

THE IMPACT OF CLOSED SHOP AGREEMENTS: A CRITICAL AND COMPARATIVE ANALYSIS OF SOUTH AFRICA AND GERMANY



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**A MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE MASTER OF LAWS (LLM) DEGREE
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CAMPUS OF THE NORTH-WEST UNIVERSITY**

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NOVEMBER 2008

DECLARATION

I, **THATO C. RAMOSEME** do hereby declare that this work is mine and has never been presented to any institution or publication. Where ideas of scholars and commentators are used herein, they are duly acknowledged. It is on this basis that I declare it originally mine and present it in partial fulfilment of the requirements of the Master of Laws (LLM) Degree in Labour Law and Social security Law.

SIGNED AT NORTH WEST UNIVERSITY ON THIS.....DAY OF NOVEMBER 2008.

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SIGNED AT THE NORTH WEST UNIVERSITY ON THIS.....DAY OF NOVEMBER 2008.

.....

Prof. PHILLIP IYA
(SUPERVISOR)



DEDICATION

To my wonderful family.

ACKNOWLEDGEMENTS

First and foremost I thank you God, the Almighty Father for your gracious gift of strength that you gave unto me towards the achievement of this work, which was not so easy. Thanks Dear Father for your eternal love on me.

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ACRONYMS/ABBREVIATIONS

ANC	African National Congress
AU	African Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CONSAWU	Confederation of South African Workers Union
COSATU	Congress of South African Trade Unions
ELRA	Education Labour Relations Act
EU	European Union
ILO	International Labour Organisation
LRA	Labour Relations Act
OAU	Organisation of African Unity
PSLRA	Public Service Labour Relations Act

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ABSTRACT

This research is based on the opinion that the application of closed shop agreements in South Africa negates the purposes of the LRA contained in section 1 of the Act. These purposes are the rights of workers to economic development, social justice, labour piece and workplace democracy. Therefore, without the achievement and attainment of these rights, the Act becomes baseless and thus redundant. The research asserts that the application of closed shop agreements to rid off free riding from union activities requires the adoption of a collective approach in the labour relations whereas the protection of the labour rights contained in the Act as its main purposes requires an individualist approach. The analysis demonstrates that the application of closed shop agreements, although premised on both the Constitutional and international obligations of South Africa, contradicts the requirements for the fulfilment of these labour rights in that it leads to loss of employment, unequal distribution of both advantages and disadvantages resulting in the instigation of labour divisions and the consequent tensions while employees are also disarmed of their ability to influence workplace activities. As such it is necessary to consider an alternative arrangement that does not contradict the exercise of these labour rights. In an attempt to reverse the effects of the closed shop practice, the research investigates the Germany law on closed shop agreements and the elimination of free riding without undermining the exercise of the labour rights identified. The research recommends the German practice which involves the proscription of closed shop agreements and the adoption of approaches intended to entice employees to join trade union membership thus eliminating free riding. In the alternative, the research recommends the high regulation of closed shop agreements to ensure the protection and promotion of the purpose of the LRA and consequently the achievement and attainment of the four labour rights refereed to above. In order for these recommendations to apply in South Africa with success, it is the collective responsibility of all the stakeholders.

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND OF RESEARCH

Closed shop agreements are as old as industrial relations in South Africa and can be traced as far back as when trade unions were first established in the last quarter of the 19th century.¹ They serve the purpose of eradicating free riding from union activities in respect of non-excludable benefits by employee non-union members. They have played a very dominant role in the early stages of the South African industrial relations though they were used as tools of abuse by South Africa apartheid regime. Rather than eradicate free riding, they were for a long period used to as a tool of segregation to exclude the black South African labour from participating in labour affairs.²

Consequently black South African labour was unable to exercise their rights to the achievement of economic development, the attainment of social justice and labour peace and as well as the promotion of workplace democracy as they did not have the forum to do so. Because of this, black South Africa labour organised themselves and formed trade unions with the purpose of addressing as well as challenging not only the use but also the existence of closed shop agreements. The combination of these efforts by organised labour together with both the regional and international pressures led to the banning of closed shops in 1988 when they were declared as being contrary to public policy.³ This contradiction with public policy was said to exist in that they were seen as discriminatory and an infringement of the right to freedom of association.

It was surprising that the closed shops were again later on re-introduced into the South African industrial relations⁴ through the Amendment Act of 1991.⁵ This was surprising more so given earlier the attitude that they were objects of racial discrimination, a deep infringement and an encroachment into the right to freedom of association. Others argued that by virtue of the fact that at the time that they were challenged there was no Constitution in South Africa, they could

¹ *ACTWUSA v. Veldspun* (1994) (1) SA 162 (A) at 170. However, they were not provided for in any South African statute at least prior to the 1982 LRA. Reliance was being had to the common law position for their application.

² Emslie T. S., (1980) *The Incidence and effects of the closed Shop in South Africa With Particular Reference to the Diamond Cutting Industry*. A Dissertation submitted in fulfillment of an MBA Degree. University of Cape Town. Closed shop agreements were used to reserve jobs for the white South African workers.

³ Labour Relations Amendment Act 83 of 1988

⁴ Brand J et al., "Opening the Doors of the Closed Shop." 1991 Vol. 7 Issue 4 *Employment Law Journal* 73

⁵ Labour Relations Amendment Act of 1991

not be said to have been contrary to public policy. This view was affirmed in the matter of *ACTWUSA v. Veldspun*⁶ where the court held that it was difficult to hold that closed shop agreements were contrary to public policy in that they infringed the right to freedom of association as there was no constitutional impediment to the effect.

Around the early 1990's the concept of freedom of association gained importance as the right came to be provided for through labour legislation⁷ both in the positive as well as in the negative⁸ limiting the effect of closed shops in application.⁹ At this stage, trade unions expressed their fears that the concept of freedom of association spelled the extinction and demise of closed shop agreements as closed shop agreement that compelled employees to belong to a specific union then became unlawful and therefore unenforceable.¹⁰ This was followed by the appellate division decision in *ACTWUSA v. Veldspun (Pty) Ltd*¹¹ where it expressed its detest of the concept of closed shop agreements coupled with the introduction of the Interim Constitution¹² in South Africa as well as other regional and international documents on right to freedom of association.

These developments brought hope that all South African labour, irrespective of race, would now have the opportunity to exercise their labour rights namely the advancement of their economic developments, the attainment of labour peace, social justice and the promotion of workplace democracy. This hope was further concretised by the inclusion of these rights in the Labour Relations Act¹³ as being its main purposes. This is reflected in section 1 of the LRA as follows,

⁶ *ACTWUSA v. VeldSpun supra*

⁷ The Public Service Labour Relations Act (PSLRA) 102 of 1993 and The Education Labour Relations Act (ELRA) 146 of 1993, sections 4 (1), (6) and (7) and Section 5 (1) (a) thereof respectively.

⁸ The right to be free from association

⁹ Olivier M. P and Potgieter O., "*The Right to Associate Freely and the Closed Shop*" 1994 (2) TSAR 289-305. Article continues in 1994 (3) TSAR 443-469

¹⁰ Burns Y., "*Freedom of Association and the Right to Fair Labour Practice and Collective Bargaining in the Defence Force.*" 1994 (19) *African Defence Review*. Also see *Cape Local Authorities Employers Organisation v. Independent Municipal* (1997) (1) SA 656 (C)

¹¹ (1994) (1) SA 162 (A). Also see *S. v. Universal Iron and Steel Foundries (Pty) Ltd* 1971 (4) SA 355 (A) where the court declared that closed shop agreements discriminated against black South African employees.

¹² Act 200 of 1993

¹³ Hereinafter referred to as the LRA

“[t]he purpose of this Act is to advance the economic development, social development, labour peace and the democratisation of the workplace ...”¹⁴

However, to date there is less to be said about effective implementation of the purposes of the LRA and consequently the promotion and protection of these labour rights as closed shop agreements continue to apply and are a well established part of the South African Labour Legislation.¹⁵ Their application results in loss of employment, the promotion of favouritism in the distribution of both advantages and disadvantages in the workplace which results in the instigation of labour divisions and the consequent tensions while employees are also disarmed of their ability to influence workplace activities.

As a result of the above said, the operation of the closed shop agreements continues to hinder the effective implementation of the purposes of the LRA. It is by virtue of this that the research seeks to analyse the impact of closed shop agreements on the purposes of the LRA with the view to recommend alternative means and practices to rid of free riding such as alternative union security arrangements without hindering the effective promotion and protection of the purposes of the LRA and accordingly the labour rights.¹⁶

1.2 PROBLEM STATEMENT AND SUBSTANTIATION

The LRA is the watershed piece of legislation in labour matters in South Africa.¹⁷ It seeks to advance the economic development, social justice, labour peace and the promotion of workplace democracy.¹⁸ The rationale behind the purposes of the LRA is to acknowledge labour veterans and to give a fair share of labour relations opportunities to all South African labour as well as to

¹⁴ Act 66 of 1995 as amended

¹⁵ This owes to the Wiehahn Commission Recommendations and efforts of the Congress of South African Trade Unions (COSATU) towards their inclusion into the current South African labour Legislation. De Waal and Currie argue that their inclusion was meant to promote worker stability and to bring orderliness in collective bargaining. See De Waal J and Currie I (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town. However, note should be taken that the Confederation of South African Workers Union (CONSAWU) challenges the constitutionality of closed shop agreements and continues to do so to date.

¹⁶ The general purpose of union security arrangements is to address the issue of non-union members who benefit from activities of the union yet they do not make a contribution. These people are called free riders.

¹⁷ Landis H (2nd Ed) (2005) *Employment and the Law: A Practical Guide for the Workplace*. Cape Town: Juta & Co.

¹⁸ Act 66 of 1995 as amended, section 1

redress the legacies of the old apartheid system in which labour was largely disadvantaged, through oppression, discrimination and suppression.¹⁹

While intended to achieve these purposes, the LRA also provides for one of the forms of union security arrangements namely the closed shop agreements. They are provided for under section 23 (6) of the Constitution²⁰ of South Africa and section 26 of the LRA.²¹ The conclusion of closed shop agreements gives rise to reciprocal obligations on the part of both the employer and the trade union party to the agreement. The trade union has the power to compel, expel or refuse an employee union membership while an employer is obliged to dismiss employees who refuses to join union membership as well as one who has been expelled or refused union membership.²²

The application of closed shop agreements poses problems with regard to the spirit and purport of the LRA in a number of ways. Particularly, closed shop agreements negate the purposes of the Labour Relations Act in that they undermine the achievement of economic development, the attainment of social justice and labour peace as well as the promotion of workplace democracy. This is discussed in detail hereunder.

The first problem posed by closed shop agreements arises from section 26 (5) of the LRA. In terms of this section a trade union has the power to either expel an employee from union membership, refuse union membership or even to compel an employee into union membership in a specific workplace where a closed shop agreement applies. This expulsion or refusal of membership as well as refusal to submit to the demand to join union membership imposes an obligation on the employer to dismiss an affected employee.²³ This is contrary to the demands of the advancement of economic development which entail job creation as well as job retention which must be met not only in substance but also in form as these are lost in the act of dismissal of an employee.²⁴

¹⁹ Du Toit D et al (2006) (6th Ed) *The Labour Relations Act of 1995: A Comprehensive Guide* Butterworth's: Durban

²⁰ Act 108 of 1996 as amended. This section gives rise to the establishment of union security arrangements including but not limited to closed shop agreements.

²¹ Act 66 of 1995 as amended. This section provides for the establishment and regulation of closed shop agreements in South Africa.

²² Act 66 of 1995 as amended, ssection 26 (5) and (6).

²³ Act 66 of 1995 as amended, section 25 (6)

²⁴ Op cit www.lanecountry.org/CAO_EconDev/Glossary.htm. Also see *NEHAWU v. UCT and Others* 2003 (3) SA 1 (CC) at 29

The application of closed shop agreements tends to have a limiting factor on the ability of workers to actively participate in particular economic activities to make a contribution in the advancement of the economic development. This view was reflected in the matter of *S. v. Solberg*²⁵ where the court stated that closed shop agreements tend to limit the workers rights to active participation in economic activities. The court went on to indicate that this has taken place in the rail and air transport, telecommunications and broadcasting sectors.

Secondly, associated with the power of trade unions to expel, refuse union membership as well as to compel an employee to union membership is the problem of denial of social justice to employees. Through the extension of the powers to expel, refuse or compel an employee into union membership, the closed shop practice places trade unions at an advantage to the disadvantage of employees non-union members as it denies them the opportunity to partake in union activities which hold social, educational and economic prospects.²⁶ The acts of expulsion and refusal of union membership force employees affected to miss out on the fair and equal rights to participate in matters of great benefit to them. Similarly, the view of the court in *S. v. Solberg*²⁷ applies to show that acts of expulsion and refusal of union membership tend to constrain the ability of workers to partake in the economic activities of the sector involved and thus negate the purport of social justice.

Thirdly, the LRA also gives power to trade unions party to closed shop agreements the power to expel employee union members from union membership on the basis of their conduct which is regarded as contrary to the union's collective exercise of its rights.²⁸ Through this provision, trade unions are able to compel employee members to concede to union issues on which they would normally not concede to in fear of expulsion on the ground of sabotage of collective union activities. In the same vein, the view of the court in *S. v. Solberg*²⁹ applies as forced concession of workers illustrates the limitation on activity and participation of workers in economic

²⁵ (1997) (4) SA 1176 (CC)

²⁶ Op cit www.museumsgalleryscotland.org.uk/about/glossary_Hens/s.asp

²⁷ *S. v. Solberg supra*

²⁸ Act 66 of 1995 as amended, section 26 (5)

²⁹ *S. v. Solberg supra*

activities. This is contrary to the prerequisites of labour peace which arises out of the harmonisation of diverse of interests as opposed to concession to by subjugation.³⁰

Lastly, the fact that trade unions have the power to expel employees from union membership on the basis of their conduct which is regarded as sabotage as well as their power to refuse employees union membership is problematic with regard to the promotion of workplace democracy.³¹ The power to dismiss employees on allegations of sabotage, on the one hand, compels employees to concede to the opinions of the majority union members in fear of punitive sanctions of expulsions with the subsequent outcome of termination of employment. The power to refuse union membership, on the other hand, denies employees their workplace democratic rights to participate in workplace decision making. Again the view of the court in *S. v. Solberg (supra)* is exemplified in this scenario as workers active participation is restricted to that of the trade union party to the agreement. All this are the factors which work against promotion of workplace democracy as earlier defined.

