

# A PERSPECTIVE ON CLOSED SHOP AGREEMENTS THROUGH CORRELATIVE RIGHTS

by Jan Adriaan Norval\*

## 1 Introduction

Section 26 of the Labour Relations Act<sup>1</sup> gives employers and employers' organisations the power to conclude closed shop agreements through collective agreements with representative trade unions. The closed shop agreement is known as a union security agreement which has been defined as:

[a] generic term for an agreement between an employer and a union or unions in terms of which union membership or, alternatively, payment of union subscription is a condition of employment for all employees.<sup>2</sup>

Therefore employees are forced to join the representative trade union subject to the conditions being met in section 26(3) of the Labour Relations Act. This has resulted in a lot of debate on whether closed shop agreements are violating the right to freedom of association,<sup>3</sup> or simply limiting it.<sup>4</sup>

This article takes the debate further by not only looking at the right to associate, but also looking at this right as a correlative right because 'freedom of association buttresses and makes good the promise of a variety of other rights.'<sup>5</sup> Rights such as labour relations rights<sup>6</sup> and political rights<sup>7</sup> rely on the right to associate. Their dependence on the right to associate means that they have to be looked at when determining if closed shop agreements violate or limit the right to associate.

\* Second year LLB student, University of Pretoria.

<sup>1</sup> Act 66 of 1995.

<sup>2</sup> F Barker & M Holtzhauzen *South African labour glossary* (1996) 160.

<sup>3</sup> *Great North Transport v TAWU* 1998 4 BALR (LC) held that closed shop agreements are constitutional as long as they prescribe to the conditions set out in the Labour Relations Act. It was however also held that the constitutionality of closed shop agreements should be determined by the Constitutional Court and that it was not appropriate for that particular court to decide the constitutionality of the agreements.

<sup>4</sup> Sec 16 of the Constitution of the Republic of South Africa 1996.

<sup>5</sup> I Currie & J de Waal *Bill of Rights handbook* (2005) 420.

<sup>6</sup> Sec 23 of the Constitution.

<sup>7</sup> Sec 19 of the Constitution.

## 2 Freedom to associate as a correlative right

### 2.1 The right to collective bargaining<sup>8</sup>

The freedom to associate is a correlative right of the right to collective bargaining, because association is imperative to collective bargaining. Employees and employers need to belong to a trade union or employers' organisation respectively, in order for collective bargaining to take place. Therefore, when closed shop agreements limit or violate the right to associate we must take a look at its effect on the right to collective bargaining.

Du Toit *et al* suggest that when looking at what effect closed shop agreements have on the right to collective bargaining:<sup>9</sup>

It may be concluded that section 26 [of the Labour Relations Act] in a substantive sense reinforces rather than limits those rights [to collective bargaining]. If, on the other hand, it is found to be a limitation, the second question is whether it can be justified in terms of section 36 of the Constitution.

It cannot be concluded that section 26 of the Labour Relations Act reinforces the right to collective bargaining. Yes, section 26 does make collective bargaining easier, as it allows for trade unions to represent an entire workforce, but the right to collective bargaining must be looked at together with the right to associate. Collective bargaining requires the right to associate, or else members and employees would not be able to form the unions and organisations required to perform collective bargaining. Section 26 does not reinforce the right to associate, but limits or violates it because it forces workers to join a trade union.<sup>10</sup> Therefore, because the right to associate – which is the basis of collective bargaining – has been limited or violated, then the right to collective bargaining can therefore not be seen as reinforced because its basis has been limited or violated.

In order for closed shop agreements to limit a right, it will have to do so in accordance with section 36 of the Constitution. Closed shop agreements are allowed because the Labour Relations Act regulates them as envisaged in section 23(5) of the Constitution. Section 23(5)

<sup>8</sup> Sec 29(5) of the Constitution.

<sup>9</sup> *Labour relations law: A comprehensive guide* (2006) 191.

