CONSCIENTIOUS OBJECTORS, CLOSED SHOP AGREEMENTS AND FREEDOM OF ASSOCIATION

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1 Introduction

There is no doubt that labour laws and labour relations play a critical role in the development of the post apartheid South African State. It is also acknowledged that the labour movement is a key role player in the reconstruction of the country. However, the question remains how reasonable the *Constitution of the Republic of South Africa* 108 of 1996[1] and the *Labour Relations Act* 66 of 1995[2] are in providing for individual employees whose sense of right and wrong precludes them from associating with any or a particular union.

In this regard, section 26(7)(b) of Act 66 provides for an exception to the general rule that an employer is entitled to dismiss an employee for refusing to join a trade union which is party to a closed shop agreement: an employee may not be dismissed if he or she refuses on the ground of being a "conscientious" objector.

Who should be regarded as a "conscientious objector"? And to what extent, if any, does the exception in section 26(7)(b) of Act 66 impact on the constitutionality of section 26 of the Act, especially in view of the fundamental right of freedom to association?[3]

In addressing these questions, an attempt will be made to give an international perspective on freedom of association, conscientious objectors and closed shop agreements. This is essentially done for two reasons: firstly, to take heed of the instruction in s39 of the 1996 Constitution[4] and also for comparative insight. However, as will be emphasised, such a

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1 Henceforth the 1996 Constitution.
2 In all instances hereafter referred to as "Act 66."
3 As the title suggests it is beyond the scope of this submission to investigate s26 in the light of fundamental rights *other* than freedom of association.
4 That is to give effect to the obligation to consider international law and to exercise the discretion to consider foreign law when interpreting the bill of rights.

perspective can not be used unreservedly to reach conclusions about the constitutionality of the South African closed shop regime for the simple reason that ultimately, it is the South African bill of rights that must be interpreted.[5]

2 Freedom of association in the international labour context

2.1 South Africa and the International Labour Organization[6]

South Africa was readmitted as member of the ILO in 1994, which has as its general aim the improvement of working conditions. There are a number of Conventions formulated by the ILO that prescribe or relate to the right to associate in the labour context, briefly discussed hereunder.

Chapter 14 of the 1996 Constitution deals with the position relating to the application of international law in South Africa. The general rule is that international agreements only bind the Republic once approved by the National Assembly and the Council of Provinces. Also, notwithstanding such approval, agreements will only become law when enacted into law by national legislation, unless they contain self-executing provisions that have been approved accordingly.[7]

However, as pointed out above, the instruction in s39 of the 1996 Constitution also now means that the South African law may be infused with

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5 See *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) where the Court warns against reaching conclusions simply based on foreign precedent and formulation.

6 Hereafter referred to as 'the ILO'.

7 See s231 of the Constitution. However, as pointed out in footnote 4, international law is important for the interpretation of the bill of rights.

the values contained in both binding and non-binding international law when the bill of rights is interpreted.[8]

2.2 International instruments

2.2.1 The Universal Declaration of Human Rights

On 10 December 1948 the General Assembly of the United Nations proclaimed the Universal Declaration of Human Rights. In reaction to World War II, the United Nations optimistically adopted a number of principles aimed at creating a new international order. These principles were not only aimed at labour relations, but the creation of an entirely new socio-legal order. The freedoms of choice, opinion and association bestowed in terms of Articles 18, 19 and 20 were supplemented by Article 23 that provides for the right to form and join trade unions. In many respects, the Universal Declaration on Human Rights serve as frontrunner and even catalyst for other instruments giving effect to human rights, including freedom of association, also in the labour sphere.[9]

2.2.2 The Freedom of Association and Protection of the Right to Organise Convention, 1948[10]

This Convention provides that workers and employers have the right to establish and join organisations of their own choosing without previous authorization.

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8 See footnote 4.

9 Devenish refers to the Declaration as the "most revered" of all international instruments following the Second World Wear – see *Commentary* 1.

10 Convention C87 of 1948, Article 2. This Convention was ratified by South Africa on 19 February 1996.

In terms of Article 3, workers' and employers' organisations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Also, public authorities may not interfere in the lawful exercise of these activities.

2.2.3 The Right to Organize and Collective Bargaining Convention, Convention C98 of 1949

In terms of this Convention, workers must enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

Such protection applies in respect of acts calculated to make the employment of a worker subject to the condition that he may not join a union or that he must relinquish trade union membership. In terms of Article 9, this Convention is binding only upon those members of the ILO whose ratifications have been registered with the Director-General.

2.2.4 The Discrimination (Employment and Occupation) Convention, 1958[11]

This Convention provides that members of the ILO undertake to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Discrimination includes any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

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11 Convention C111. South Africa has not ratified this Convention.

2.2.5 The Employment Policy Convention, C122 of 1964

Convention C122 provides that each member must declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment. The said policy must aim to, *inter alia* ensure that there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments. This Convention has not been ratified by the RSA.

2.2.6 *The European Convention of Human Rights*[12]

Article 11 of this Convention provides that everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions may be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

2.2.6.1. Case law interpreting this Convention

This Convention has been the subject of numerous decisions on freedom of association, albeit not always within the context of the labour law.

(a) Young, James & Webster

In the case of *Young, James &Webster*[13] the European Court of Justice had the opportunity to interpret the provisions of Article 11.

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12 Originally agreed to on 4 November 1950 in Rome. It now has five protocols, the latest being 16 September 1963.

Messrs Young, James and Webster were former employees of the British Railways Board ("British Rail"). In 1975, a closed shop agreement was concluded between British Rail and three trade unions, providing that thenceforth membership of one of those unions was a condition of employment. The applicants failed to satisfy this condition and were dismissed in 1976. They alleged that the treatment to which they had been subjected gave rise to violations of Articles 9, 10, 11 and 13 of the Convention.