In conclusion, while intended to rid off free riding, the closed shop agreements result in the negation of the exercise of the labour rights contained in the LRA as its main purposes. This explains the position of CONSAWU in its policy paper whereby it swore never to uphold and apply closed shop agreements.³² This continuing to be the position to date is only a reflection of the fact that the purposes of the LRA remain unattained. As a result, in real terms the acknowledgement of labour veterans and the conferment of a fair share of labour relations opportunities to all South African labour as well as rectification of the legacies of the old apartheid system have not as yet been attained despite the fact that it has been about twelve years since the LRA has been in place.

1.3 RESEARCH AIMS AND OBJECTIVES

The aim of this research is to critically analyse the application of closed shop agreements with the purpose of proving that closed shop agreements negate the purposes of the LRA. To achieve this task the research will advance the following objectives: -

³⁰ Op cit www.kzneducao.gov.za/manuals.tesm/manuals/e_manual_8/Englishmanuals_chapter1.pdf.

³¹ Act 66 of 1995 as amended, section 26 (5)

³² "Confederation of South Africa Workers Union Policies." www.consawu.co.za acquired on 9th April 2008.

- Analysis of the conceptual and legal basis of closed shop agreements. The purpose is to establish the content, scope and extent of closed shop agreements application in South Africa;
- Analysis of the impact of closed shop agreements on the purposes of the LRA. The intent here is to prove that the application of closed shop agreements has a negative impact on the purposes of the LRA hence prove or disprove the hypothesis.
- Having understood the impact of closed shop agreements in South Africa, a comparative analysis with the German model will be made with the view to copy ideas for reform of the South African closed shop agreements system.

1.4 BASIC HYPOTHESIS

The application of closed shop agreements by trade unions to rid off free riding, in terms of the Labour Relations Act, negates the purposes of the LRA namely the achievement of economic development, attainment of social justice, giving effect to labour peace and the promotion of workplace democracy. The application of closed shop agreements results in loss of employment, the promotion of favouritism in the distribution of both advantages and disadvantages in the workplace and which results in the instigation of labour divisions and the consequent tensions while employees are also disarmed of their ability to influence workplace activities. As a result the purposes of the LRA become redundant giving rise to the need to consider alternative means to rid off free riding from union activities as well as an alternative union security arrangement.

1.5 METHOD OF INVESTIGATION

To achieve the aims and objectives of the research, the researcher will employ a qualitative research method. In this process, the researcher will make use of both primary and secondary sources such as legal documents both at the local and international levels as well as case law and text books, journals and articles respectively. This research will combine both descriptive and analytical research methods in handling data. It will employ the available literature to describe closed shop agreements as they exist, ascertain their characteristics and examine the problematic areas in their application in relation to the purposes of the LRA with the view to make recommendations at a later stage. This research will be library and desk based.

1.6 LITERATURE REVIEW

The subject of closed shop agreements has been heavily written on in the past and as a result there are a lot of views on the closed shop agreements. Some of the studies on closed shop agreements have focussed on the compatibility of closed shop agreements with the right to freedom of association.³³ Olivier concluded that closed shop agreements are incompatible with the right to freedom of association with particular reference to the negative right while noting that both the right to freedom of association and closed shop agreements are provided for under section 18 of the Constitution of the Republic of South Africa.

Further studies slightly divert from focus on the compatibility of closed shop agreements with the right to freedom of association to the analysis of closed shop agreements as a being a cruel infringement of the right to freedom of association.³⁴ Olivier and Potgieter argue that this is the reason why closed shop agreements were in effect banned in the late 1980's in South Africa labour legislation, though later reintroduced in the early 1990's.

Further writings on the subject focus on the fairness of closed shop agreements vis-à-vis the right to freedom of association.³⁵ These writings raise much debate on the issue of the fairness of closed shop agreements advancing plethora of diverse issues without pronouncing their stand on the issue as to whether closed shop agreements are fair or unfair.

Other perspectives on the subject, view closed shop agreements as a statutory inroad into the trade union's right of disassociation.³⁶ Landman views closed shop agreements as being good in the South African industrial relations though they need to be regulated as giving them a free hand would only lead to havoc in labour relations. The main emphasis is on the control mechanisms that are in place to regulate the operation of closed shop agreements.

Albertyn C. S builds on the above view that closed shop agreements are necessary in industrial relations as they are intended to assist in the maintenance of trade unions.³⁷ Likewise, the writer

³³ Olivier M., "Managing Employment Relations in South Africa" A hand out in an LLM-Labour law and Social Security in September 2005. North West University (Mafikeng Campus) 1-32

³⁴ Olivier M. P and Potgieter O *op cit*

³⁵ Brand J et al., "The Closed Shop and Fairness." 1991. Vol. 7, Issue 4. *Employment Law Journal*, 74-77

³⁶ Landman A. A "Statutory Inroads into a Trade Union's Right to Disassociate." 1997. Vol. 18. *ILJ* 22

³⁷ Albertyn C. S *op cit*

advocates for the democratic controls to limit the power of trade unions operating closed shop agreements. It is further stated that there is more to benefit from the operation of closed shop agreements than without them in industrial relations and that what makes them undesirable are the burdens that are necessary for the maintenance of trade unions operating such agreements.

Furthermore, other perspectives on closed shop agreements focus on the purposes behind closed shop agreements.³⁸ They identify such as being to address the free rider problem which is the result of the fact that some of the benefits arising from union activity are non-excludable. However, other means and ways of dealing with the free rider problem are identified as convincing the non-union members to join by showing them that there is more to benefit by being members than being free riders. It is said that the free rider problem is due to the inability of trade unions to recruit and organise new and potential members effectively.

Emslie³⁹ writes on closed shop agreements with specific focus on the operation of closed shop agreements in the apartheid era whereby they were used as tools of racial discrimination to reserve jobs requiring skilled and semi-skilled labour of the white South Africans. As a result, this tended to hinder the prospects of full utilisation of manpower with particular reference to the diamond cutting industry. It is suggested that closed shop agreements were used as a scale to ensure the eligibility of candidates for employment.

Olivier⁴⁰ in the paper on the impact of the Constitution and the Bill of Rights⁴¹ on the private and public employment in South Africa states that there is still uncertainty on the issue regarding the closed shop and the right to freedom of association. Olivier argues that there is no clear cut line regarding the issue of the infringement of the right to freedom of association in the exercise of the closed shops. Rather, there are issues set out which have to be considered in order to determining if there is indeed an infringement. As a result it is still uncertain as to whether closed shop agreements are unconstitutional.

³⁸ Cradden C. *op cit*

³⁹ Emslie T. S. *op cit*

⁴⁰ Olivier M., "Reshaping the Private and Public Employment in South Africa: The Impact of the Constitution and the Bill of Rights." 2005. Conference paper presented on the 8th to 10th March 2005 at Stellenbosch South Africa. 1-20. Accessed at www.law.sun.ac.za acquired on 15th April 2008.

⁴¹ Act 108 of 1996 as amended

Albertyn C. S⁴² argues that it is accepted that closed shop agreements are an infringement of the right to freedom of association and that this is not automatically the position. However, Albertyn argues further that protection that is bestowed on workers through the principle of freedom of association only leads to the abuse of the principle. He states that this much protection undermines the ability of trade unions effectively collectively bargain with the employer as well as to withstand the immense power of employers. In the same vain this protection also undermines the principle of solidarity of workers to counter the immense power of employers as underpinned under article 29 of the African Charter of Human Rights.

From the discussions above, it will be observed that most of the literature on the subject from the past is concerned mainly with the compatibility, fairness and utility of the application and operation of the closed shop agreements in South Africa. The purpose of this research is therefore to take the research further by embarking into a study on the impact of misalignment of closed shop agreements with the purpose of the LRA with the view to recommend other means to rid off free riding without contradicting with the purposes of the Act or which if it does, it so does in the most minimal and insignificant manner.

1.7 SCOPE

In order to achieve the aims and objectives set in this research, the analysis will be divided into five chapters and these are briefly introduced in the below.

1.7.1 Chapter Division

Chapter 1 is the introductory chapter which composes the background of the research, definitions of important terms, statement of the problem, basic hypothesis, research aims and objectives, methodology, literature review and the scope with emerging limitations.

Chapter 2 deals with the conceptual and legal framework for closed shop agreements. This chapter will introduce the concept of closed shop agreements and provide a legal basis against which the practice is founded and operates in South Africa.

Chapter 3 deals with the analysis of application of closed shop agreements in South Africa with specific focus on the impact of their application and operation in South Africa in terms of the

⁴² Albertyn C. S *op cit.* in the matter *Veldspun c ACTWUSA* 1990 (4) SA 98 (SE) of the court stated that closed shop agreements constitute an infringement and they are an interference with the right of workers to dissociate. Also see Benjamin P and Cooper C “*Innovations and Continuity: Responding to the Labour Relations Bill*” (1995) 16 *ILJ* 258 (A).

provisions of the Labour Relations Act on the purposes of the Act itself. This chapter tests the basic hypothesis, that the application of closed shop agreements in South Africa negates the labour rights contained in the preamble of the LRA as its purposes, with the view to either prove or disprove same. This will lay a basis for the comparative study of the South African with the German model regarding closed shop agreements in the subsequent chapter.

Chapter 4 deals with a comparative analysis of the impact of the application closed shop agreements in the model country with the view to determining the methods used in the model country to solve the problem of free riding. South Africa has the one of most advanced labour legislation system in the continent. This is evidenced by the shift of economic activity from other African countries towards South Africa among which is the high level of labour migration. As a result for purposes of this research it is imperative to identify a country that has a more advanced system of labour legislation that is akin to the system used in South Africa. Germany has been chosen as the model country for the reasons it fits the desired profile as several aspect of the labour laws of the two countries are similar.⁴³ Further, Germany has put in place a means of eliminating free riding while protecting and protecting the labour rights contained in the South African LRA as its purposes. Therefore, South Africa can benefit from the German labour law system.

Chapter 5 will be the last chapter and it will be on the findings, conclusions and recommendations. This chapter will among others state the results on the hypothesis and make recommendations accordingly.

1.7.2 Limitations

This research will focus on the negation of closed shop agreements on the purposes of the LRA because the consequences of the negation undermine the redress of legacies of the old apartheid system in South Africa. This paper will largely focus on the LRA while it will make reference to relevant various legal instruments due to the limitation of time and resources constraints.

⁴³ See Liliane J “*National Labour Law Profile: Federal Republic of Germany*” available at www.ilo.org/public/english/dialogue/ifpdial/info/national/ger.htm (accessed on 27th August 2008) and Bhoola U “*National Labour Law Profile: Republic of South Africa*” available at www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm (accessed on 27th August 2008). These two websites provide a profile and scope of the labour legislations of the two countries.

1.8 DEFINITION OF TERMS

For purpose of this research the definitions provided hereunder will be used.

a) Closed shop agreements

Closed shop agreement refers to a collective agreement between a representative trade union and an employer or employer's organisation requiring all employees covered by the agreement to be members of the trade union.⁴⁴

b) Agency shop agreements

Agency shop agreements are collective agreements concluded between a representative trade union and an employer or an employer's organisation requiring the employer to deduct an agreed fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership.⁴⁵

c) Union Security Arrangements

These are agreements between an employer and trade unions on the conditions that union membership or alternatively, payment of union subscriptions is condition of employment for employees and examples include closed shop and agency shop agreements.⁴⁶

c) A Collective Agreement

These are written agreement concerning the terms and conditions of employment or any matter of mutual interest that are concluded by one or more registered trade unions, on the one hand and, one or more employers; one or more registered employer's organisations; or one or more employers and one or more registered employers' organisations.⁴⁷

⁴⁴ Act 66 of 1995 as amended, Section 26 (1). Also see De Waal J and Currie I (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town

⁴⁵ Act 66 of 1995 as amended, Section 25 (1)

⁴⁶ De Waal J and Currie I (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town. Also see Carrel M and Heavrin C. (6th Ed) (2001) *Labour Relations and Collective Bargaining*. New Jersey: Prentice Hall.

⁴⁷ Act 66 of 1995 as amended, Section 213

d) Economic development

Economic development refers to a program, a group of policies and/or activity that are intended to improve the quality of life for a community which are ideally projected to create, retain jobs and provide a stable tax base.⁴⁸

e) Social Justice

Social justice is the principle that every individual is entitled to fair and equal rights as well the opportunity to partake in social, educational and economic opportunities.⁴⁹

f) Labour Peace

Labour peace refers to a situation in which tensions in the employment relationships that are a result of either the employer or the employee pursuing the own interests at the expense of the other/s are minimal. It comes about as a result of the balancing of interests of both employees and employees and employers⁵⁰

g) Workplace Democracy

Workplace democracy refers to the idea of conferring more power in individual employees by including them in decision making in the workplace.⁵¹

1.9 CHAPTER CONCLUSION

Closed shop agreements have formed part of the South African labour legislation for a long time. During the early stages of the use and operation of closed shop agreements, they have by and large been used as tools to advance the apartheid policies of the then South African government thereby denying the black South Africans their rights to economic development, social justice, labour peace and workplace democracy. As a result of this, they were banned from the South Africa labour legislation but later reintroduced due to demands for their recall by South African trade unions. These trade unions have played a large role towards the form and application of closed shop agreements as they exist to date. The current practice of closed shop agreements negates the exercise of the labour rights contained in the LRA as its purposes.

⁴⁸ www.lanecountry.org/CAO_EconDev/Glossary/htm. Accessed on 24th July 2008.

⁴⁹ www.museums.galleries.scotland.org.uk/about/glossary_hens/s.asp. Accessed on 24th July 2008

⁵⁰ www.kzneducation.gov.za/manuals.tesm/manuals/e_manual_8/Englishmanuals_chapter1.pdf. Accessed on 11th August 2008.

⁵¹ www.usnews.com/articles/business/carrests/2008/04/24/why-workplace-democracy-can-be-good-in-business.html. Accessed on 24th July 2008.

As a result, this research seeks to analyse the impact of the application of closed shop agreements on the purposes of the LRA with the view to show why and how they negate the purport of the LRA. To do this, this research will employ a library and desk based method of investigation in which it will use available literature for descriptive purposes and make an analysis. Unlike earlier writers on the subject who focused on the compatibility, fairness and utility of closed shop agreements this research will embark on a study of the impact of closed shop agreements on the purposes of the LRA. While confining itself largely to the LRA due to limitations of time and resources, reference will be made to the Constitution of South Africa and other relevant legal instruments from time to time. The research will be broken down into five chapters dealing with the introduction, conceptual and legal framework, analysis of the application of closed shop agreements in South Africa, a comparative evaluation of the application of closed shop agreements in south Africa and Germany and then make conclusions on the findings and proffer recommendations for consideration. A few definitions have been provided which will be used to guide the research throughout.

