vir Suid-Afrikaanse Reg* 91 91). This argument is supported by the landmark case of *Government of the Western Cape v COSATU* (1999 20 *ILJ* 151 (LC)). In this case, the court found that workers' protest actions seeking socio-economic advantages for workers from institutions other than their employer were legitimate, as they served the socio-economic interests of workers. The court's decision was informed by two objectives of the LRA that it considered vital: the advancement of economic development and the promotion of social justice. On that basis, the court construed "socio-economic interests of workers" to allow workers to participate in social activities that are meant to improve living conditions in the communities they live. To that end, court found workers protest against their children's poor education system to be in the

interest of workers since it is their responsibility to ensure that their children do not suffer the same ills they experienced as a result of past apartheid policies. It is submitted that non-members should not be compelled, through the union's use of agency fees, to take part in the country's aspiration to promote social justice. Non-members should be allowed individually or collectively to associate with political activities of their choice so that they can raise their opinions or views on matters of interest to them (Motala and Ramaphosa *Constitutional Law: Analysis and Cases* (1994) 248).

It would be anomalous to use the socio-economic interests of workers to justify limiting non-members' rights to make political choices without subjecting such a limitation to analysis under section 36 of the Constitution – particularly considering the centrality of the right to make political choices in a democratic society. Section 19 of the Constitution ensures that everyone, including non-members of representative unions, can freely align with the political cause of their choice without adverse consequences, and thereby participate in law-making processes on issues of interest to them. (The importance of s 19 in SA's constitutional framework was echoed by Cameron J in *My Vote Counts NPC V Speaker of National Assembly* [2015] ZACC 31 par 39, where he stated that the right to make a political choice will be valuable if a person knows what he's choosing and as a result associates himself with that view. See also Harms "Political Rights" in Currie and De Waal *Bill of Rights Handbook* (2005) 446.)

Forcing non-members to support a union's demonstration for free tertiary education that aligns with a political party's campaign for the national election contradicts the country's aspiration to create a democratic society founded on constitutionalism, the rule of law and democracy. The country's transition to democratic dispensation requires that the government be based on freedom, and that citizens be allowed to align freely with political causes that affect them. This is consistent with the Constitution's foundational principle in section 1(*d*) aimed at ensuring that people are not disenfranchised without valid reason, and that they are able to exercise their free will in participating in the country's democratic processes, particularly in electing a new government.

4 Concluding remarks

It has been demonstrated that the legislature introduced section 25(3)(*d*) in the LRA to allow unions to use agency fees for minimal and uncontroversial purposes intended to better serve workers' interests in the workplace. Since the use of agency fees for a union's political ideals is neither minimal nor uncontroversial, section 25(3)(*d*) has not adequately articulated it. This necessitates reforming section 25 of the LRA to introduce explicit and unambiguous provisions that outline how agency fees should be used for political or ideological purposes. Such reform is crucial to promote certainty regarding how unions must use agency fees for their political ideals, ensuring that the law becomes predictable, reliable and capable of uniform application. Such clarity will enable non-members to understand when their fundamental rights are at stake and to challenge infringements with confidence that they will be granted a remedy.

The case of *Greathead v SACCAWU* (2001 22 *ILJ* 595 (SCA)) highlights the difficulty non-members face in formulating objections to the use of agency fees for political activities. The obscurity surrounding the union's use of agency fees for political activities impeded the complainant's ability adequately to articulate his dispute, leading the court of first instance (the Witwatersrand Local Division) to dismiss it and grant leave to appeal solely to challenge the validity of the agency-shop agreement between the union and his employer. Notably, the applicant invoked the right to make a political choice as one of the grounds for challenging the constitutionality of the agency-shop agreement. However, this challenge was overlooked because of the obscurity regarding the use of agency fees for political activities by the union.

The introduction of a provision to regulate the use of agency fees for political activities is crucial to inform non-members that their right to make a political choice cannot be at stake or infringed upon simply because the union is affiliated to a political party that they detest. Instead, their rights are at stake when the union uses agency fees for purposes that advance a party's political ideals to which they object.

Moreover, incorporating such a provision in section 25 is crucial to compel unions to inform non-members about the intended use of agency fees for political purposes, allowing them the opportunity to raise conscientious objections. It is unconscionable to expect non-members to learn about the use of agency fees for political purposes solely through the auditor's report that trade unions are compelled to submit to the registrar in terms of sections 98 and 100 of the LRA. Clarifying the protection of non-members' fundamental rights is essential, especially since the current law is silent on the consequences of a union's inappropriate use of agency fees. In particular, there is a lack of certainty regarding whether a union can be compelled to refund the agency fees to a separate account.

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