A majority of the Court found that there had been a violation of Article 11(1) of the Convention.

It was argued that that Article 11 guaranteed not only freedom of association in the positive sense but also, by implication, a "negative right" not to be compelled to join a trade union. Eleven of the judges, who constituted the majority of the court, found that while the dismissal of the applicants clearly ran counter to the freedom of association in its negative sense, held that it was not necessary to decide whether Article 11 also protected the freedom not to associate.

They substantiated their finding that the dismissal of the applicants nevertheless violated Article 11 because the threat of dismissal involving loss of livelihood was "a most serious form of compulsion" and struck at the very substance of the freedom guaranteed by Article 11.

The remaining seven judges, while agreeing with the finding that the provisions of Article 11 had been violated, held that Article 11, in fact, guaranteed not only the freedom to associate but also the freedom not to associate. Trade union freedom, a form of freedom of association, involves freedom of choice: it implies that a person has a choice whether he will

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13 European Court of Human Rights 2004 HYPERLINK http://www.icnl.org/library/legal/youngjames.htm 31 July). Also reported as *Young, James and Webster v The United Kingdom* [1981] ECHR 4 (13 August 1981).

belong to an association or not and that, in the former case, he is able to choose the association. This choice is in reality non-existent where there is a trade union monopoly. *In casu,* the sanction of dismissal did not give rise to but simply aggravated the violation and was irreconcilable with the freedom of choice that is inherent in freedom of association.

As far as the second question was concerned, namely, whether the violation of Article 11 could be justified on the basis that it was "necessary in a democratic society" (as envisaged by Article 11(2)) the majority of the court held that it could not notwithstanding the advantages of a closed shop system in general.

The majority therefore concluded that there had been a violation of Article 11(1) of the convention which did not fall within the scope of the limitations authorised by Article 11(2).

(b) Sibson v the United Kingdom[14]

Mr Sibson resigned his membership from the Transport and General Workers Union (the TWGU) and joined another union after allegations that he had misappropriated TGWU funds. Members belonging to TGWU threatened to strike unless Mr Sibson rejoined that union or was employed somewhere else. Mr Sibson refused and eventually resigned after he was told by his employer that he would be sent home without pay unless he started working somewhere else.

Mr Sibson alleged that since United Kingdom legislation did not provide him with a meaningful remedy, he had been the victim of a violation of Article 11 of the Convention.

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14 European Court of Human Rights 2003 HYPERLINK http://www.icnl.org/library/legal/sibson.htm 30 Sept.) Also reported as *Sibson v The United Kingdom* [1993] IIHRL 38 (20 April 1993)

The Court held that the facts of the present case should be distinguished from *Young, James and Webster.* Mr Sibson did not object to rejoining TGWU on account of any convictions regarding union membership, but only because the apology he demanded from the author of the allegations of misappropriation was not forthcoming. Indeed, he would have rejoined TGWU if he received the apology. Also, Mr Sibson had the possibility of working somewhere else and was not under threat of dismissal. As such, he was not subject to a form of treatment striking at the very substance of the right to freedom of association. Therefore, there was no infringement of Article 11.

(c) Sigurdur A. SigurjÓnsson v Iceland [15]

The applicant was granted a licence to operate a taxicab on the condition that he would apply to the Frami Automobile Association for membership. His licence could also be revoked for failure to comply with this condition. The applicant ceased paying membership fees to Frami and his licence was revoked. The Supreme Court rejected his claim that Article 73 of the Icelandic Constitution protected him against compulsory membership of Frami. The Court held that the Article was intended to protect the right to "form associations" and not the right to remain outside one. However, the Court annulled the revocation of the applicants licence because it lacked any statutory basis.

The European Court for Human Rights held that Frami must be considered an association for the purpose of Article 11 of the Convention. The Court referred to the "growing measure of common ground at international level" with regard to negative association[16] and held that Article 11 must be

15 European Court of Human Rights 2004 HYPERLINK http://www.worlslii.org/html 31 Jul.) Also reported as (16130/90) [1993] ECHR 32 (30 June 1993)

16 See paragraph 35 of the judgement.

viewed as encompassing a negative right of association. The risk to the applicant of losing his licence strikes at the very substance of the right guaranteed by Article 11 and amounts to an interference with that right. The Court further held that the restrictions placed on the applicant's rights were disproportional to the aim pursued and as such, could not be validated under Article 11(2) of the Convention.

(d) Gustafsson v Sweden[17]

The applicant owned a restaurant and a youth hostel. He was not a member of the two associations of restaurant employers and therefore not bound by a collective agreement between the above associations and organised labour. He could, voluntarily, accede to a substitute agreement.

As a result of his refusal to sign such a separate agreement, unions placed his restaurant under "blockade" and declared a boycott against it. Eventually, all deliveries to his restaurant were stopped whereupon the applicant approached the Swedish government for assistance. More specifically, he requested the Government to prohibit the blockade and order the payment of compensation. Alternatively, he requested compensation by the State. The Government refused to assist.

The Court held that the facts *in casu* did not give rise to a violation of Article 11 of the Convention. The union's demand was that the applicant either joined an employers' organisation or sign a substitute agreement. Only the first alternative involved membership of an association. The applicant also refused to consider the second alternative. Such a substitute agreement offered the advantage that the applicant could have negotiated clauses tailor made for his business.

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17 Eurpean Court of Human Rights 2004 HYPERLINK http://www.kurt.nu 21 Sept.) (Application 15573/89 decided on 25 April 1996).