CHAPTER 2: THE CONCEPTUAL AND LEGAL FRAMEWORK

2.1 INTRODUCTION

In this part, the analysis will focus on the conceptual and legal framework of closed shop agreements. The aim is to introduce the concept of closed shop agreements indicating their aims and purposes, types as well as the scope of operation, advantages and disadvantages. Further, focus will be placed on the legal basis against which closed shop agreements application in South Africa derive, tracing their historical background to the current legal framework and indicating the influential international instruments. Once the basis is established, it is important to verify the extend of compliance by the South African model to the international standards as enunciated in the International labour Organisation⁵² and African Union⁵³ instruments.

2.2 THE CONCEPTUAL FRAMEWORK

A closed shop agreement refers to a collective agreement between a representative trade union and an employer or employer's organisation requiring all employees covered by the agreement to be members of the trade union.⁵⁴ A closed shop agreement is therefore an undertaking between the employers and the employees through their representative trade unions and on their behalf to the effect that any worker who works within the workplaces in which the agreement is in operation is to become a member to the trade union concerned. The implication of closed shop agreements is that if an employee loses membership, then he/she stands to lose his job as employers are under the agreements are obliged to dismiss workers who have lost their membership.⁵⁵

2.2.1 Purposes of Closed Shop Agreements

Closed shop agreements are the strongest form of union security arrangements mainly intended to solve the problem of free riders from trade union activities.⁵⁶ For trade unions free riding is of

⁵² Hereinafter referred to as the ILO

⁵³ Hereinafter referred to as the AU

⁵⁴ Act 66 of 1995 as amended, Section 26(1). Also see De Waal J and Currie J (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town. Also see Davies D et al (1997) *Fundamental rights in the Constitution: Commentary and Cases*. Juta & Co: Cape Town.

⁵⁵ Beaumont M "Agency Shop and Closed shop agreements" available at www.butterworths.nwu.ac.za/ntx/gateway (accessed on 16th October 2008)

⁵⁶ Christianson M et al (2000) (2ⁿ Ed) *Essential Labour Law* Labour Law Publications: Cape Town. Closed shop agreements were initially intended to maintain the trade unions as strong and viable in the face of serious threats to their existence. They were used as self defence mechanisms. See Cordova E and Ozaki M "Union Security Arrangements: An International Overview" (1980) Vol. 119, No. 1, *International Labour Review* 19. Available at

great concern particularly because there are only two most effective ways of dealing with it. Firstly, this may be through the closed shop regime or secondly, if the union members forfeit the benefit so that non-union members may not get the benefit as well.⁵⁷ The latter option to rid free riding is undesirable as it brings as much inconvenience to the trade union members as it does to the non-trade union members particularly with regard to the benefits which are non-excludable. These benefits are non-excludable because they are benefits arising from trade union activities which are available to every employee within the particular workplace irrespective of whether they are union members or not or whether they have paid union fees as a form of agency fee for the enjoyment of these benefits. As a result the closed shop regime is much more preferable to trade unions than the option to sacrifice the benefit in order to deny same to the non-trade union members.

According to prominent labour law theorists, there are two most common methods of eliminating free riding in the industrial relations and these are the regulatory solution and the market solution.⁵⁸ Closed shop agreements are classified under the regulatory solution to free rider problems. According to the theorists, the market solution is a method which involves trade unions enticing workers within the concerned workplace to join into their union members by convincing them that there are benefits that derive from such membership and that these are worth paying for. This later method depends largely on the ability of the lobbyist to get through to the workers to interest them in joining the trade union concerned and it does not impose any form of compulsion into membership. This method is mostly preferred in developed countries such as in Germany. It is however, largely criticised of being less effective in eliminating free riding as it depends largely on the mercy of the workers to succeed.

<http://web.ebscohost.com/ehost/pdf?vid=2&hid=115&sid=1783dba8-92d5-45be-bb1b-95285df2eca7%40sessionmgr104> (accessed on 19th August 2008). Also see *Media Workers Association of South Africa and Others v. Die Morester and Noord-Transvaal (EDMS) Bpk, Pietersburg* (1990) 11 ILJ 703 (IC). Beaumont M op cit, defines free riders are workers who fall within the bargaining who do not belong to union negotiating with the employer and avoid paying for union activities within a workplace yet they acquire benefits because they are non-excludable. Union activities include collective bargaining which is negotiations between employers and trade unions on behalf of employees on the terms and conditions of employment as well as matter of mutual interest. Also see Albertyn C. S op cit. Also see Cradden Also see Victor B and King R "Agency chop and closed shop agreements" available at [http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates&fn=default.htm\\$vid=nylnb:10.1048/enu](http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates&fn=default.htm$vid=nylnb:10.1048/enu), where free riders are defined as "...employees who fall within a bargaining unit and who do not belong to the union negotiating with the employer on behalf of that bargaining unit." (accessed on 14th October 2008)

⁵⁷ Albertyn C. S op cit

⁵⁸ Cradden C op cit

2.2.2 Types of Closed Shop Agreements

There are two types of closed shop agreements and these are the pre-entry closed shop agreement and the post entry closed shop agreements. The distinguishing features of these two types of closed shop agreements are that the pre-entry closed shop agreements come into place prior to employment while the post entry comes into place after employment has taken effect. Therefore, the pre-entry closed shop agreements are easily identifiable in that they are a pre-condition towards the conclusion of a contract of employment while the post entry closed shop agreements are a term of the contract of employment.⁵⁹ These are analysed in the subsequent captions in detail.

Pre-entry closed shop agreements are agreements whose secondary purpose is to achieve union membership that is as close to 100% as possible within a workplace besides ridding off free riders.⁶⁰ These are agreements founded on the arrangement between the employer and the trade union that the employer gives preferential treatment to the union members of the union party to the agreement in hiring.⁶¹ They are based on the notion that in order to obtain employment, a job seeker must first be a member of the trade union party to the closed shop agreement and remain so in order to remain in employment.⁶² As a result of this agreement, the members of the trade union party to this agreement are given first priority in hiring at workplaces covered by a pre-entry closed shop agreement. This type of closed shop agreement is outlawed in many democratic states as it is undemocratic by its very nature.

Post-entry closed shop agreements are the most common type of closed shop agreements. Besides to rid off free riding, they also serve to ensure the maintenance of high levels of trade union membership in a unionised workplace.⁶³ They involve an agreement between an employer and a trade union representing employees within a workplace to the effect that every hired employee is bound to join the trade union party to a post-entry closed shop agreement.⁶⁴ This

⁵⁹ *Amalgamated Clothing and Textile Workers Union v. Veldspun Ltd* (1994) SA 162 (A)

⁶⁰ De Waal J and Currie I (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town. Also see *Ibid*

⁶¹ Cradden C op cit. also see *Veldspun v. ACTWUSA* (1990) (4) SA 98 (SE) at 116 where pre-entry closed shop agreements are defined as an undertaking by an employer to employ only trade union members on the condition that the employees retain their membership with the union party to the agreement in order to ensure and secure their continued employment.

⁶² Also see *Amalgamated Clothing and Textile Workers Union supra*

⁶³ *Amalgamated Clothing and Textile Workers Union supra*

⁶⁴ De Waal J and Currie I op cit. Also see *Veldspun v. ACTWUSA* (1990) (4) SA 98 (SE) at 109 where a closed shop agreement was defined as a agreement between a trade unions and employers in terms of which the employers make

means that newly hired employees are compelled to become members of the trade union party to the post-entry closed shop agreement. These agreements are callous than pre-entry closed shop agreements in that they allow for employment without first being a member of the trade union party to the closed shop agreement. They do not impose a restriction on application for employment as well as in the making of the employment contract.⁶⁵ However, these agreements are also outlawed in many of the democratic states on the grounds that they are an infringement of the rights to freedom of association.

Closed shop agreements do not operate in a vacuum and as such they have limitations in application. There are two most important limitations of the application of closed shop agreements. Firstly, Closed shop agreements do not bind conscientious objectors. These are people who as a result of their informed conscience and for moral or religious reasons, genuinely believe that it is wrong to join a particular trade union and as such they will not join or pay any fee to that union.⁶⁶ Secondly, closed shop agreements do not bind people who have been in the employ of an employer, within a particular workplace in which they operate, prior to their coming into force.⁶⁷ This class of employees includes those who were union members but who have resigned from union membership prior to the coming into effect of the closed shop agreement.

Within both the pre-entry and the post entry closed shop agreements, there are two further classifications namely the open union closed shop agreements and the closed union closed shop agreements. The open union closed shop agreements are defined as closed shop agreements that do not restrict the categories of workers who may make membership while the closed union closed shop agreements do impose restriction is that nature on workers who are legible for membership.⁶⁸ The latter type of closed shop agreements is crude and prone to abuses such as job reservation in that it excludes workers of certain categories as specified in the individual union's constitutions.

it a term of employment that all employees must belong to one or more of the trade unions or that their freedom not to do so be granted in exchange for an agency fee.

⁶⁵ *Amalgamated Clothing and Textile Workers Union v. Veldspun Ltd supra*

⁶⁶ *Albertyn C. S op cit*

⁶⁷ *Grogan J op cit*

⁶⁸ *Amalgamated Clothing and Textile Workers Union v. Veldspun Ltd supra*

2.2.3 Advantages and Disadvantages of Closed Shop Agreements

Closed shop agreements have both advantages and disadvantages to the parties concluding them. Albertyn⁶⁹ argues that the disadvantages of closed shop agreements are meant for the social good of all who benefit from them. As a result, the disadvantages inherent in closed shop agreements should not be viewed from a negative point but rather as the necessary ills for the attainment and enjoyment of the advantages. The following are some of the advantages and disadvantages of closed shop agreements.

Firstly, closed shop agreements circumvent the existence of a free rider situation which may augment friction within a particular workplace.⁷⁰ By compelling trade union membership within a workplace, closed shop agreements rid off the possibility of antagonism revolving around non-union subscription fee paying employees benefiting from union deeds at the expense of the union fee paying employees. This is particularly possible with regard to those benefits which are non-excludable in nature such as an increase in salaries which cannot exclude non-union members as that will amount to undue discrimination.

Associated to above advantage is that closed shop agreements assist to reduce the possibility of acts of violence and intimidation amongst and between workers within a particular workplace.⁷¹ Acts of violence and intimidation may occur where unionised workers threaten either physical or verbally non-unionised employees to take part in their strike action to prevent them from weakening the ability to influence negotiations with an employer to their side by their continued work. With compelled unionism there is no need for acts of violence and intimidation because all employees will be members of the striking union and accordingly partaking in all of its activities particularly because show of no support for the union collective activities exposes a worker to expulsion and necessarily termination of their employment.

Closed shop agreements shield the employers against allegations of discriminatory acts in treatment of different employees in case of advantages being offered.⁷² This may arise in a situation involving benefits which arise from trade union negotiations with the employer/s that are excludable. With the closed shop agreements in place no employees will be excluded in

⁶⁹ Albertyn C. S *op cit*

⁷⁰ Brand J et al *op cit*. Also see Victor B and King R *op cit*

⁷¹ Albertyn C. S *op cit*

⁷² Brand J et al *op cit*

distribution of advantages as all employees within a particular workplace will be members of the trade union party to the closed shop agreements. In this way no employees are left out in the allotment of benefits by virtue of non-membership to the trade union. Therefore, employees are also protected from being victimised and discriminated against on the basis of their participation and/or non-participation in trade union activities.

Closed shop agreements also make the collective bargaining system within a particular workplace in which they operate a coherent system.⁷³ By compelling employees in a specific workplace to join a single trade union, this eliminates multiple and diverse trade unions memberships within a single workplace. This tends to aid the development of strong and representative trade unions and thus it brings an advantage to the employers as they only have to bargain and deal with the demands of a single trade union which makes their task simpler than in a situation where there are multiple and diverse trade unions.⁷⁴

The compulsion to join a single trade union is also advantageous to employees in that all their needs and demands are safeguarded by one single strong trade union which enjoys total support from within a workplace. Through this arrangement the views of all employees are heard including those of employees who are regarded as moderates in union activities.⁷⁵ As the collective bargaining relationship between the employer and the union party to the closed shop agreement grows a certain pattern of consistency forms and this approach helps to minimise and eliminate confusion in activities between trade unions and employers and also brings stability in the employment relationship.⁷⁶

Further, closed shop agreements make it easier for the employer to embark on a lock-out⁷⁷ against employees who belong to a specific trade union.⁷⁸ Where a trade union refuses to either

⁷³ Brand J et al *op cit*. Also see Victor B and King R. They state that closed shop agreements assist the process of collective bargaining by binding all employees together and thereby strengthening the bargaining process. Also see Le Roux P. A. K. "The Closed Shop and the Industrial Conciliation Act" (1980) 2 *Modern Business Law* 69. Also see *Veldspun (Pty) Ltd v. ACTWUSA and Another No* (1992) (3) SA 880 (SE) at 899.

⁷⁴ Christianson M et al *op cit*. also see Beaumont M *op cit*. Beaumont states that closed shop agreements assists to bring all workers together and in the process this leads to the strengthening of the bargaining process.

⁷⁵ Albertlyn C. S *op cit*

⁷⁶ Christianson M et al *op cit*

⁷⁷ A lock-out is defined as the act of an employer/s by which they exclude employees from the workplace with the view to compel them to concede to their demands on matters of mutual interest to both of them. Employees who are locked out are not entitled to remuneration provided the lock-out is lawful. See *ibid*.

⁷⁸ Brand J et al *op cit*

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concede to the demands of an employer within a specific workplace, an employer may embark on a lock-out to compel concession on the part of the trade union party to negotiations. This lock-out can only be effectuated against the members of the trade union party to the negotiations. As a result an employer effectuating a lock-out is compelled to remunerate those employees who do not belong to the trade union party the negotiations which are the basis of a lock-out. Through compulsory trade union membership arising out of closed shop agreements, an employer/s can just lock their plant and not have to remunerate anyone.⁷⁹

While this proves advantageous to the employer, the contrary holds for the workers, particularly those who are union members by virtue of compulsion emanating from the closed shop practice as well those who do not support such industrial action but are only participating in same to avoid expulsion which could lead to the end of their employment. This is even worse where the contemplated industrial action does not advance the interest of the workers concerned.

The application of any concept has both advantages and disadvantages and closed shop agreements are no exceptions. Having looked at the advantages of the application of closed shop agreements, it is now prudent to turn to the disadvantages with the view to balance the analysis. Firstly, closed shop agreements tend to compel workers to join trade unions in which they have no interest.⁸⁰ The issue of interest is particularly dreadful in jurisdictions where trade union activity is practised along party politics lines. That is to say, where trade unions are aligned to political parties and as such share similar ideologies with those of their political party affiliate. This is tantamount to compelling employees, not only in their capacity as such, but also as individuals to follow the ideology of a political party not of their choice and liking.