<sup>10</sup> *Young, James & Webster v The United Kingdom* 1981 IRLR 408 (ECHR) found that the right to associate allows for the right not to associate. *Lavigne v UPSEU* 1991 2 SCR 211 held that the right to associate does not allow for the right not to associate. The argument however should not centre on whether the right to associate gives the right not to associate; but rather that a person should have a choice of which union he would want to bargain on his behalf. The current closed shop agreement does not give that choice, but rather forces an employee to join a trade union and therefore limits or violates the right to associate.

also states that a right can be limited in order for collective bargaining to be regulated. So it must be asked whether closed shop agreements regulate collective bargaining, or just promote and make collective bargaining easier.

In order to find out whether closed shop agreements regulate or promote collective bargaining, it must first be determined what is considered to be collective bargaining. The International Labour Organisation (ILO) describes it as:<sup>11</sup>

[A] process in which workers and employers make claims upon each other and resolve them through a process of negotiations leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.

From this definition, it can be seen that closed shop agreements do not regulate collective bargaining. The conditions for closed shop agreements as found in section 26 of the Labour Relations Act rather regulate the collective agreement that is necessary for closed shop agreements to exist, and not collective bargaining itself. Therefore the limitation envisaged in section 23(5) of the Constitution that will regulate collective bargaining cannot be seen to stem from the closed shop agreement, as the agreement does not regulate collective bargaining but rather promotes it.

It can therefore be argued that the limitation that closed shop agreements place on the right to associate in order to promote collective bargaining is not a limitation but rather a violation. Firstly, it does not reinforce the right to collective bargaining because it limits the very basis on which it is formed. Secondly, the limitation that closed shop agreements place on the right to associate cannot be seen as the limitation envisaged in section 23(5), because closed shop agreements do not regulate – they only promote. Finally, the closed shop agreement cannot be viewed as a limitation under section 36 of the Constitution. Section 36(1)(b) states that ‘the importance of the purpose of the limitation’ should be a factor taken into account when a right is limited. Collective bargaining will still be able to take place without closed shop agreements, with agency shop agreements ensuring that unions receive their dues for negotiations that benefit non-members. The limitation of a right in order to merely promote

<sup>11</sup> International Labour Organisation ‘Organising for social justice – global report under the 2004 Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work’ in A van Niekerk *et al* *Law at work* (2008) 341.

another cannot be seen as an important purpose for limiting a right. This also means that section 23(6) of the Constitution cannot be seen as allowing for closed shop agreements in the Labour Relations Act, as it would not comply with the limitations clause in the Constitution.

## 2.2 Political rights<sup>12</sup>

The purpose of section 19(1) [of the Constitution] is to ensure that citizens are able to align themselves freely with the political cause or party of their choice without fear of adverse consequences.<sup>13</sup>

The right to associate is vital for the existence of political rights. Without this right, persons would not be able to align themselves as stated above. Therefore the right to associate is a correlative right to political rights.

Section 26(3)(d) of the Labour Relations Act tries to protect political rights within closed shop agreements as follows:

A closed shop agreement is only binding if it provides that no membership subscription or levy 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.

This protection is only in a monetary sense. But surely support for a political cause goes further than contributing money towards it; being a member of that cause may also be seen as support for a certain political stance.

Trade unions and political parties in South Africa are closely related. This is illustrated by the tri-partite alliance between the South African Communist Party (SACP), the African National Congress (ANC) and the Congress of South African Trade Unions (COSATU). COSATU have not contested any elections in South Africa, but field candidates through the ANC, hold senior positions in the ANC and influence party policy and dialogue.

It can be said that the larger a trade union is, the larger its influence. Therefore a large trade union can have a sizeable influence on the political parties with which it is affiliated. Yet closed shop agreements force employees to join a trade union, thereby growing trade union numbers and consequently growing their influence on political parties. Should employees not wish to join a trade union that he or she is forced to join due to a closed shop agreement, because

<sup>12</sup> Sec 19 of the Constitution.