(e) Morten Sørenson v Denmark[18]

In this case, the applicant, a student, applied for a holiday relief job with a company, FDB. The application form completed by the application informed him that it was mandatory to be a member of one of the unions affiliated to the National Union. The applicant became aware from his first payslip that he was paying a subscription to SID although he had not applied for membership of that union. As he was told that as a holiday relief he would not enjoy full membership, he informed his employer and the shop steward that he did not want to pay the subscription. Consequently, he was dismissed from his position.

Following decisions by the Danish Supreme Court that closed shop agreements as such are not contrary to Article 11 of the Convention, the applicant took his case to the European Court of Human Rights where the Court decided that, without prejudging the merits, the applicant's complaint that his right to freedom of association under Article 11 has been violated, was admissible for adjudication.

2.2.7 The Termination of Employment Convention, C158 of 1982

Article 4 provides that the employment of a worker may not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

In terms of Article 5 termination based on union membership does not constitute a valid reason for termination.

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18 European Court of Human Rights 2003 HYPERLINK http://hjem.tele2adsl.Dk 30Sept.) (Decided by the European Court of Human Rights on 20 March 2003 (Application 52562/99)

2.3 Conclusions

There can be little doubt that freedom of association was intended to shape the 20th century nation state following the Second World War. That is clear from the instruments discussed above. Due cognizance must be taken of the commitment to democratic values that are contained in these instruments and their interpretation in foreign cases for the following reasons: Firstly, the instruments may be relevant for the simple reason that they may be binding international law - as reported, however, South Africa has not ratified a number of critical Conventions, especially Conventions C 111 of 1958 and C122 of 1964. Secondly, they are relevant because of the instruction contained in s39 of the Constitution. Having said this, South Africa has its own bill of rights and any student of the subject must understand that in constitutional democracies a range of possibilities, formulations and legal recipes exist to give effect to these values – some arguably more effective than others.

3 A brief overview of closed shop arrangements in other jurisdictions[19]

The following paragraphs are intended to give a comparative overview of how foreign jurisdictions deal with closed shop agreements.

3.1 Italy

Article 39 of the Italian Constitution expressly proclaims free labour organisation, in addition to the general freedom of association clause in s18. Closed shop clauses are illegal.

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19 M Biagi 2003 HYPERLINK http://www.org/public/english/dialogue/actrav 15 July.)

3.2 France

SL 412-2 of the Labour Code explicitly prohibits employer discrimination for reasons related to union membership. Closed shop agreements are illegal.

3.3 Germany

Negative freedom is regarded as the mirror of positive freedom of association and all arrangements that restrict the individual right to organise are invalid under the Basic Law, Article 9(3). As such, closed shop agreements violate such negative association.[20]

3.4 Norway

In November 2001, the Norwegian Supreme Court ruled that an arrangement whereby employment is conditional upon an applicant's trade union affiliation is in breach of *the Act relating to Worker Protection and Working Environment.*[21] This follows the incorporation of international human rights conventions into the Norwegian national law in 1999.

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20 European Foundation for the Improvement of Working and Living conditions 2003 HYPERLINK http://www.eurofound.eu.int 15Jul.)

21 European Industrial Relations Observatory Online 2003 HYPERLINK http://www.eiro.eurofound.eu.int 15Jul.)

3.5 Canada

In Lavigne v Ontario Public Services Union and Others[22] the facts were as follows:

Lavigne was a teacher at a community college in Ontario. Although not a member of the respondent union, he was required to pay union dues in terms of an agency shop ("Rand formula") provision in a collective bargaining agreement concluded between the union and his employer's collective bargaining agent. Lavigne objected to certain contributions made by the union including financial contributions to a political party and pro-choice abortion groups.

He sought a declaration that, in so far as ss 51, 52 and 53 of the *Ontario Colleges Collective Bargaining Act* (the legislation under which the agency shop clause was concluded) resulted in compulsory payment of dues used for any of the challenged purposes, they violated his rights under the Canadian Charter of Rights and Freedoms, including his right to freedom of association.

Although the Supreme Court accepted that the Canadian Charter applied to the facts at hand, it decided that the limitation on the appellant's freedom of association was justified in the broad interest of the union.[23]

In *Regina v Advance Cutting and Coring*[24] the legislated requirement of union membership as a condition of employment in the Quebec

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22 [1991] 2 S.C.R

23 Also see http://pssp.on.ca/news9900/unioncourt.html for further references to the Canadian jurisdiction. The general approach appears to be an acknowledgement that closed shop agreements infringe freedom of association, but that such infringement is justified under the Charter.

24 [2001] 3 S.C.R. 209 2000, also published in http://www.lexumumontreal.ca .

construction industry was narrowly upheld by the Supreme Court of Canada.

3.6 The United States

A distinction is made between a "union shop" agreement and "closed shop" agreement. The closed shop agreement, which requires membership of a union to become eligible for employment, was outlawed by the Taft-Hartley Act of 1947. Union shop agreements require employees to join the union within a specified time period and remain in good standing. Union shop agreements are lawful, provided they are not outlawed by a particular state. Twenty-One states have enacted laws prohibiting agreements that compel union membership. In *NLRB v General Motors Corporation*[25] it was held that an employee who pays his union dues as a non-member is entitled to keep his job. Therefore, membership denotes as a core obligation the financial support of a union. However, s8(a)(3) of the *National Labour Relations Act* does not permit a union to expend funds collected from dues-paying, non-member employees on activities unrelated to collective bargaining.[26]

3.7 Japan

Union security arrangements, including the closed shop agreement, are rare but legal. The negative right to labour association, that is the right to refrain from joining a union, is not guaranteed.