Further, trade unions operating closed shop agreements tend to compel their members to decisions that they would not otherwise accept.⁸¹ This is premised on the fact that closed shop agreements give rise to paired obligations on the side of the employer and the trade union party. Trade unions have to power and obligation to expel from their membership an employee who is considered to impede the advancement of a trade union's collective efforts while giving rise to an obligation on the side of the employer to dismiss from employment an expelled employee

⁷⁹ Albertyn C. S. *op cit*

⁸⁰ Brand J et al *op cit*

⁸¹ Albertyn C. S. *op cit*

from union membership.⁸² Therefore employees are compelled to concede to decisions of trade unions which may at times be to their disadvantage.

Closed shop agreements tend to give trade unions party to them a sense of security emanating from an assured membership. In the long run this tends to make trade unions complaisant and less responsive to the needs and demands of their members. Where this is the position, trade unions engage in collective bargaining without their members mandate and this limits their ability to effectively represent the interest of the their members, something which is material and the very essence of their establishment.

In view of the above analysis, the issue of what constitutes an advantage or a disadvantage of the closed shop agreements rests largely on the perspective from which the analysis is made.⁸³ However, in view of the foregoing analysis, the closed shop agreements advantages seem to outweigh the disadvantages. This is particularly true are far as focus is placed on the interests of the workers as a collective as for instance it eliminates free riding and promotes collective bargaining, encourages strong, responsible and representative trade unions. The disadvantages are almost totally outweighed by the advantages that go to the workers in their collective capacity. However, few as the disadvantages may be, they have far reaching consequences on the individual workers because in the process of satisfying the interest of the collective, individual advantages and rights are sacrificed at different intensity from worker to worker. This is the reason why most countries which provide extensive protection to individual workers, closed shop agreements are outlawed.

2.3 HISTORICAL BACKGROUND OF THE LEGAL FRAMEWORK ON CLOSED SHOP AGREEMENTS IN SOUTH AFRICA

Closed shop agreements are as old as industrial relations in South Africa and can be traced as far back as when trade unions were first established in the last quarter of the 19th century.⁸⁴ At this stage there were no formal statutory provisions for their application and as such they were operating on the basis of the common law position. In these times, they played a very dominant

⁸² Grogan J (2007) (9th Ed) *Workplace Law* Juta & Co.: Cape Town

⁸³ Beaumont M *op cit*. Beaumont states that the impact of these agreements can be analysed from the individual employer's perspective, the employer, trade union or the multilateral perspective which takes the interests of all the 3 role players into account.

⁸⁴ *ACTWUSA v. Veldspun supra* at 170. However, they were not provided for in any South African statute at least prior to the 1982 LRA. Reliance was being had to the common law position for their application. The Industrial Conciliation Act 11 of 1924 did neither prohibit nor allow their operation..

role in the early stages of the South African industrial relations. They were responsible for the propping up of orderly collective bargaining and as such many industrial councils owe their stability and industrial peace to them.⁸⁵

However, they were used by the white South Africans to exclude the black South African labour from participating in labour affairs and for purposes reservation of work in certain categories.⁸⁶ To achieve these discriminatory objectives, closed shop agreements were only extended to white employees while the black workers were excluded from the meaning of the term employee.⁸⁷ As a result, the arrangement made is easy to restrict the role of black workers in the South Africa industrial relations, at least lawfully. Due to the insensitivity in the industrial relations system of the time, black workers mounted series efforts to disgruntle the system.

Consequently, they embarked on a series of protests among which the major incidents were the 1973 Durban strikes that almost put the functioning of the labour relations system to a stand still as well as the 1976 Soweto uprisings.⁸⁸ Subsequent to this, the Wiehahn Commission was established in 1979 with the view to look into the standard of the South African labour legislation particularly to address the recurring up risings. Among the considerations was the controversy regarding the closed shop agreements whereat the Commission recommended that they be retained. The result of this is that the definition of the term employee was extended to cover even black workers thereby removing the discriminatory feature prevalent in the earlier labour legislation.⁸⁹ This meant that closed shop agreements could no longer discriminate against black workers.

Subsequent to the inclusion of the black workers in the definition of the employees, several amendments were made to the LRA of 1981. The amendment had the effect of limiting the rights

⁸⁵ Benjamin P and Cooper C “*Innovation and Continuity: Responding to the Labour Relations Bill*” (1995) 16 *ILJ* 258 (A).

⁸⁶ Emslie T. S., (1980) *The Incidence and effects of the closed Shop in South Africa With Particular Reference to the Diamond Cutting Industry*. A Dissertation submitted in fulfillment of an MBA Degree. University of Cape Town. Closed shop agreements were used to reserve jobs for the white South African workers.

⁸⁷ The discriminatory feature of closed shop agreements was expressed by Rumpff JA in *S. v Universal Iron and Steels Foundries (Pty) Ltd* (1971) (4) SA 355 (A) at page 365 where the court said that closed shop agreements discriminated against blacks as a group in that they could not join trade unions which had concluded such agreements. The court was basing its opinion on the fact that these agreements restricted the black workers from working in the categories of work covered by the agreements.

⁸⁸ Van Rensburg Finnemore (2001)*Contemporary Labour Relations* Butterworth's: Durban

⁸⁹ See Government Notice R1329GG 7103 of the 27th June 1980

of workers, particularly of the blacks in the exercise of their rights to freedom of association. As a result, with the birth of COSATU, which had just been formed in 1985, much pressure was mounted against the legislature to revisit the LRA. This coupled with the lodgement of the complaint by COSATU against the LRA of 1981 with the ILO, closed shop agreements were banned from application in South Africa in 1988.⁹⁰ The main reason behind the ban was that they were contrary to the right to freedom of association and as such they were declared as being contrary to public policy.⁹¹

However, they were later re-introduced into the South African industrial relations⁹² through the Amendment Act of 1991.⁹³ This was surprising more so given earlier the attitude that they were objects of racial discrimination, a deep infringement and an encroachment into the right to freedom of association. Others argued that by virtue of the fact that at the time that they were challenged there was no Constitution in South Africa they could not be said to have been contrary to public policy. This view was affirmed in the matter of *ACTWUSA v. VeldSpun*⁹⁴ where the court held that it was difficult to hold that closed shop agreements were contrary to public policy in that they infringed the right to freedom of association as there was no constitutional impediment to the effect.

Around the early 1990's the concept of freedom of association gained importance as the right came to be provided for through various labour legislation⁹⁵ in the negative⁹⁶ limiting the effect of closed shops in application.⁹⁷ At this stage, trade unions expressed their fears that the concept of freedom of association spelled the extinction and demise of closed shop agreements as closed shop agreement that compelled employees to belong to a specific union then became unlawful

⁹⁰ In *BTR Industries South Africa (Pty) Ltd and Others v. Metal and Allied Workers Unions and Another* (1992) (3) SA 673 (A), the court stated that it seemed the legislature was aware of the undesirable aspects of the closed shop phenomenon.

⁹¹ LRA 83 of 1988

⁹² Brand J et al., "Opening the Doors of the Closed Shop." 1991 Vol. 7 Issue 4 *Employment Law Journal* 73

⁹³ Labour Relations Amendment Act of 1991

⁹⁴ *ACTWUSA v. Veldspun supra*

⁹⁵ The Public Service Labour Relations Act (PSLRA) 102 of 1993 and The Education Labour Relations Act (ELRA) 146 of 1993, sections 4 (1), (6) and (7) and Section 5 (1) (a) thereof respectively.

⁹⁶ The right to be free from association

⁹⁷ Olivier M. P and Potgieter O., "The Right to Associate Freely and the Closed Shop" 1994 (2) *TSAR* 289-305. Article continues in 1994 (3) *TSAR* 443-469

and therefore unenforceable.⁹⁸ This was followed by the appellate division decision in *ACTWUSA v. Veldspun (Pty) Ltd*⁹⁹ where it expressed its detest of the concept of closed shop agreements coupled with the introduction of the Interim Constitution¹⁰⁰ in South Africa as well as other regional and international documents on right to freedom of association.

With the beginning of the preparations for the 1995 Labour Relations, the major South African trade union federations agreed that irrespective of the criticism laid against the application of closed shop agreements, mainly as being contrary to the right to freedom of association, that they be retained in the 1995 Act. In support of this motion, much reference was made to the success of the operation of these agreements mainly, the earlier achievement of orderly collective bargaining, as well as the strengthening of unionism. In order to avoid a possible constitutional challenge against the phenomenon, it was agreed not include them in the labour Relations Bill but only to do so in the final Act.¹⁰¹ It is on the basis of these historical events that the closed shop agreements were able to make part of the South African labour legislations.

2.4 THE CURRENT LEGAL FRAMEWORK

Closed shop agreements are established and applied in South African labour relations under the LRA. Their application derives from three main sources namely, the ILO Conventions, the African Union¹⁰² Charter as well as the Constitution of South Africa.¹⁰³ Both the ILO conventions and the African Charter serve as a point of referral on the application of closed shop agreements and this is strengthened by membership of South Africa into both Organisations. By virtue of its membership, South Africa is obliged it to put in place mechanisms necessary at the national level to ensure the adoption and observance of the ILO and AU standards. These

⁹⁸ Burns Y., "Freedom of Association and the Right to Fair Labour Practice and Collective Bargaining in the Defence Force." 1994 (19) *African Defence Review*. Also see *Cape Local Authorities Employers Organisation v. Independent Municipal* (1997) (1) SA 656 (C)

⁹⁹ (1994) (1) SA 162 (A). Also see *S. v. Universal Iron and Steel Foundries (Pty) Ltd* 1971 (4) SA 355 (A) where the court declared that closed shop agreements discriminated against black South African employees.

¹⁰⁰ Act 200 of 1993

¹⁰¹ Victor B and King R *op cit*. According to Du Tiot D and Potgieter M in "Labour and the Bill of Rights" available at www.butterworths.nwu.ac.za/rlx/gateway (accessed on 16th October 2003), the drafter of both the LRA and the Interim Constitution Act 200 of 1993 were well aware of the potentially unconstitutional nature of the operation of the closed shop agreements. As a result it was not surprising that their provisioning was not contested in the final LRA.

¹⁰² Hereinafter referred to as the AU.

¹⁰³ ILO Convention 87 of 1948, Convention 98 of 1948, Charter of 1981 and Act 108 of 1996 as amended.

sources of the law on closed shop agreements will be discussed in the foregoing paragraphs separately.

2.4.1 ILO Conventions

The ILO conventions are the benchmark and guidelines on the provisions and application of labour law principles and serve as the yardstick against which recognition of labour rights is measured in individual states members to the ILO.¹⁰⁴ There are two conventions which recognise union security arrangements and these are convention 87 of 1948 on Freedom of Association and Protection of the Rights to Organise and Convention 98 of 1949 on the Application of the Principles of the Right to Organise and Bargain Collectively. These two conventions are regarded as very important as far as the protection of labour rights is concerned and they have been declared as the fundamental conventions requiring universal observance.¹⁰⁵ These conventions are binding on the states which have ratified them and such states are obliged to either incorporate or implement them within their national spheres. Both these conventions have been ratified by South Africa since the 19th February 1996.¹⁰⁶

2.4.1.1 ILO Convention 87 of 1948 on freedom of association and protection of the Rights to Organise

This convention is referred to as the most important guide in labour relations and its importance is manifested in the level of ratification of same by member states to the ILO.¹⁰⁷ It does not directly provide for union security arrangements but however it has been interpreted to include union security arrangements by the Committee of Experts.¹⁰⁸ The convention provides that

¹⁰⁴ Olivier M. P “*Social Protection in SADC: Developing an Integrated and Inclusive Framework – A rights-based Perspective*”. A paper handed out in an LLM-Labour Law and Social Security class on the 30th September 2005. North West University (Mafikeng Campus)

¹⁰⁵ Gopalakrishnan R “*Freedom of association and collective bargaining in export processing zones: the role of ILO supervisory mechanisms*” International Labour Office Geneva (2007) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087917.pdf (accessed on 19th August 2008)

¹⁰⁶ “*Ratification of Fundamental Human Rights Conventions by Country*” available at www.ilo.org/LOLEX/English/Docs/declwrld.htm (accessed on 25 August 2007)

¹⁰⁷ *Media Workers Association of South Africa and Others v. Die Morester and Noord-Transvaal (EDMS) Bpk, Pietersburg* (1990) 11 ILJ 703 (IC).

¹⁰⁸ “*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body*”, 4th Edition, 1996 Union security clauses (Right of workers and employers freely to establish and join organizations of their own choosing)” para 324 available in Digest of Decisions at http://training.ilo.it/ils/foa/library/digestdecisions_en/23087.htm (accessed on the 16th October 2008)

workers shall have the rights to form and join organisations of their choice without interference from authority.¹⁰⁹

The committee has interpreted these provisions to mean that each individual state has the discretion in tune with its national legislation to choose either to allow or disallow the use of union security arrangements.¹¹⁰ However, in the event that a state decides to provide for union security arrangements, they will only be compatible with the provisions of convention 87 provided that they have come about as a result of free negotiations between parties wishing to conclude them.¹¹¹ This means that any union security arrangements that come about as a result of compulsion are not compatible with the conventions and are therefore invalid.

According to the interpretation of article 2, it is clear that this convention is rather neutral as to whether union security arrangements should as a matter of fact form part of labour legislation in member states. This stance is further illuminated by the explanation of the committee that systems that proscribe and those that sanction the use of union security arrangements both are compatible with Convention 87 of 1948.¹¹²

2.4.1.2 ILO Convention 98 of 1949 on the Application of the Principles of the Right to Organise and Bargain Collectively

This convention supplements the ILO convention 87 of 1948 and it is aimed at affording protection to the workers against acts of anti-union discrimination in the workplace.¹¹³ In terms

¹⁰⁹ Convention 87 of 1948, article 2 reads “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.” Article 8 reads as follows, “1. In exercising the rights provided for in this convention, workers and employers and their respective organisations like other persons or organised collectives, shall respect the law of the land. 2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention.”

¹¹⁰ *“Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing” op cit*

¹¹¹ *“1994, Freedom of association and collective bargaining: Right of workers and employers to establish and join organizations”* available at http://training.ilo.org/ILS/foa/library/general_surveys_en/25943.htm (accessed on 21 April 2008). Also see *Media Workers Association of South Africa and Others v. Die Morester and Noord-Transvaal (EDMS) Bpk, Pietersburg supra*.