<sup>13</sup> Currie & de Waal (n 5 above) 448.

the employee does not want to be indirectly affiliated with a certain political party, he or she will be dismissed under section 26(6)(a) of the Labour Relations Act. Under any other circumstances this would be considered an automatically unfair dismissal under section 187(1)(f) of the Labour Relations Act, as being unfair discrimination based on political opinion – but because the Act allows for this dismissal in section 26(6)(a), the dismissal would probably be justifiable.

The employee is also not protected from dismissal as a conscientious objector<sup>14</sup> because he would not fall within the ambit of the definition of a conscientious objector. A conscientious objector has been defined as:

A person who refuses to belong to a trade union because his or her moral and/or religious convictions prohibit him or her from association with other persons in this manner or in such organisations.<sup>15</sup>

An employee could refuse to join the trade union because he disagrees on moral grounds with the views of the political party with which the trade union is affiliated. The definition does not, however, allow for someone who simply does not agree with the views of a certain political party.

‘A threat of dismissal involving loss of livelihood is a most serious form of compulsion.’<sup>16</sup> This compulsion cannot be seen as any less serious because an employee is being compelled to join a mere affiliation of a political party. The very purpose of section 19(1) of the Constitution is to allow people the choice to join or support the political party that they choose. Closed shop agreements limit this choice of support by forcing employees to join trade unions that are affiliated with political parties that they do not necessarily want to support. This is surely a threat of a person’s right to associate, and accordingly an Irish court has held the following:<sup>17</sup>

Both logically and practically, to deprive a person of the choice of persons with whom he will associate is not control of the exercise of a right of association, but denial of a right all together.

The impairment placed on political rights by closed shop agreements is of great effect. This impairment therefore also has an effect on its correlative right - the right to associate.<sup>18</sup> There is also no way that a closed shop agreement can be seen to limit political rights in terms of section 36: The limitation should be reasonable and justifiable in an

<sup>14</sup> Sec 27(7) of the Labour Relations Act.

<sup>15</sup> *Barker & Holtzhausen* (n 2 above) 29.

<sup>16</sup> *Young, James and Webster v The United Kingdom* ECHR (13 August 1981) A 44.

<sup>17</sup> *National Union of Railwaymen v Sullivan* 1947 IR 77.

<sup>18</sup> *R v Edwards Arts and Books Ltd* 1986 4 DLR 435 held that closed shop agreements as a means to promote collective bargaining should impair the right to associate ‘as little as reasonably possible.’ As cited in *Du Toit et al Labour relations law* (1995) 178.

open and democratic society. The closed shop agreement does not try to promote or create a democratic society. Instead it promotes and creates an oligarchy.

Both Swedish and Israeli unions have experienced problems as a consequence of their affiliation to a particular political party, respectively the Swedish Social Democrats and the Labour Party in Israel. Worker dissatisfaction with the policies of these parties, to which their unions are affiliated, has resulted in new, splinter unions being formed which are not politically affiliated ... The effect has been to undermine the bargaining coherence of the established national unions. This result may well have been avoided had the unions concerned not been so closely allied to a particular political party or view.<sup>19</sup>

This has also been seen in South Africa with former COSATU president Willie Madisha wanting to start a new trade union not focusing on politics but on the issues of workers.<sup>20</sup> This new union would obviously try and draw members away from COSATU, thereby deteriorating their ability for collective bargaining. This shows the negative effect closed shop agreements can have on collective bargaining.

### 3 Conclusion

The closed shop agreement can hold a lot of benefits for workers and employers alike. It must be looked at whether these benefits are worthwhile at the expense of the right to associate, a right that has an influence on other rights. The removal of the closed shop agreement from our law due to its unconstitutionality would embrace people's right to associate, strengthen their political rights and create a collective bargaining platform where all workers are represented by the union of their choice and not just the union of the majority of the workers.

<sup>19</sup> C Albertyn 'Freedom of association and its moral consequences' (1989) 60 *Industrial Law Journal* 1002.

<sup>20</sup> 'Madisha to form new workers group' *The Times* 16 February 2009.