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25 373 U.S. 734 (1963), also published in http://www.caselaw.lp.findlaw.com.
26 See *Communications Workers v Beck* 487 U.S. 735(1988) 487 U.S. 735.

3.8 Australia

Section 170CK of the *Workplace Relations Act*[27] prohibits an employer from terminating an employee's employment on the basis of that employee's trade union membership or his non-membership of a trade union. Employers are similarly prohibited from threaten to terminate or terminate an employee or independent contractor's employment because such employee or contractor has become or does not propose to become a member of an industrial association.[28] However, nothing prevents an industrial association and a person who is not a member of the association to enter into an agreement for the provision of bargaining services.

The *Workplace Relations Amendment (Prohibition of Compulsory Union Fees)* Act[29] prohibits conduct designed to compel employees to pay compulsory bargaining services fees, prohibits the inclusion of bargaining services fee clauses in agreements and provide for the removal of such clauses.

The Act does not prevent people from making voluntary contributions, provided there is no coercion or misrepresentation involved. Neither does the Act prevent an industrial association from enforcing payment of a bargaining services fee that is payable to the association under a contract for bargaining services.[30]

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27 Of 1996.
28 See http://www.ilo.org/dyn/natlex/natlex_browse.details
29 Act 20 of 2003.
30 See http://www.workplace.gov.au

3.9 New Zealand[31]

Part 3 of the *Employment Relations Act*[32] makes it plain that this jurisdiction outlaws forced association. Section 8 provides that contracts may not require any person to become or remain a member of a union or any particular union, or not to so become or remain a member.[33] Also, no such agreement may confer preferences on a person because such person is or is not a member of a union or a particular union, inclusive of preferences related to the obtaining or retaining of employment, and conditions of service. Any such agreement has no force or effect.

4 Conscientious objectors in the international labour context

The term "conscientious objector" is often directly associated with conscription – the compulsory imposition of military service by governments.[34] It would appear that, generally speaking, "conscientious objectors" are, with regard to military service, regarded as persons who have "profound religious, philosophical or moral convictions" regarding such military service.[35]

However, the concept of a conscientious objection is not strange to the employment arena. Albertyn[36] describes it as follows:

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31 See http://www.legislation.govt.nz
32 Act 24 of 2000.
33 See s8.
34 See for instance, the useful report entitled *"The Question of Conscientious Objection toMilitaryService" in* http://www.hri.ca/fortherecord1997/documentation/commission/e-cn4-1997-99.html 26 September)
35 In Argentina, the Federal Republic of Germany, Romania, the Netherlands, Brazil, Spain, and the United States, to mention a few countries. See the report referred to in footnote 32.
36 *Freedom of Association and the Morality of the Closed Shop* (1989) 10 ILJ 981.

> There is a third position which is rare, and unusual in the context of the closed shop, that of the conscientious objector - the person who, with an informed conscience, and for moral or religious reasons, genuinely believes that taxation is wicked, and that he or she will not be party to the wicked practice. The genuine conscientious objector is usually prepared to face the consequences of his or her conviction, by accepting punishment for the anti-social expression of the belief. In relation to taxation no society can reasonably tolerate conscientious objection. However in relation to the closed shop conscientious objection should, in fairness, constitute a valid ground for avoidance of the objection to be a member?

4.1 Canada

In recognition of the principle of freedom of association and the import of Convention 87, the Canadian Labour Code, more particularly Chapter L-2, devotes detailed attention to the aspects under discussion.[37] Whilst section 70 (1) of the Labour Code makes express provision for the deduction of union dues in favour of a bargaining agent union and from non-members of the union, section 70(2) also makes express provision for the position of the religious objector.

The Canadian Industrial Relations Board, established under section 9 of the Code, may, if it is satisfied that an employee, because of their religious conviction or beliefs, objects to either joining a union or paying regular union dues, order that a provision in a collective agreement requiring membership in a trade union or requiring the payment of union dues as a condition of employment, does not apply to that employee provided that an amount equal to such union dues are paid to a registered charity agreed on by the employee and the trade union. Where the employee and union can not agree on a charity, the Board may designate a charity of its choice.

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37 See http://laws.justice.gc.ca/L-2/17054.html

4.2 Australia

S320 of the former *Industrial Relations Act*[38] prevented an employer from, *inter alia,* dismissing an employee who is a conscientious objector, "injure" such an employee in his or her employment, or alter the position of such an employee to the employee's prejudice because the employee was not a member of an organization. Threats to do the above were also outlawed.

Prospective jobseekers were also protected and employers were prohibited from refusing to employ conscientious objectors. Also, organizations were prohibited from, *inter alia*, take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person who is a conscientious objector in his or her employment, with intent to coerce the person to join an organization.

Section 320(8) of the Act provided that a conscientious objector, for the purpose of s320, should include both persons already certified as conscientious objectors and persons who have applied to the Registrar but who are still awaiting the outcome of their application.

S267 provided for the procedure to be recognized as a conscientious objector. Where a natural person, on application made to a Registrar, satisfied the Registrar that his "conscientious beliefs" did not allow him to be a member of an association of employees and paid the prescribed fee to the Registrar; the Registrar would issue to the person a certificate to that effect in the prescribed form.

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38 Act 86 of 1988. See WorldLII Databases http://www.worldlii.org/au/legis/cth/num_act/ira1988 17 December)

"Conscientious beliefs" were widely defined as

> "Any conscientious beliefs, whether the grounds for the beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion".[39]

No appeal was available to the Commission against a decision of a Registrar to issue a certificate.