¹¹² *“Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing” op cit*

¹¹³ *Media Workers Association of South Africa and Others v. Die Morester and Noord-Transvaal (EDMS) Bpk, Pietersburg (1990) 11 ILJ 703 supra*.

of this Convention workers are not to be compelled into pre-entry closed shop agreements or to be prejudiced in any manner on the basis of their union membership.¹¹⁴

The provisions of this article are meant to curtail the scope of application of union security arrangements. This is particularly so with regard to security arrangements which require that an employee relinquish their own union membership as well as those which require that employers dismiss employees on the basis of their union membership.

Despite the neutrality of Convention 87 of 1948 on the provision of union security arrangements, in that it neither prohibits nor allow for the closed shop phenomenon, it is clear that the application of these union security arrangements is compatible with the ILO standards. Their compatibility derives from the fact their application is not prohibited in terms of the ILO standards. South Africa thus by virtue of its membership in the ILO as well as its ratification of the two conventions, provides for the application of the closed shop agreements in its labour relations law.

2.4.2 Regional Legal Instruments

South Africa is located within the African Continent and it forms membership to a number of organisations among which is the AU.¹¹⁵ The AU has established a number of regional legal instruments on a variety of subjects since its inception. Of particular importance to this research is the African Charter on Human and Peoples Rights of 1981. This charter is discussed hereunder in detail.

2.2.2.1 The African Charter on Human and Peoples Rights of 1981

The African Charter on Human and Peoples Rights was adopted in 1981 in Banjul by the OAU which is now known as the AU. This Charter provides for the individual freedom of association subject to the reasonable limitations.¹¹⁶ In terms of the Charter the individual's right to freedom

¹¹⁴ Convention 98 of 1949, article 1 reads as follows, "1. [w]orkers shall enjoy adequate protection against acts of anti union discrimination in respect of their employment. 2. Such Protection shall apply more particularly in respect of acts calculated to – a) make the employment of a worker subject to the condition that he shall not join or shall relinquish trade union membership; b) cause dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

¹¹⁵ The AU was originally called the Organisation of African Unity (OAU).

¹¹⁶ Article 10 (1) and (2) of the Charter provides that "1. Every individual shall have the right to free association provided that he abides by the law. 2. Subject to the obligation of solidarity provided for in article 29, no one may be compelled to join an association."

of association is recognised and protected subject to the obligation of solidarity the purpose of which closed shop agreements serve. As a result Charter recognises the use of union security arrangements the recognition which has influenced South Africa to make a provision for same in its national statutory instruments.

2.4.3 South African Legal Framework on Closed Shop Agreements

At the national level, there are three important statutory instruments that provide for closed shop agreements. These are the Constitution of South Africa, LRA as well as case law. These are discussed in detail hereunder.

2.4.3.1 The Constitution

The Constitution of South Africa is the supreme law of the land and any law that is inconsistent with it is invalid to the extent of the inconsistency.¹¹⁷ Among its provisions in the Bill of Rights¹¹⁸ are the labour rights which are contained in section 23. The constitution provides that the South African labour legislation may provide for the operation of closed shop agreements provided that their application does not limit individual fundamental rights as contained in the Constitution.¹¹⁹ However, in the event that they do impose a limitation, the limitation must be based on reasonable and justifiable grounds. It is against this background that closed shop agreements are provided for in the South African labour legislation, particularly the LRA.

2.4.3.2 The LRA

The LRA provides for the establishment, regulation and termination of closed shop agreements.¹²⁰ The LRA provides for the operation of the closed shop agreements in line with

¹¹⁷ Act 108 of 1996, section 2. The South African Constitution was promulgated on the 18th December 1996 and commenced on the 4 February 1997. The 1996 Constitution is the successor of the earlier interim Constitution, Act 200 of 1993, which was brought into effect on 27 April 1994, following the first democratic elections in South Africa. Also see Bhoola *U op cit*

¹¹⁸ These are found in Chapter 2 of the Constitution. Bill of rights contains the rights of all people in South Africa which the state must respect, promote, protect and fulfil subject to limitations in section 36. See section 7 of the Constitution.

¹¹⁹ Act 108 of 1996 as amended, section 23 (6) reads, “[n]ational 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 section 36 (1).” Section 36 (1) reads, “[t]he 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 ...”¹¹⁹

¹²⁰ This is contained in section 1 (b) of the LRA as amended.

the international Labour Standard as spelled out in the ILO conventions as well as the obligations under the AU.¹²¹

In terms of preamble of the LRA¹²², its objective is to give effect to the obligations of South Africa that flow from its membership in the ILO. This means that South Africa is bound by the provisions of the ILO conventions¹²³ in making its provisions within in the LRA on closed shop agreements. Therefore, the provisions on closed shop agreements must be compatible with the ILO conventions in order to enjoy validity and to pursue the objectives of the LRA in its preamble.

The effect of this is that through provisions in the LRA, the South African legislation must continue to adopt the ILO convention's position of neutrality with regard to the closed shop agreements. This is to say that LRA must be neutral so as to make it upon the parties wishing to conclude closed shop agreements to decide whether or not to out of their own will and without compulsion from the state or any authority. Therefore, should the LRA make it compulsory for closed shop agreements to be concluded then this will be contrary to the spirit and purpose of the two ILO conventions referred to.

In line with its international obligations, the LRA provides for the establishment, regulation and termination of closed shop agreements.¹²⁴ In terms of the LRA, closed shop agreements may only be concluded by trade unions which enjoy support of the majority of employees within a workplace in which the closed shop agreement is to be concluded. Therefore, the conclusion of closed shop agreements is voluntary as there is nothing in the LRA that obliges an employer or a trade union to conclude a closed shop agreement.¹²⁵ This implies that closed shop agreements are issues of collective bargaining as they cannot be imposed or proscribed as long as they comply with the statutory requirements. This view was expressed in the *BAMCWU V. Linfries Timbercity*¹²⁶ when the court refused to issue an order compelling the respondent trade union to

¹²¹ Conventions 87 of 1948 and 98 of 1949.

¹²² Act 66 of 1995 as amended, section 1(b)

¹²³ Convention 87 of 1948 and 98 of 1949.

¹²⁴ Closed shop agreements are provided for under section 26 of the LRA 66 of 1995 as amended.

¹²⁵ Christianson M et al *op cit*

¹²⁶ Jutastat, NW 18491, 29th January 2001.

conclude closed shop agreements with the application trade union. The court stated this practice is prohibited under the LRA.

In order to be valid, a ballot must have been held by all employees including those non-union members and two thirds of the employees must have voted in favour of this agreement.¹²⁷ This principle was enunciated in the matter of *Great North Transport v. TAWU*.¹²⁸ The case involved the conclusion of a closed shop agreement through the conduct of a ballot by members of the intending trade union alone to the exclusion of other workers in the same bargaining unit. The court held that the closed shop agreement so concluded was null and void and of no binding effect on the workers who had been excluded from the voting. Logically, the opportunity to cast a ballot is intended to give the non-union members a chance to participate in the decision making in the workplace. However, given the fact that the majority of employees within the concerned workplace are already members of the trade union wishing to conclude this agreement, relegates the ability of the non-union members to influence the making of the decision to conclude a closed shop agreement. From this view, the opportunity to partake in decision making within a workplace is merely a disguise to comply with the democratic control for validity of closed shop agreements.¹²⁹

A closed shop agreement must not require an employee to be a member of a trade union party to the agreement as a precondition to employment and it must provide for the use of union subscription fees which must be solely for purposes which are aimed at advancing and/or protecting the socio-economic interest of the employees covered.¹³⁰ The closed shop agreement

¹²⁷ Act 66 of 1995 as amended, section 26 (3) (a) and (b).

¹²⁸ (1998) BALR 470 (IMMSA).

¹²⁹ Democratic controls are measures intended to ensure that closed shop agreements conclusion and operation is democratic. A democratic closed shop is one which is voted by the majority of all employees it covers; it must be regularly reviewed through a ballot as agreed, the trade union party thereto must have a duty to represent all workers covered by the agreement fairly; all employees within its coverage must have equal rights of union membership, the trade union must not directly support a political party; and it should provide for conscientious objectors. See Benjamin P and Cooper C *"Innovation and Continuity: Responding to the Labour Relations Bill"* (1995) 16 ILJ 258 (A).

¹³⁰ Act 66 of 1995 as amended section 26 (3) (c) and (d). Also see *Amalgamated Clothing and Textile Workers Union v. Veldspun Ltd supra*. This case concerns deductions being made from non-union members and paid over to a charity which was agreed on by the employer and the trade union party to the closed shop. The court held that the deducted money was only to be used to advance the socio-economic interests of the employees and not otherwise. This case made the distinction between closed union closed shop agreements and open union closed shop agreements. The former, on the hand, means that the trade union does not place a restriction on its membership while the latter on the other hand places a restriction its membership.

need not state the procedure to be followed in the event of a dispute over its interpretation.¹³¹ The LRA¹³² invokes the option guaranteed by the ILO convention 87 of 1948 to choose either to allow or disallow the use of union security arrangements which in this case is invoked to prohibit the use of pre-entry closed shop agreements.¹³³ Through this provision, the LRA ensures that all job seekers have fair opportunities to employment.

Section 26 (6) of LRA provides that once a closed shop agreement has been concluded, the trade union party has the power to compel an employee to join its membership, refuse or expel certain employees from their membership. The LRA is silent about the prior held union membership of the employees who have been compelled to join membership of the trade union party to the closed shop agreements. However, practice has proved that these employees are not precluded to maintain their old membership provided that their old trade unions allow for dual membership.¹³⁴ It has also proved that nothing precludes these employees to further join other trade unions of their choice despite the one they have been compelled to join. This is another indication of short-sightedness on the side of the LRA on the issue of dual membership. Dual membership could result in a conflict of demands by the union of employee holding dual membership. This raises the question as to what happens in this situation, does it mean that affected employees will have to place priority on the trade union party to the closed agreements' needs over these of their own in fear of expulsion? This is one of the issues that the LRA has left hanging.

The fact that a trade union party to closed shop agreement can compel, refuse or expel from membership raises the possibility that a trade union party to the closed shop agreement can engineer the dismissal of certain employees by expelling them from their membership.¹³⁵ To limit this, the LRA has made it conditional on the fact that the refusal is in line with the provisions of the trade unions Constitution and that the expulsion is based on fair grounds which may include, though not limited to conduct of an employee that is inconsistent with the

¹³¹ *National Union of Metal Workers of South Africa v. The Persons listed in Annexure "A" and Another* (2002) 23 ILJ 895 (LAC)

¹³² Through section 26 (3) (c) of Act 66 of 1995 as amended

¹³³ See *ACTWUSA v. Veldspun supra*, where the court held that pre-entry closed shop agreements were contrary to public policy in that they were contrary to the right to freedom of association which gives employees the right to form and join trade unions for the protection of their interests.

¹³⁴ *Grogan J op cit.* Also see *Black Allied Workers union and Others v. Asoka Hotel* (1989) 10 ILJ 167 (IC)

¹³⁵ *Ibid*

collective exercised o the union's rights. The case of *Theron v. Food Allied Workers Unions*¹³⁶ states that the requirement of fairness of the reason is intended to protect employees against acts of victimisation by the trade unions. An illustration of conduct that amounts to sabotage of the exercise of the collective trade union rights may include refusal by an employee or employees to partake in a strike action called by the trade union party to the closed shop in accordance with the provisions of the LRA.¹³⁷ The provisions of the LRA in this regard do not seek to advance the balance of interests of different employees but to compel the minority employees to decision of the majority which are not in their best interests. This is a clear sacrifice of individual rights to the collective rights.

These provisions give the trade union party to the closed shop agreement an undue exclusive authority to represent all the employees in a workplace to the prejudice of other trade unions.¹³⁸ Though the arrangement is intended to ensure that only strong trade unions bargain with the employers, it also eliminates the existence as well as the exercise of the freedom of choice on the side of employees as far a unionism within the workplace is concerned and puts employee non-union members in situation of choosing between submitting to the will of the majority or losing their jobs.¹³⁹ The LRA is clearly concerned with coherence of the system at the expense of diversity and representation of diverse views which are among powerful ingredients for the development of any system.¹⁴⁰

Pursuant to the provisions of LRA¹⁴¹, an employer is obliged to dismiss an employee who has been refused membership or expelled or one who refuses to join the trade union party to the close shop agreement.¹⁴² Again to limit the abuse of closed shop agreement to get rid of certain employees, the LRA impose two conditions. With regard to refusal of membership, on the one

¹³⁶ (1997) ILJ 1046 (LC). This case involved a contested removal of some union officials on the ground that they had not been given a fair hearing. It was held that their removal was valid as it was predicated on a majority vote by the employees for their removal.

¹³⁷ LRA provides that a strike action must enjoy the support of the majority employees covered by the closed shop agreement in order to justify expulsion of employees who refuse to partake in the strike. See section

¹³⁸ Olivier M. P "Managing Employment Relations in South Africa". A paper handed out in an LLM-Labour Law and Social Security class on the 16th September 2005. North West University (Mafikeng Campus)

¹³⁹ Baird C "Permissible Uses of Forced Union Dues: From Hanson to Beck available at <http://www.cato.org/pubs/pas/pa-174.html> (accessed on 19th August 2008)

¹⁴⁰ By the provisions of section 26 (5) and (6)

¹⁴¹ Act 66 of 1995 as amended, section 26 (6).

¹⁴² *South African Chemical Workers Union and Others v. Storm Plastics (Pty) Ltd* (1993) 14 ILJ 367 (LAC)

hand, the LRA makes the dismissal conditional upon the refusal being made in accordance with the constitution of the trade union party to the closed shop agreement. On the other hand, expulsion requires that the dismissal be predicated on a fair reason which may include though not limited to conduct by the employee which is contrary to the exercise of the collective exercise of the rights of the trade union party to the closed shop agreement.

While it is true that the proscription of pre-entry closed shop agreements ensures that indicators of jobs creation are visible such as the actual acquisition of employment, it is questionable whether job retention is among the objectives, spirit and purport of the LRA. This is premised on the fact that dismissal though it might fall within the provision of the constitution of a trade union, it leads to job loss on the grounds that have nothing to do with the conduct of employees vis-à-vis his/her work or even the employers operational requirements.¹⁴³

There are two exceptions to this rule under which closed shop agreements may not compel an employee to union membership in terms of section 26 (7) of LRA. The first is with regard to employees who are already in employment at the time that the closed shop agreement was concluded in that particular workplace. The second exception is with regard to the conscientious objectors.¹⁴⁴ The matter of *Veldspun c ACTWUSA*¹⁴⁵ makes a distinction between two classes of conscientious objectors namely those based on political and religious reasons. However, the LRA does not define what these conscientious objectors are as well as the procedures that are to be followed in seeking immunity from the agreement. In spite of this, after their refusal to join the trade union party to the closed shop agreement, both these groups of employees may be required to pay agency fee for the benefits they derive from activities of the trade union party to the closed shop agreement.¹⁴⁶

The money paid by this category of employees as well as all those employees covered by the agreement may not be used to make contributions to political parties or candidates or even for

¹⁴³ Operational requirements of an employer are reasons for dismissal which are based on the economic, technological, structural and similar needs of an employer. See Du Toit D et al (2006) (5th Ed) *Labour Relations Law: A Comprehensive Guide* Lexis Nexis Butterworth's: Durban

¹⁴⁴ Conscientious objectors are workers who refuse to belong to a trade union party to the closed shop agreements on the grounds of conscience and they may not be dismissed from their employment refusing to join that trade union available at http://www.labour.gov.za/basic_guides/bgguide_display.jsp?id=5893 (accessed on 19th August 2008). Also see Du Plessis J. V et (2006) (6th Ed) *A Practical Guide to Labour law* Butterworth's Durban.

¹⁴⁵ *Veldspun c ACTWUSA supra*

¹⁴⁶ Act 66 of 1995 as amended, section 26 (8)

payment of affiliation fees with the political parties in terms of the LRA¹⁴⁷ and as postulated in the case of *Amalgamated Clothing and Textile Workers Union v. Veldspun Ltd.*¹⁴⁸ It is important to highlight that among exceptions, no provision is made for ministerial exemption to closed shop agreements.¹⁴⁹ This implies that in terms of the LRA there may be no exceptional circumstances beside the two scenarios referred to above. In this way, the LRA has lost touch with the South African socio-economic realities by making this narrow provision.

The LRA fails to take cognisance of the fact that in South Africa some of the trade unions are affiliates of political parties, particularly the Congress of South African Trade Unions (COSATU) which is affiliated to the African National Congress (ANC). By virtue of affiliation¹⁵⁰ the two share a common ideology which the LRA¹⁵¹ imposes on employees non-union members through closed shop agreements. Logically, activities of COSATU as a trade union party to a closed shop agreement will be aligned to policies of the ANC irrespective of how reflective they are of the interests of the non-union members. Basically, union fees will be practically financing activities of the ANC as a political party through COSATU's trade union activities. The LRA clearly did not envisage this possibility for it ought to have either prohibited union affiliation or at least provided for its regulation.

Employees, who have been dismissed due to either refusal or expulsion from union membership by a trade union or those who have been dismissed for their own refusal to join a trade union party to a closed shop agreement, may refer their grievance to the bargaining council with jurisdiction within the workplace concerned.¹⁵² The LRA¹⁵³ provides that where there is no bargaining council with jurisdiction, the matter may be referred to the Commission for Conciliation, Mediation and Arbitration¹⁵⁴ for conciliation which must be done within 30 days of the referral. If the dispute remains unresolved after 30 days have passed the commissioner must

¹⁴⁷ See section 26 (3) (d) as amended. Also see "Union Security Arrangements" available at http://www.capecapegateway.gov.za/Text/2004/4/know_your_lra_chap4.pdf (accessed on 19th Augusts 2008).

¹⁴⁸ (1994) SA 162 (A)

¹⁴⁹ Grogan *J op cit*

¹⁵⁰ Affiliation is the term that is used to describe a partnership between two or more parties. See definition of affiliation available at <http://en.wikipedia.org/wiki/Affiliation> (accessed on 19th August 2008)

¹⁵¹ In section 26 (7) of Act 66 of 1995 as amended

¹⁵² Act 66 of 1995, section 191 (4)

¹⁵³ Act 66 of 1995 as amended, section 191 (4).

¹⁵⁴ Hereinafter referred to as the CCMA

issue out a certificate to the effect that the dispute is unresolved so that the matter may be referred for either arbitration at the CCMA or adjudication at the Labour Court.¹⁵⁵ Remedies available are re-employment with new terms and conditions which may be similar or better than previous terms, re-instatement into the previous position with all benefit or compensation which may be ordered against the trade union party to the closed shop agreement.¹⁵⁶ The conferment of power on the CCMA and the Labour Court are intended to limit the power of trade unions in the operation of the closed shop agreements and to prevent industrial disputes that might threaten labour relations.¹⁵⁷

A trade union non-party to the closed shop agreement that represents a considerable number of employees covered by the agreement, may apply to be a party to the closed shop agreement in a particular workplace in terms of section 26 (10). In terms of the LRA, this application may be made by a trade union whose members are covered by this closed shop agreement and it should be considered within 30 days of being lodged. In the event that this application is refused, the aggrieved trade union has an option to refer the matter to the CCMA for conciliation failing which to the Labour Court for adjudication.¹⁵⁸ The mere possibility of refusal of being a party to the agreement clearly shows that the issue of ideology is of importance. This therefore means that there is a possibility of diversity and conflict of interests of different trade unions and necessarily the demands by unions on their members. The LRA clearly had a blurred vision on this issue as it has failed to provide for its regulation, particularly with regard to the position where there is a conflict of demands from the trade union party to closed shop agreement and the trade union non-party whose member had been compelled to join membership of the trade union party to the closed agreement.

¹⁵⁵ Act 66 of 1995 as amended, section 191 (5). Disputes that go for arbitration are those concerning the interpretation and application of closed shop agreements while those that go for adjudication are those on dismissals in the context of closed shop agreements. Awards in respect of disputes on interpretation and application of closed shop agreements are appealable to the Labour Court in terms of section 24 (6) and (7). See *op cit* Christianson M et al. Also see *Fidelity Guards Holdings (Pty) Ltd v. EPSTEIN L. M N. O and others* DA 25/99 (unreported) where the Court stated that employees who allege that the reason for their dismissal is due to their being refused to join or being refused membership or expelled from a trade union party to a closed shop agreement, they may refer the dispute to the Labour Court for adjudication.

¹⁵⁶ Act 66 of 1995 as amended, section 26 (9)

¹⁵⁷ Olivier M. P *op cit* *op* (note 84 above). Also see *National Entitled Workers Union v. Sithole and Others* (2004) 25 ILJ 2201 LAC. At 2204, Davis AJA stated that sore industrial relations could lead to detraction from the purport of the Act and its primary objectives.

¹⁵⁸ Act 66 of 1995 as amended, section 26 (11) to (14)

The LRA¹⁵⁹ provides for the termination of closed shop agreements. In terms of these sections a closed shop agreement may terminate under two circumstances. Firstly, if at least one third of the employees covered by the agreement have signed a petition to that effect that a closed shop agreement should terminate and secondly if three (3) years have passed since its commencement or since the last ballot was held founding to it. Under either of the two scenarios a ballot¹⁶⁰ of all employees covered by the agreement must be held and the majority must vote in favour of termination. If the majority vote in favour of termination, then the agreement must terminate failing which it shall continue to apply. Similarly, this arrangement seems to favour the members of the trade union party to the closed shop agreement as clearly termination is likely to reflect their interest than those of the non-members. In the same vein as earlier put, the ballot in these instances is intended to serve as a disguise towards compliance with the LRA democratic controls.

2.5 CHAPTER CONCLUSIONS

Closed shop agreements are one of the most effective ways that are used by trade unions to rid off free riding. There are mainly two types of closed shop agreements namely pre-entry closed shop agreements and post entry closed shop agreements. The latter is mostly preferred as the former is regarded as being contrary to the principle of freedom of association in most democracies and therefore outlawed. The closed shop agreements have more advantages than they do disadvantages when taken from the perspective of workers as a collective. Their application is generally limited to the conscientious objectors and the employees who were in employment already by the time they came into operation.

Closed shop agreements operate in South Africa by virtue of the ILO conventions and the African Charter on Human and Peoples Rights. South Africa has incorporated them into its Constitution though subject to some limitations. It has provided for their establishment, regulation and termination under the LRA. Though their provisioning is in line with the South African international obligations namely the ILO and AU obligations, their regulation under the LRA has many problems. Although the LRA has attempted to put in place democratic controls to protect individual workers rights, primary due to the dictates of the ILO, the problems still persist. These problems range from their abuse to misuse with the aim of gaining influence and advantages most of which were unavailable under the old South African labour relations system.

¹⁵⁹ Act 66 of 1995 as amended, section 26 (15) to (17)

¹⁶⁰ The ballot must be conducted in line with the guidelines provided by the CCMA in the absence of guidelines in the collective agreement establishing a closed shop agreement. See Act 66 of 1995 as amended, section 26 (17).

The main problems developing from the operation of the closed shop agreements arise from the fact that the LRA focuses on the collective rights of the workers. This particularly causes problems as the unique the historical background of South African labour relations system requires the protection of individual labour rights in order for the LRA meet its main purposes namely the advancement of economic development, social justice, labour peace and the promotion of workplace democracy. Practice proves that in the advancement of the collective rights, individual rights of employees are crossly undermined.¹⁶¹ The impact of operation of the closed shop agreements on the premises of the current South Africa labour system now contained in the LRA as its main purport will be discussed in the preceding chapter.

¹⁶¹ For instance closed shop agreements compel individuals to join into the majority union and they threaten with the sanction of dismissal workers who have contrary views to the collective views.

CHAPTER 3: ANALYSIS OF APPLICATION OF CLOSED SHOP AGREEMENTS IN SOUTH AFRICA

3.1 INTRODUCTION

Closed shop agreements are one of the most effective ways of dealing with the problem of free riding. Their operation in South Africa has proven to be fraught with problems arising from the unique historical background of the country and the approach of the LRA on closed shop agreements which is focused on collective labour rights. In order to redress the impact of the historical legacies of the apartheid system, which affected workers not only as a collective but also individually, the history of South Africa requires greater focus on workers as individuals through the protection of their individual rights. This is evident in the purposes of the LRA, namely advancement of economic development, social justice, labour peace and workplace democracy which are all mainly concerned with individual labour rights.

An attempt will be made to prove that the application of closed shop agreements negates the purposes of the LRA. By so doing, evidence will be provided to test and confirm the researchers hypothesis that the operation of closed shop agreements negates the purposes of the LRA which results in the redundancy of the Act and that this necessitates consideration of an alternative union security arrangement. To achieve this objective, the arguments will highlight the following issues, closed shop agreements and the achievement of economic development; closed shop agreements and the attainment of social justice; closed shop agreements towards achieving labour peace; and closed shop agreements and giving effect to workplace democracy.

3.2 ACHIEVING THE OBJECTIVES OF LABOUR RIGHTS THROUGH CLOSED SHOP AGREEMENTS

3.2.1 Closed Shop Agreements and the Achievement of Economic Development

Economic development is a policy or a program that is explicitly directed at the creation of jobs as well as their retention and this is its primary purpose.¹⁶² The objectives of economic development are to promote the well being and quality of life as well the elimination of poverty through the creation and retention of jobs. Within the labour perspective, economic development seeks to ensure the availability of employment through job accessibility as well as security by

¹⁶² *"Economic Development"* available at www.en.wikipedia.org/wiki/Economic_Development (accessed on 30th October 2008). Other purposes are to ensure price stability, high employment, expanded tax base as well as sustainable growth; and to provide infrastructure and services including roads, recreation facilities, housing, the prevention of crime as well as education. Also see *"Economic Development"* available at www.urbanplan.org/UP_Glossary/UP_Glossary.html (accessed on 30th October 2008) where the main purpose of Economic development is said to be the expansion of the number of jobs.

way of the restriction of the probability of job cessation and encouraging job retention. Therefore, the modest way to measure a country's economic development, and to be particular, within the industrial relations, is through the easy with which jobs are accessible and retained.

Economic development is one of the main ingredients in the general development of any country's economy. It can lead to the general improvement of the quality of life for people within any sovereign country through the creation of jobs as well as their retention. This is particularly true in South Africa because its economy is based on a small formal sector employment which accounts for a very small portion of the population while the rest are either unemployed or in the informal sector.¹⁶³ As a result there is a need to jealously protect the formal sector employment by ensuring that the jobs are not only created but that they are also retained. In order for this to actualise at the national level, it must start at the sectoral levels.

In South Africa, the protection of employment is attained through section 26 (3) (c) of the LRA. The LRA provides that a closed shop agreement will only be binding if does not require job seekers and potential employees to have membership of a representative trade union in the concerned workplace as a precondition for employment. Through this provision, the LRA prohibits the coming into force of pre-entry closed shop agreements. Pre-entry closed shop agreements are a form of closed shop agreements that require employees and/or job seekers to be members of a trade unions party to the closed shop agreement in order to attain employment in the workplace in which this agreement is in place. Through the proscription of pre-entry closed shop agreements, the LRA ensures that jobs are easily accessible thus leading to the promotion of the well being and quality of lives of workers and the elimination of poverty.

Job creation and retention are two processes that operate in a chain like manner towards the attainment of economic development. As jobs are created and employees retain them, their standards of living improve leading to increases in employee productivity and profits. With high profits, more jobs are created as new enterprises are created through the process of re-investment of profits gained. The reinvestment of profits leads to substantial growth in the level of the national economy. Judging by the importance of both job creating and retention, they are both important factors of economic development that must be regulated carefully.

The LRA seems to ignore the importance attached to the concept and purport of economic development. The most controversial provisions of the LRA in this regard are found in section

¹⁶³ Olivier M P et al (2005) *Introduction to Social Security Law* Lexis Nexis Butterworth's: Durban

26 (5) of the LRA. The Act provides that a representative trade union party to the closed shop agreement may not expel an employee from membership nor may it refuse an employee membership unless the expulsion or refusal is sanctioned by the trade union's constitution or unless the expulsion is fair or due to conduct by an employee so expelled that undermines the exercise of the collective rights of the trade union. This means the reasons for the expulsion or refusal of an employee from trade union membership must be based either on the constitution of the union or on grounds that are fair

The LRA, therefore vests the power and authority on the trade unions to compel employee participation in the collective action through threats of expulsion from union membership which could mean the end of employment for employees. Trade unions are at liberty to use these powers and authority irrespective of whether compelling employee participation in the collective action through threats of expulsion from union membership is done in the interest of promoting employee well being and quality of life or not. The LRA leaves it upon the trade unions to determine the use of these powers for as long as it is within the exercise of collective rights of the trade union. As a result in order to avoid laying oneself open to victimisation, workers find themselves bound by the decision of the majority to go on a collective action which could by itself lead to the termination of a worker's employment.¹⁶⁴

Consequently, workers are left in a vulnerable situation in which they could face the termination of their employment whether they conduct themselves in line with the union demands or not. For workers, this situation presents an unfortunate lose-lose situation and a total negation of the advancement of economic development purport of the LRA. This is a complete illustration of the failure by the LRA to protect workers against loss of employment both in substance and form as well as to enable the execution of its main purposes. In the case of *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v. LT Cordero and Another*, the court highlighted the fact that LRA is seized with the function of ensuring that workers are protected both in substance and form against loss of employment.¹⁶⁵

Notwithstanding, the effect of the provisions of section 26 (5) on employees, the Section 26 (6) (a) of the LRA further aggravates the position of employees. In terms of section 26 (6) (a), it is fair to dismiss an employee who refuses to join a trade union. The implications of the provision

¹⁶⁴ This is particularly so in cases involving unprotected industrial action.