Such certificates remained in force for a period not exceeding 12 months specified in the certificate, but could be renewed from time to time by a Registrar for another maximum of twelve months. Where a Registrar became aware of a matter that was not known to him when the certificate was issued and would have persuaded him not to have issued same if he was aware of it, he could, after giving the person an opportunity to show reason why the certificate should not be revoked, revoke the certificate.

5 Freedom of association in the South African labour context

5.1 The closed shop regime prior the Labour Relations Act 66 of 1995

Until the promulgation of the 1988-amendments to the *Labour Relations Act* 28 of 1956[40] the closed shop was permitted in all its forms, both in terms of the common law and under s 24(1).

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39 Section 267(6) of the Act.

40 Previously the *Industrial Conciliation Act* until its renaming in 1981. See, for instance *Mynwerkersunie v O'kiep Copper Co Ltd & 'n Ander* (1983) 4 ILJ 140 (IC) where it was held that closed shops were an accepted practice in South African industrial relations and were not in principle an unfair labour practice.

With the 1988–amendment to the *Labour Relations Act 28 of 1956*[41] paragraph (j) of the definition of an "unfair labour practice" contained in section was amended to specifically provide that the denial of the right to freedom of association and disassociation was an unfair labour practice.[42] The *Labour Relations Amendment Act* 9 of 1991 however, changed the position back to the pre-1988 situation. In *CTMPSA v City of Cape Town,* for instance, it was held that it could not be said that closed shops in all cases constitute an unfair labour practice.[43]

5.2 The 1996 Constitution[44]

S18 of the 1996 Constitution boldly professes that "everyone" has the right to freedom of association. Considered on its own, the term "everyone" in s18 must be understood to also include workers and employers.[45]

However, contextual interpretation demands that s18 cannot be read in isolation but regard must be had to its entire text, including s23 which specifically provides for fundamental rights related to labour relations.[46]

S23 (1) provides for a general right to "fair" labour practices. S23(2) enshrines the right of workers to form and join trade unions and to

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41 By the *Labour Relations Amendment Act* 83 of 1988.
42 See *Mazibuko v Mooi River Textiles Ltd* 1989 ILJ 875 IC.
43 1994 ILJ 348 (IC).
44 Where necessary, reference will also be made to the Constitution of the Republic of South Africa, Act 200 of1993. In such cases, reference will be made to the "Interim Constitution."
45 See, for instance *Tettey and Another v Minister of Home Affairs 1999* (3) SA 715 (D) where '"every person" in item 23(2)(b) of Schedule 6 to *the Constitution* was interpreted to afford aliens to South Africa administrative justice. Indeed, the Constitutional Court quite clearly interpreted s18 to include workers in *NUMSA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC). Also see *Landman* (2001) 22 ILJ 856.
46 See de Waal *et al Handbook* 126 and *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) for an exposition of this method of interpretation.

participate in their activities. Trade unions are guaranteed, in s23(5), the right to engage in collective bargaining.

Critically, s23 (6) provides that

> National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with s 36(1).

Unlike the formulation in s27 of the Interim Constitution that gave no express approval to union security arrangements, the Constitution expressly include provisions on the issue. This is an important consideration in evaluating the validity of Act 66.

The interpretation of "union security arrangements" in this provision is entirely clear and in accordance with the following definition accepted by de Waal *et al*:[47]

> A union security arrangement is a generic term for an agreement between an employer and union or unions in terms of which union membership, alternatively payment of union subscriptions is a condition of employment for all employees.

This approach is also supported by other writers like Devenish and a number of cases.[48]

It would therefore appear that the Bill of Rights expressly makes provision for the right of both workers and employers to positively associate within the labour context.[49]

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47 See *Handbook* on 366 and footnote 15.

48 See *Commentary* 316-317. Also see *Landman's article Hey Ho Silver and the 'Freerider' rides free again- a note on Greathead v SACCAWU (2001) 22 ILJ 595 (SCA)* in (2001) 22 ILJ 856 and *SA National Defence Union v Minister of Defence & Another (1999)* 20 ILJ 2265 (CC). For earlier judgements see *Media Workers Association of SA & Others v Die Môrester & Noord-Transvaler (Edms) Bpk, Pietersburg* (1990) 11 ILJ 703 (IC).

An aspect that requires consideration is whether s18 of the 1996 Constitution, as read with s23, should be understood to acknowledge the negative right to association. This is so because a consideration of the constitutional validity of Act 66 requires, first and foremost, an interpretation and understanding of the content and reach of the bill of rights.[50]

As a starting point, the 1996 Constitution requires an interpretation that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom. Also, regard must be had to international law and foreign law may be considered.[51] Having said this, as pointed out above, notwithstanding the value of comparative research

> ... the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management.[52]

Ultimately therefore, it remains the South African Bill of rights that is to be interpreted.

It is submitted that the point of view advanced by Devenish[53] that implicit in the right to associate (the so-called "positive" right to associate with an interest group) is the right not to associate (the "negative" right *not* to associate with such an interest group), should be supported. Such an interpretation will give effect not only to the value based dictates of s39 of the Constitution, but also heed the warning of *Sanderson*: s23(6) expressly prepares the way for legislated union security arrangements and contains an acknowledgement that "a right in this chapter" - the entire bill of rights,

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49 Especially s23(2) – (5).
50 See de Waal *et al Handbook* 27-28.
51 See s39 of the Constitution. International law includes both binding and non-binding law – See *Makwanyane* 1995 (3) SA 391 (CC) par 36.
52 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at 53.
53 *Commentary* 317. Also see the case of *Young, James and Webster* referred to above and van Veen W J M 2003 http://www.icnl.org/journal/vol3iss1/ar_wvl.html [Date of use 15 July 2003.) for an extensive discussion of Freedom of Association.

including freedom of association – may be validly infringed, provided that such legislated limitations comply with the general limitations clause in s36.