¹⁶⁵ JS546/2005 (LAC)

are consequential particularly because the outcome of a particular act of an employee results in another consequence as a trade union has the power to compel an employee to join its membership failing which an obligation will vest on the employer to dismiss such an employee. The repercussions of an employee's refusal to join union membership are a guaranteed loss of employment. The LRA therefore, neither offers sufficient job security nor does it encourage job retention, but rather it makes it relatively easy for the economic development to be emasculated.

Section 26 (6) (b) and (c) of the LRA further concretises the disregard by the Act of the importance of economic development in that it leaves it upon the employers to determine extent to which the Act affords job security to employees. Section 26 (6) (b) and (c) provide that an employee may be dismissed if refused membership into or if expelled from membership of the union party to the agreement in line with the constitution of the union and if expelled from union membership for conduct that undermines the union's exercise of its collective rights. The LRA confers on the employers the legislative authority to extend the grounds for dismissal of employees that are not related to either employee's conduct, capacity or even the employer's operational requirements. Employers are thus bestowed with the power and authority to determine the well being and quality of life of an employee through a mere act of dismissal on grounds which are not even recognised by the ILO standards. This is another indication of failure by the LRA to offer sufficient job security and to encourage job retention while it is relatively easy for the economic development to be rendered ineffectual.

Sections 26 (7) and (8) of the LRA have an undesirable effect that places a material restriction on the employment of labour.¹⁶⁶ In terms of the Act, those who were already employees at the time the closed shop agreement was concluded as well as conscientious objectors may not be dismissed for refusing to join a union party to the closed shop agreements though both may be required to pay an agency fee. The conscientious objectors and those who were employee prior to the conclusion of the agreements account for a very small portion of the workforce particularly due to globalisation¹⁶⁷. Globalisation has made it relatively easy for employees to switch employment with ease and it has enabled easy expansion of industries. The expansion of new industries results in the creation of new employment opportunities and makes it relatively easy

¹⁶⁶ This view was reflected in the matter of *BTR Industries South Africa (Pty) Ltd and others v. Metal and Allied Workers Union and Another* (1992) (3) SA 673 (A)

¹⁶⁷ "Globalization is often used to refer to economic globalization, that is, integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration, and the spread of technology." See <http://en.wikipedia.org/wiki/Globalization> (accessed on 25th August 2008)

for job seekers to access employment.¹⁶⁸ For the Act to offer such high protection of jobs to a smaller group of employees while offering dwindling protection to the majority is an act that is tantamount to negation if not the elimination of economic development. In this way, the application of closed shop agreements prevents the effective use of manpower while it also encourages restrictive practices which have the result of excluding the best man from the job.¹⁶⁹

3.2.2 Closed Shop Agreements and the Attainment of Social Justice

Social justice refers to the system in which both advantages and disadvantages within society are distributed evenly.¹⁷⁰ Social justice is thus concerned with the provision of fair treatment and an equitable share of the benefits of society to both individuals and collectives.¹⁷¹ Therefore within the context of labour law, social justice is concerned with the spread of advantages and disadvantages arising from the industrial relations in an equitable manner among and between employees and employers alike. Social justice seeks to ensure that that fairness and equity in the industrial relations is achieved in every aspect.

Social justice is the main driving force in the development of labour standards around the globe and it is regarded as a means towards the attainment of universal peace. As a result, social justice forms the central notion of the ILO. Social justice has two most crucial elements namely, the provision of fair treatment and equitable share of benefits arising from the workplace and workplace activities. These two elements mean that within the workplace, all employees must be treated reasonable and that they must be afforded equal rights within the workplace. Therefore, rights of all employees must be reasonable, similar and must not be seen to advantage certain employees over other employees. This is the spirit that the LRA must adopt according to the dictates of social justice. However, less desires to be said about the attainment of social justice under the LRA in the operation of closed shop agreements. It would seem that closed shop agreements as provided for under the LRA negate this particular purport in so many ways.

The first incidence concerns the provisions of section 26 (3) (a) and (b) of the LRA. In terms of the Act, in order for a closed shop agreement to have force and effect, a ballot of the employees

¹⁶⁸ *FOODGRO v. Keil* (1999) 20 ILJ 2521 (LAC) at 2524

¹⁶⁹ Also see the matter of *Veldspun (Pty) Ltd v. ACTWUSA and others NO* (1992) (3) SA 880 (SE) for opinion of the Court on the application of closed shop agreements in South Africa at page 899.

¹⁷⁰ "Social Justice" available at www.library.thinkquest.org/05Aug/00158/glossary15.html (accessed on the 30th October 2008). Social justice is also referred to as civil justice and it based on the concepts of human rights and equality.

¹⁷¹ "Social Justice" available at www.en.wikipedia.org/wiki/social_justice (accessed on the 30th October 2008)

to be covered by the agreement must have been held and two thirds of the employees who voted must have done so in support of its conclusion. There are two important aspects to this provision. Firstly, all employees within a bargaining unit, in which a trade union wishing to conclude a closed shop agreement holds majority of the employees in its membership, are entitled to vote in the determination of the conclusion of a closed shop agreement. Secondly, two thirds of the employees, whether union members or not, who are entitled to vote must have voted in favour of the coming into effect of the agreement. At a glance, this appears to be the extension of fair and equal rights in the workplace activities which affect all employees.

However, this is not the case as the members of the trade union wishing to conclude a closed shop agreement are already large in masses against the non-members. This means that the opportunity to decide on the coming into place of a closed shop agreement is only fair and equal as far as the entitlement to vote is concerned. However, the main issue is with regard to the fairness and equality of the footing upon which the voting is predicated. The fact that the members of the union party to the closed shop agreement already enjoy a mass advantage puts them at an advantage and gives them better rights of determination than non-members.¹⁷² Clearly, this does not amount to the fairness and equality as far as the issue of determination and conclusion of a closed shop agreement is concerned. This makes a distortion in the provision of fair and equal rights within the workplace. In *Kylie v. CCMA and Others*¹⁷³ the court stated that the function of the LRA is to promote social justice by protecting vulnerable workers against impervious workers. The LRA fails dismally to protect the vulnerable minority workers against the will of the mighty and therefore subsequently fails to promote social justice for them.

The LRA attempts to confine the distortion into social justice through section 26 (3) (c) prohibiting pre-entry closed shop agreement. Pre-entry closed shop agreements are an arrangement which imposes union-membership into a trade union party to the agreement as a precondition for employment. The Act provides that a closed shop agreement will only be binding if it does not contain provisions which require union membership as a pre-condition of employment. The LRA thus, seeks to protect job-seekers against the uneven distribution of advantages that arise from the workplace. The Act ensures that social justice is extended to all job seekers as it gives them a fair and equal right to employment opportunities irrespective of their union membership.

¹⁷² This is also the situation with regard to the termination of these agreements.

¹⁷³ C52/2007 (LC) at 7

The decision of the Court in *NAAWU¹⁷⁴ v. Borg-Warner SA (Pty) (Ltd)*¹⁷⁵ reflects the spirit and purport of the LRA and also illustrate the practicality of protection afforded by the Act towards the attainment of social justice. In the matter, the Court held that employees and jobseekers cannot be refused a fair and equal opportunity to employment by virtue of their union or non-union membership 26 (3) (c). It ensures that both union and non-union employees and job seekers have similar and reasonable chances to employment opportunities. This is one area where the LRA succeeds in promoting social justice in industrial relations and hence fortifies the spirit and purport of the LRA.

Notwithstanding the successes of section 26 (3) (c), section 26 (5) of the LRA serves to the contrary with regard to the advancement of social justice within the workplace. Sections 26 (5) and 6 (a) give trade unions the power to compel an employee into union membership, refuse and expel an employee from union membership provided that the refusal or expulsion is based on the constitution of the union, that it is fair or that the expulsion is based on conduct that undermines the union's exercise of collective rights. The acceptance of the right to right to exclude one from membership was illustrated in the cases of *Taylor v. Kurtstag NO and Others* and *Wittman v. Deutscher Schulverein, Pretoria*.¹⁷⁶ These cases involved refusal to admit an applicant into membership of a church association on the basis of failure to meet the qualification requirements for admission.

The conferment of such enormous power to compel an employee into union membership as well as to expel an employee from union membership on one party results in the levitation of the rights of trade unions over those of the employees who are non-union members. By augmenting the rights of the trade unions over those of employee non union members, the LRA affords advantages over the exercise of power and authority in an uneven and biased manner resulting in the definitive distortion of social justice.

The levitation of rights portrayed by section 26 (5) is further compounded by section 26 (7) of the LRA. According to section 26 (7) those who were already in employment at the time the closed shop agreement was concluded as well as conscientious objectors may not be dismissed for refusing to join the trade union party to the agreements though they may be required to pay an agency fee. This means that both these categories of employees are not bound by the

¹⁷⁴ NAAWU is now known as NUMSA

¹⁷⁵ (1994) ILJ 509 (A)

¹⁷⁶ (2004) (4) ALLSA 317 (W) and (1999) (1) BCLR 92 (T) respectively.

agreement conditional upon satisfaction of the requirement to pay agency fee as and when required to do so by the trade union concerned. The LRA, in this way provides for the exceptional circumstances under which the closed shop agreements may not bind employees. This is another route which the closed shop agreements take towards the negation of social justice as one of the purports of the LRA. Through section 26 (7), employees falling within the exception are given an advantage over newly employed workers and this distorts the fairness and equity towards the distribution of advantages to all employees as advocated by social justice.

The Act gives conscientious objectors and those who were in employment prior to the agreement an opportunity to elude the compulsion to join the trade union party to the closed shop agreement. These employees are given an option to elect to either join the trade union or pay agency fees for the benefits they derive from this trade union's activities. This allows them to maintain their loyalty fully with their own trade unions without either the worry or the risk of conflicting demands of the two trade unions. This shows that in terms of section 26 (7) of the LRA, there is no fairness and equality as far as treatment of employees is concerned, particularly within the category of non-union member employees as some are given preferential treatment. The LRA fails to effectively regulate the operation of closed shop agreements in a manner that is commensurate to its purpose of social justice.

Sections 26 (10) and (11) provide that a registered trade union that represent a significant number of employees who are covered by the closed shop agreement may apply to parties to the agreement to be a party to the agreement. The application must be considered within 30 days of being lodged and if refused membership, an applicant trade union may refer their complaint to the commission. The Act vests the right to apply for admission as a party to the agreement on the trade union non-party to the agreement while leaving upon the parties to closed shop agreement to determine if the trade union wishing to form party should be certified as such. This means that these parties are at liberty to either grant or refuse membership to the party making the request. This illustrates the inequality and unfairness inherent in this provision as by virtue of section 26 (5) and (6), as the parties are likely to refuse to grant the request.

Sections 26 (5) and (6) compel employees who are non-union members, to trade union party to the agreement, to pay loyalty the trade union party to the agreement over their trade unions through threats of expulsion that lead to dismissal. Acts by the trade union party to the closed shop agreement in contemplation of section 26 (5) cause the object of admitting into membership the trade union whose significant number of members are affected by the closed shop agreement

to cease. Vesting such authority on one party under the circumstances is to distribute advantages in a biased manner and to the prejudice of applicant trade union. A biased distribution of advantages in this fashion undoubtedly negates the purport of social justice.

3.2.3 Closed Shop Agreements and Giving Effect to Labour Peace

Labour peace refers to a situation in which tensions in the employment relationships that are a result of either the employer or the employee pursuing the own interests at the expense of the other/s are minimal. The concept of labour peace takes cognisance of the fact that labour relations are conflictual in nature and as a result it is concerned with striking a balance of interests of both employees and employers amongst themselves as well as between themselves. The purpose of labour peace is to achieve harmony through consideration and reconciliation of the incongruous interests of interacting parties. Therefore, labour peace is a very important ingredient for the successful organisation of labour relations. It is necessary for cooperation and coordination of efforts in labour relations. Labour peace is conspicuously important for the elimination of tensions between employers and employees and amongst themselves. As a result, labour peace and labour feud cannot co-exist as the eradication of one is the precondition of existence of another.

Section 26 (3) of the LRA only affirms this purport but partly. Section 26 (3) (a) and (b) of LRA is only concerned with the elimination of tensions between employers and employees and not amongst the employees themselves. It does not attempt to strike a balance between the interests of employees amongst themselves. The Act provides that a ballot must held for all the employees covered by the agreement out of which two thirds must vote in favour of the coming into force of the closed shop agreement. The conduct of a ballot towards the determination of the conclusion of a closed shop agreement is done at advantaged footing for union members to the trade union wishing to conclude a closed shop agreement.¹⁷⁷

Therefore, the ballot determination the coming into effect of the closed shop agreement cannot reflect the balance of interests of employees but rather the interest of the employee union members to the trade union wishing to conclude a closed shop agreement. The fact that on the one hand, the employee members to the trade union are likely to want to eliminate free riding by the employee non-union members while on the other hand, the employee non-union members are likely to vote against the agreement which is intended to induce upon them forced riding, renders

¹⁷⁷ There is a similar situation with regard to the termination of closed shop agreement which is also determined through the casting of a ballot.

the purpose of the ballot insignificant. Therefore, the LRA fails to harmonise and reconcile the incongruous interests of both the union and non union parties to the trade union party to the agreement as the ballot is destined to reflect the wishes and wants of the union members to the closed shop agreement.

Compulsion to either join or to secede from union membership both carry an element of prejudice against the party on whom they are being exercised. Section 26 (5) provides for the exclusive right of trade union party to closed shop agreements to compel, refuse and expel from union membership other employees within the concerned workplace. Through the exercise of the power to compel membership, there is no room for consideration and reconciliation of differing interests as the will of the might, which in this case is the trade union party to the closed shop agreement, is imposed upon the employees on whom the act of compulsion is being exercised. The court in *SATAWU v. North West Star*¹⁷⁸ reflected the view that labour peace cannot be attained through acts of compulsion to join a trade union membership. The LRA thus institutionalises the domination of interests of one group over the other and because human interaction is naturally conflictual this leads to the exacerbation of tensions among the two groups.