5.3 The Labour Relations Act 66 of 1995 and freedom of association

Act 66 commenced on 11 November 1996 and the Constitution on 4 February 1997.[54] It is quite clear from the primary objects of *Act* 66 that it was written to give effect to the provisions of the Interim Constitution, and not the1996 Constitution.

Act 66 devotes Chapter 4 to the regulation of freedom of association. S4 repeats the Interim Constitution and provides that every employee has the right to join a union and participate in its activities.

S5 prohibits the discrimination against a person for exercising his or her rights. More specifically, employers are not entitled to require employees and job seekers "not to be" members or "not to become" members or to "give up' membership of a trade union. Past, present or anticipated membership of a trade union membership may also not be used to prejudice employees or employment seekers. Finally, employers may not advantage or promise to advantage employees or job seekers for not exercising rights conferred in terms of the Act.[55]

From the aforementioned provisions it is quite clear that the interests of those persons electing to be members of and positively associate with a trade union are expressly protected by the Act, but not those of persons that wish to disassociate themselves from such trade unions. This

54 Unless otherwise indicated in their texts.
55 See s5(2) of the Act.

approach is entirely in accordance with the rest of Act 66 insofar it makes provision for closed shop agreements in Chapter III.

S26(1) of Act 66 provides for the definition of a closed shop agreement: a collective agreement between a representative trade union[56] and an employer or employer organisation that requires all employees covered by that agreement to be members of the union in question. [57]

The agreement is required to be a "collective agreement" as defined in the Act, and therefore in writing.[58]

Act 66 prescribes certain requirements for the validity of such collective agreements, some pertaining to the content of the agreement and others of a procedural nature. The necessary ballots must have been held and two thirds of the employees *who voted* must have voted in favour of the agreement.[59] The agreement must, *inter alia* specifically provide that deductions or subscriptions may not be paid to a political party as an affiliation fee. Also, these agreements may not require membership of the representative trade union *before* employment commences.[60]

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56 For the purposes of the Act a 'representative trade union' is a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed by an employer in a workplace or the majority of the employees employed by the members of an employers' organisation in a sector and area in respect of which the closed shop agreement applies

57 *Greathead v SACCAWU* (2001) 22 ILJ 595 (SCA) (2001) 22 ILJ 856 quite clearly illustrates that freedom of association in the labour context was even topical before the introduction of the constitutional state.

58 See s213 of the Act.

59 It is therefore theoretically possible for a minority of the employees at a workplace to bring about a closed shop agreement and affecting the rights of the majority.

60 See s26(3)(c) of the Act. This is sometimes referred to as pre-entry closed shop agreements. In contrast, post-entry closed shop imposes no restriction on application for jobs and no condition on the making of the contract of employment, but makes it incumbent on every worker to join the union (or a specified union) within a stated period after having taken up the job.

According to Du Toit *et al*[61] these provisions represent significant checks and balances in the evaluation of the constitutionality of the closed shop regime contained in Act 66.

5.4 The Labour Relations Act 66 of 1995 *and the conscientious objector*

Act 66 does not expressly provide for a definition of a "conscientious objector" or a "conscientious objection." As such, the Act itself does not indicate with sufficient certainty who should be regarded as a conscientious objector and what the basis should or could be for such objection.

Generally, the *ipse dixit* of conscientious objectors is not regarded as sufficient for exemption. Invariably, some legislated authority decides whether such objection is indeed sufficient and valid and whether the applicant could be regarded as a conscientious objector. South African authors appear to accept that this should be the same with regard to objectors in the labour context. For example, Albertyn pronounces as follows:[62]

> It is sometimes difficult to distinguish between the free rider and the conscientious objector. The conscientious objection would need to be subjected to an enquiry and scrutiny to establish its conscientiousness, viz that the belief giving cause for the objection has been consistently held over a period of time, it is compatible with the conduct of the objector in other aspects of his/her life, it is informed in the sense of being coherent and considered, etc.

Important aspects are who should consider claims by employees that they are conscientious objectors and when such claims should be considered.

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61 *Labour Relations Law* 91-93.
62 *Op cit* at 994.

Section 9 of the Act provides that disputes about the "interpretation or application" of chapter 2 of the Act – dealing with freedom of association - may be referred to a bargaining council or the Commission for conciliation. If such conciliation fails, the matter may be reported to the Labour Court for adjudication.

In terms of s24(6) of Act 66, any disputes about the "interpretation or application" of a closed shop agreement must be referred to the Commission, who must conciliate the matter. If the dispute remains unresolved, a party may request that the matter be adjudicated through arbitration.

Lastly, in terms of s191(5) of Act 66, an aggrieved employee may refer a dispute to the Labour Court if he alleges that the reason for the dismissal is because he refused to join a union party to a closed shop agreement.

None of the above provisions make express provision for the unbiased assessment by a third party of the true standing of an objector prior to his or her dismissal. Practically, therefore, it would appear that an employee could face dismissal because *his employer* holds the view that such an employee should not be regarded as a conscientious objector. The provisions of s191 of Act 66 only construct a procedure that provides for evaluation of claims by third parties after dismissal. [63] This stands in stark contrast to the repealed s320 of the Australian Act as well as the Canadian Labour Code where employees have the opportunity for independent third parties to pronounce on their status without the risk of prior dismissal by an interested employer.

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63 See in this regard flow diagram 11 in Schedule 4 to Act 66.

6 A brief perspective on the constitutionality of the closed shop regime in Act 66

6.1 The limitation in s23(6) of the Constitution

It has been established that s23(6) of the Constitution authorises national legislative schemes that make provision for closed shop agreements provided that they comply with the general limitations clause in s36(1) of the Constitution. The text of s23(6) therefore makes provision for a "special limitation" of the rights in the bill of rights, especially freedom of association and those contained in s23 of the Constitution. [64]

6.2 S36 of the Constitution and its application to the closed shop regime in Act 66

S36 of the Constitution provides that

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.

64 See *Handbook* 153.

In applying s36,

> ... the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the *concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. . . .* Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. *There can accordingly be no absolute standard for determining reasonableness.* [65]

6.2.1 Law of general application

Only a "law" of "general application" can validly limit a right in the bill of rights.

Of course, there can be no doubt that Act 66 is a "law." This, however, is not where the enquiry ends. To be a law of "general application" the provisions of Act 66 must not only be accessible but precise enough to allow persons to know and understand the law to enable them to conform.

In the case of *Hugo*[66] reference was made to the European Court of Human Rights' decision in *The Sunday Times*[67] where it was held that in order to be a law of general application, a law must be formulated with sufficient precision to enable a citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

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65 *S v Manamela* (3) SA 1 (CC) (2000 (1) at paras [32] and [33].

66 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at 43.

67 *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245.

There is no indication in the Act as to who will qualify as a "conscientious objector" and what the grounds will be for a successful exemption.[68] There are also no clear provisions as to what needs to be done to obtain the status of conscientious objector.

The possible danger of this shortcoming is the arbitrary and unequal application of the Act, at least until authoritative certainty on these aspects are obtained through the Courts - compare the following extract from *Makwanyane:* [69]

> Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision-making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.

6.2.2 The limitation must be reasonable and justifiable in an open and democratic society

It is conspicuous from the formulation of s36 that to be valid, a limitation must only be "reasonable and justifiable" and not "necessary." Generally speaking, therefore, the formulation in s36 makes the attainment of constitutional validity easier. [70]

To pass constitutional muster, therefore, the provisions of Act 66 must serve a constitutionally acceptable purpose and the harm caused by their infringement should be sufficiently proportional to benefits they purport to

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68 See the jurisdictions referred to above for helpful definitions.
69 para [156].
70 See for example, Article 11 of the European Convention of Human Rights discussed above.

achieve. The approach is summarised as follows by O' Regan J and Cameron AJ:

> ... determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.[71]

To establish such reasonableness the arbitrator must take the factors referred to in s36 into account on the understanding that they do not always represent all the relevant considerations. The limitation must also be reasonable and justifiable with reference to "an open and democratic society" that is based on "dignity, equality and freedom".

(a) The nature of the rights that are infringed

As a starting point and in accordance with the two stage approach[72] the first step is to determine the rights that are limited by the provisions of Act 66:

> This is essentially a two-stage exercise. First, there is the threshold enquiry aimed at determining or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b)..

There can be little doubt that the closed shop provisions in s26 of *Act 66* limit the fundamental right of freedom of association.[73] That is clear from

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71 As per *S v Manamela* and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) (2000 (1) SA 414 at para [66].

72 See for instance *Ex Parte Minister of Safety and Security: in re S v Walters and Another* 2002 (4) SA 613 CC at 631.

the international instruments and foreign cases referred to above where it is accepted that there exists a direct relationship between freedom of association and closed shop agreements is accepted both in foreign jurisdictions, international instruments and South African Courts.[74]

By its very nature, freedom of expression is closely related to other rights like freedom of expression, belief and opinion and lastly, but not least, dignity, which, together with the right to life, is the most important fundamental right.[75] These rights form a "web of mutually supporting rights". [76] The central place of association in the constitutional democracy can therefore not be overemphasised.

(b) The importance of the purpose of the limitation

Much has been said and written about the importance of the purpose of closed shop provisions.[77] The reason behind the closed shop regime in Act 66 is to enhance collective bargaining.

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73 It is not within the scope of this submission to comment on the impact of Act 66 on other fundamental rights.

74 That the South African Courts also accept that freedom of association plays a role in labour relations is clear from cases like *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T), but especially *NUMSA V Bader Bop 2003 (3) SA 513 (CC). Also see Greathead v SACCAWU* 2001 (3) SA 464 (SCA) where the Supreme Court of Appeal had the opportunity to deliberate the argument that a agency shop agreement infringed the right of freedom of association, but decided rather to restrict its enquiry to compliance with Act 66.

75 See *S v Makwanyane* at [144].

76 *See South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) [7].

77 See, in a South African context, Albertyn's article *Freedom of Association and the Morality of the Closed Shop* at 986 where he argues that that a violation of free association must be understood within the context of collective bargaining, since the benefits of collective bargaining have the overall effect of improving on the standard of living of workers generally. In her article *In Defence of Majoritarianism: Part 2* (1993) 14 ILJ 1145 Grant refers to the fact that the arguments in favour of the closed shop are usually made in terms of "social expediency." *Mazibuko v Mooi River Textiles* at 889E. See also *Mbobo v Randfontein Estate Gold Mining Co* at 1498A where it was held that the purpose for union security clauses is to encourage collective bargaining

An explanatory memorandum prepared by the Minister of Labour refers to the collective shop provisions in Act 66 as "an institutional prop to orderly collective bargaining."[78] Collective bargaining itself has now been entrenched as a fundamental right in the Constitution. That the lawmaker regards such collective bargaining as a critical means to promote industrial peace and stability is clear from the stated purpose of the Act. [79] There can therefore be little doubt about the importance of the purpose of closed shop provisions.

(c) The nature and extent of the limitation

This aspect requires the arbitrator to evaluate the way in which the provisions of s26 affect the right of freedom of association. How serious is the invasion of freedom of association?

In a nutshell, s26 makes it possible for a majority union and their employer to agree to compel future jobseekers to join such association or face the possibility of dismissal, provided that where such jobseekers are "conscientious objectors" they may not be dismissed. Such objectors may be required to pay an agency fee so that they do not reap the benefits of collective bargaining as complete "freeriders."[80] On the face of it, therefore, the nature and extent of the limitation in s26 appears reasonable, at least with reference to conscientious objectors – if one considers that the payment of an agency fee is placed as an alternative to the otherwise permanent loss of an employment opportunity.

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since they are a method to promote the process of collective bargaining more effectively.

78 See (1995) 16 ILJ 278 on 295. Prepared by the Ministerial Legal Task Team January 1995

79 See S1.

80 A term used internationally for such employees.

However, it is in the application of sections 36(d) and (e) of the Constitution that s26 of Act 66 appear to be less positive.

Limitations of fundamental rights must directly serve the purpose it professes to serve – a causal connection is required between the limitation and its purpose. *Bathgate*[81] quotes from the Canadian case of *Oakes*[82] as follows:

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd [(1985) 18 DLR (4th) 321] at 352. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance.

In terms of s26(7) of the Act the "employees at the time a closed shop agreement takes effect" may not be dismissed for refusing to join a trade union party to the agreement. Effectively, this will generally mean that persons who have voted in favour of and were responsible for the creation of such a collective closed shop, will to a significant degree be exempt from the consequences of their decision whilst persons who are employed after the implementation date but not responsible for its creation, could be compelled to join the trade union. In this regard, the stipulation that membership is not a valid precondition for employment has limited practical value. How rational is the distinction between persons who were employees at the time the collective agreement takes effect and those who were not? How does the fact that such a distinction is made rationally

81 *Director of Prosecutions v Bathgate* 2000 (2) SA 535 (C)
82 *R v Oakes* (1986) 26 DLR (4th) 200 (SCC)

contribute to the purpose of the limitation, namely union security?[83] Also, inevitably, the question should be posed whether such a distinction does not have the effect of discriminating unfairly against persons who join an employer *post* the forming of a closed shop agreement.[84]

In terms of the Act, only a two-thirds majority of *voting* employees can create a collective agreement. As pointed out above, this means that a simple minority of employees could bind their future colleagues to a collective closed shop. It is submitted that the decision by such a potential minority of existing employees who stand relatively unaffected by their decision cannot be regarded as either reasonable or justifiable in a constitutional state based on equality and freedom.

It is submitted that these aspects are potentially more extensive than is warranted by the purpose that s26 seeks to achieve and simple amendments to the Act could address these.

7 Conclusions

Modern states invariably value the importance of freedom of association, also in the labour context. It is also not uncharacteristic of some of these states to limit freedom of association in the advancement of collective labour relations by mandating closed shop agreements. Whilst due regard must be had to these examples in considering the legal validity of the South African closed shop regime, the fact remains that the primary benchmark is the South African bill of rights. The inclusion of s26(3) in the bill of rights leaves little doubt that our Constitution authorises closed shop agreements

83 See s36(1)(d) of the Constitution and *inter alia*, the case of in

84 See *Harksen v Lane* NO 1988(1) SA 300 (CC) especially with reference to the requirement of a rational distinction between the differentiation in question and the purpose it is designed to achieve.

and therefore, a limitation of the negative dimensions of freedom of association. As such, the Constitution itself contains as *grundnorm* the general proposition that the individual's personal interest may be subjected to that of collective labour.

Although the *Labour Relations Act 66 of 1995* contains a number of checks and balances that all assist in developing significant proportionality as envisaged by s36 of the Constitution (one being the inclusion of a reference to the conscientious objector) there remain a few aspects which appear not to be completely beyond constitutional reproach. These can be addressed through amendments to the Act.

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CONSCIENTIOUS OBJECTORS, CLOSED SHOP AGREEMENTS AND FREEDOM OF ASSOCIATION

Abstract and key terms

Section 26 of the *Labour Relations Act* 95 of 1996 makes provision for the introduction of closed shop agreements at the workplace between majority unions and employers. All employees covered by such agreements are required to be members of such unions or otherwise face the possibility of dismissal. "Conscientious objector" employees are an exception to this rule. The purpose of this submission is to investigate the constitutional validity of s26 in the light of the fundamental right to freedom of association in the *Constitution of the Republic of South Africa*, 1996 whilst investigating the position of "conscientious objectors" in certain foreign jurisdictions.

Closed shop agreements – freedom of association – conscientious objectors – s26 of the Labour Relations Act 66 of 1995

GEWETENSBESWAARDES, GESLOTE GELEDERE OOREENKOMSTE EN VRYHEID VAN ASSOSIASIE

Uittreksel en sleutelterme

Artikel 26 van die *Wet op Arbeidsverhoudinge,* 95 van 1996 maak voorsiening vir die sluit van geslote geledere ooreenkomste tussen meerderheidsvakbonde en werkgewers. Ingevolge hierdie ooreenkomste word van werknermers vereis om lede te word van sulke vakbonde of die risiko van ontslag te loop. "Gewetensbeswaarde" werknemers is 'n uitsondering op hierdie reël. Die doel van hierdie voorlegging is om die grondwetlikheid van artikel 26 te ondersoek in die lig van die die reg op vryheid van assosiasie soos vervat in die *Grondwet van die Republiek van Suid-Afrika*, 1996. Daar word ook aandag geskenk aan die posisie van "gewetensbeswaardes" in sekere buitelandse jurisidiksies.

Geslote geledere ooreenkomste – vryheid van assosiasie – gewetensbeswaardes - artikel 26 van die Wet op Arbeidsverhoudinge 66 van 1995