Due to the presence of tension, labour peace is impossible to attain as parties involved tend to view each other with antagonism, always looking out for an opportunity to strike back at their antagonists. The court in the matter of *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v. LT Cordero and Another (supra)* shared the sentiments in stating that tensions in industrial relations often lead to labour disputes which impact negatively on labour peace. This is likely to be worsened by the complacency of the trade unions that enjoy the protection under the closed shop agreements as they become less responsive to the needs of their members in the long run, a matter which can lead to further labour disputes and a negation of the purport of the LRA on labour peace.¹⁷⁹

¹⁷⁸ (2008) 29 ILJ 224 (BCA). The Court stated that labour peace cannot be attained where employees are not certain about their future, compounded by compulsion from them to belong to a trade union to the exclusion of another. This view was held by the Court in *Mazibuko and others v. Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC) where the Court stated that "compelling membership of a particular union would in view of the political and ideological pluralism in South African Society as mirrored in the union movement itself not advance the cause of industrial peace. It would lead to dissention and conflict in the workplace."

¹⁷⁹ This view was reflected by the court at page 899 in the matter of *ACTWUSA v. Veldspun* (1991) 1 SA 162 (A).

Where fear of sanctions reigns, there is no room for voluntary negotiations and without voluntary negotiations there cannot be a balance of interests. In this situation the decisions reached will always reflect the interests of the prodigious. Section 26 (5) and (6) of the Act provides for the right of trade unions party to the agreement to expel employees from trade union membership based on the constitution of the union and for conduct that undermines the exercise of the union's collective rights, and that the expulsion once carried out imposes an obligation on the employer to terminate the employment of the employees so expelled.

The Act gives trade unions party to the closed shop agreement the exclusive power to threaten with sanctions of expulsion, which carry the consequential effect of job demise, to employees who are unwilling to concede to the decisions of the majority union members irrespective of whether such decisions are beneficial or detrimental to them. This provision induces the minority union members to concede to the majority interests even to their detriment. The interests of parties are not harmonised but rather the interests of the majority are imposed on the minority who have to accede to them to avoid being sanctioned. Failure to harmonise divergent interests gives rise to labour warfare rather than labour peace. Labour warfare has been held to be responsible for the distortion of not only labour peace but also economic development in the matter of *National Education Health and Allied Workers Union v. University of Cape Town and others*.¹⁸⁰ Courts of law have as a result, always expressed their censure of the closed shop agreements as a means to rid off free riding.¹⁸¹

Usually, differential in treatment of people within the same category or class gives rise to tensions among them. These tensions are typically manifested when the disadvantaged are made to feel the consequences of their weaker position. Section 26 (7) of the LRA provides for the immunity of both the conscientious objectors and employees who were already in employment at the time the closed shop agreement was concluded from being bound by the agreement. These employees are not to be bound by closed shop agreements while the rest of the employees are fully bound irrespective of their own individual personal circumstances as the cases may be. The Act thus extents advantages in a biased manner to the conscientious objectors and the employees who were already in employment at the time the closed shop agreement was concluded to the exclusion of the rest of the employees, particularly the newly employed.

¹⁸⁰ (2003) 3 SA 1 (CC) at 18.

¹⁸¹ In the matter of *ACTWUSA v. Veldspun* (1991) 1 SA 162 (A), the court stated that it disapproved of the closed shop agreements and approved of its variant union security arrangement namely the agency shop agreement.

Both the conscientious objectors and those who were in employment prior to the conclusion of the agreement have an advantage to make an election to either join a trade union party to the closed shop agreement or to pay an agency fee. The newly employed workers have no such advantage as they only get to choose between union membership or termination of their employment by virtue of sections 26 (5) and (6). The two sections compel the newly employed workers to join a trade union party to the agreement or face dismissal.¹⁸² The Act thus creates two classes of employees within one single group, that is, the advantaged and the disadvantaged, which two groups can never view each other with trust but rather antagonism. The Act therefore promotes antagonism among the working class which is unconstructive in an endeavour to achieve labour peace.

Section 26 (10) and (11) seek to reverse the tribulations of section 26 (5) which result in a conflict of demands arising from multiple unions union membership secured through compulsion. Section 26 (10) and (11) of the Act provide for the right of a registered trade union whose significant number of members are covered by the closed shop agreement, to apply to be included as a party to the agreement within the bargaining unit in the workplace in which its affected members are employed. The Act attempts to solidly establish a framework within which interests of different trade unions may be harmonised to avoid conflict of interests and hence achieve labour peace.¹⁸³ However, the LRA does not have logistics in place to ensure that the established framework is utilised in an appropriate manner. The Act does not set parameters with respect to refusal such as those set in the exercise of the power to refuse union membership to employees. The restricted provisioning of the LRA in terms of section 26 (10) and (11) are an indication of ease with which the LRA allows for labour peace to be undermined.

3.2.4 Closed Shop Agreements and the Promotion of Workplace Democracy

Workplace democracy refers to the application of the democracy to the workplace in all its forms.¹⁸⁴ It is mainly concerned with the idea of conferring more power in individual employees

¹⁸² Section 26 (5) gives the trade unions the right to compel workers to join union membership as well as to refuse same union membership. Section 26 (6) imposes an obligation on the employer to dismiss the workers who have been refused union membership as well as those who have been expelled from union membership.

¹⁸³ Labour peace will be advanced by the provision of a framework within which interests of employees and trade unions, employees and employers organisations may be harmonized. See *William Ralph Joey Langeveldt v. Vryburg Transnational Local Council and Others* JA21/00 (LC)

¹⁸⁴ These forms include voting systems, debates, democratic structuring, due process, adversarial process as well as systems of appeal. See “*Workplace democracy*” available at www.en.wikipedia.org/wiki/workpalce_democary (accessed on 30th October 2008)

by including them in decision making in the workplace.¹⁸⁵ Workplace democracy is one of the most important factors in industrial relations as it seeks to involve employees in the decision making within the workplace through the conferment of power on the individual employees to influence matters that affect them in the workplace. Workplace democracy is also concerned with the inclusion of workers in the decision making processes within the workplace. This means that employees within a workplace must not only be given the power of influence but must also be included in the process of decision making.

As it is the case with regard to closed shop agreements and the attainment of labour peace, sections 26 (3) (a) and (b) of the LRA seems to affirm this purport but in part though. These sections provide for the rights of all employees in bargaining unit to hold a ballot to determine the coming into effect of a closed shop agreement whose conclusion is subject to a majority vote of at least two thirds of the employees who have voted. Therefore, employees non union members to the trade union concluding a closed shop agreements are given an opportunity to take part in the determination of matters that affect them in the workplace. However, the opportunity to influence the coming into effect of the closed shop agreement is only given in part though. This is predicated on the fact that partaking in the ballot to determine the coming into effect of a closed shop agreement only gives employees non-union members to the trade union concluding a closed shop agreement an opportunity to be part of the decision. However, less can be said as far as the actual exertion of the influence in such decisions is concerned.

The fact that employee members to the trade union wishing to conclude a closed shop agreement already enjoy majority in terms of the masses negates the purport of the LRA in this regard in the same way that the attainment of social justice is affected. This relegates the ability of non-union members to the trade union wishing to conclude a closed shop agreement to actually influence the determination of the coming into effect of the agreement.¹⁸⁶ This means that their involvement is simply a mere formality manufactured to ensure compliance with the democratic controls of the LRA in the regulation of closed shop agreements. Therefore, the LRA fails to effectively dictate to the trade unions how to conduct their business in the interests of workplace democracy. In the matter of *AngloGold Health Service Centre (Pty) Ltd v. The National Union*

¹⁸⁵ www.usnews.com/articles/bussiness/carrests/2008/04/24/why-workplace-democracy-can-be-good-in-bussiness.html. (Accessed on 24th July 2008).

¹⁸⁶ This situation equally holds with the termination of closed shop agreements which require a ballot by all employees to determine if it should terminate.

of Mineworkers and Others,¹⁸⁷ the court stated that one of the innovative and interventionist legislative effects of the LRA on the parties to the industrial relations is to dictate conduct of business in the workplace to secure workplace democracy.

Section 26 (5) of the LRA deprives individual employees their power to influence decisions that affect them within the workplace. The section provides for rights of trade unions to refuse employees to membership as well as to expel them from union membership. By giving trade unions the exclusive power to determine the membership of employees divest employees of their power not only to be heard but also to be influential within the workplace. Through refusal or expulsion into and from membership, employees are deprived of an opportunity to exercise their democratic rights within the workplace to participate in the decision making through an association or an organisation of their own choice. This view was reflected in the matter of *North Transport v. TAWU*¹⁸⁸ when the Court reiterated the above view in saying that if an employee is required to be a union member to the trade union party to the closed shop agreement, then he/she does not have the courtesy of an option to exercise his/her democratic rights within the workplace.

The view of the court in the *North Transport (supra)* is a clear testimony of the fact that there is indeed no workplace democracy where the closed shop phenomenon prevails. The court in the matter of *SACTWU and Others v. Novel Spinners (Pty) Ltd*¹⁸⁹ further concretised the perception on the absence of democracy in the workplace in its statement that once one has joined a trade union party to the closed shop agreement, whether voluntarily or through compulsion, they have no choice in participating in its collective actions. This is particularly so because in terms of the LRA¹⁹⁰ a worker who hampers the exercise of the collective rights of the trade union which enjoys protection under a closed shop agreements is exposed to expulsion from the trade union and ultimately termination of employment.

Section 26 (7) has attempted to correct this deformity by extending workplace democracy to employee conscientious objectors and employees who were already in employment at the time the closed shop agreement came into force. In order to correct the deformity, the Act protects the

¹⁸⁷ J1143/1999 (LC)

¹⁸⁸ (1998) BALR 470

¹⁸⁹ Case No. C257/1998 (LC) at 16. The court stated that by abstaining from participation in union activities, one exposes himself to victimisation.

¹⁹⁰ Act 66 of 1995 as amended, section 26

conscientious objectors and those who were in employment prior to the conclusion of the agreement from dismissal for their refusal to join trade union membership, provided that they pay an agency fee when required by the trade union party to the closed shop agreement. The Act thus gives these employees the opportunity to make a choice to either join the trade union party to the closed shop agreement or to pay an agency fee for the benefits they derive from this union's activities.

The Act thus ignores the workplace democratic rights of the employees falling outside the exceptions. In terms of the dictates of workplace democracy, all employees in their individual capacity must be given the power to influence the decisions that affect them. By failing to take cognisance of this fact, the Act only protects and promotes the democratic rights in a biased manner towards the conscientious objectors and the employed prior to the conclusion of the closed shop agreement. Based on the dictates of workplace democracy absence of the power to influence decisions within the workplace either individually or through representatives reflects the absence of workplace democracy.

Section 26 (10) to (11) extends workplace democracy to the employees of trade union party to the closed shop agreement by giving them the right to make a determination regarding the admission of the trade union non-party the agreements. The Act provides that a trade union whose significant number of employees is covered by a closed shop agreement, such a union may apply for inclusion a party, the determination of which lies with the parties to the agreement. From this provision, the Act undoubtedly affords workplace democracy in a biased manner. The extension of workplace democracy is done at the expense of the trade union making the request. The applicant trade union has to subject its workplace democratic rights to the rights of trade union party to the agreement as it wields the ultimate authority to determine certification of inclusion of the applicant union in concert with an employer. Therefore, the applicant trade union has no actual power to influence the decisions that affect its members by virtue of the closed shop agreement to which it seeks to form partaker.

Further, the similar deprivation of workplace democracy is found in the exercise of powers conferred by section 26 (5) and (6) of the LRA which gives trade unions the power to compel employees into union membership and to expel and refuse union membership with the consequential loss of employment. The Act thus fails to adopt a blanket approach in granting workplace democracy and as a result workplace democracy does not extend to all parties in the workplace to give them the power to participate in decisions that affect them as well as to

influence same. Therefore, the LRA dismally fails to promote, achieve and protect workplace democracy.

3.3 ENFORCEMENT STRUCTURES AND MECHANISMS

The LRA takes cognisance of the imperfections that derive from the application of closed shop agreements. As a result, the Act provides for the establishment and regulation of structures and mechanisms that may be utilised to address the grievances by employees arising out of the application of closed shop agreements operation and in protection of the labour rights namely, achievement of economic development, attainment of social justice, giving effect to labour peace and the promotion of workplace democracy. The LRA provides for the establishment of the bargaining councils and Statutory Councils, Accredited Agencies, the CCMA, the Labour Court and the Labour Court of Appeal as structures that are empowered to deal with disputes arising out of the application of closed shop agreements. The Act also provides for the processes of conciliation and adjudication as mechanisms in place to resolve the closed shop related grievances. In terms of the Act, all disputes must first go for conciliation before they can be referred to arbitration and adjudication. These structures and mechanisms are discussed hereunder.

3.3.1 Structures for the Resolution of Closed Shop Related Disputes

The LRA¹⁹¹ provides for the establishment of bargaining councils and statutory councils within the workplace for the conclusion of collective agreements, including but not limited to the closed shop agreements, as well as the resolution of labour disputes. The bargaining councils are intended to afford a speedy means of resolving labour disputes. Bargaining councils have the power to conciliate over labour disputes once accredited by the CCMA.¹⁹² The main purpose of accreditation is to ensure that the councils so established are competent to perform the functions.¹⁹³ These councils compose of both the employers and employees through trade union representation.¹⁹⁴

In terms of the LRA, the bargaining and statutory councils have the power to conciliate over labour disputes after which unresolved disputes may be refereed to the CCMA for arbitration. In terms of the LRA, these councils have the power and authority to appoint a conciliator to head

¹⁹¹ Act 66 of 1995 as amended, section 51. Also see Grogan J *op cit*

¹⁹² Act 66 of 1995 as amended, section 52

¹⁹³ Van Eck S and Van jaarveld F *op cit*

¹⁹⁴ Christianson M *et al op cit*

the processes of conciliation within their structures. The Act provides that the disputes which may be conciliated at the Bargaining and Statutory councils include disputes about the right to freedom of association, matters of mutual interest, refusal to bargain, unilateral change of terms and conditions of employment, unfair dismissals, severance pay entitlements, unfair labour practise as well as unfair discrimination in accordance with the Constitution of the Council.¹⁹⁵ However, these councils may also arbitrate over disputes upon request and voluntary consent of the parties to the dispute.

Further, the LRA¹⁹⁶ provides for the establishment of CCMA as the central institution in the statutory labour dispute resolution system.¹⁹⁷ In terms of the LRA, the CCMA is an independent body separate from the state, trade unions, employers and any other organisations.¹⁹⁸ It is a tripartite body consisting of members of trade unions, employer's organisations and the state in its governing body.¹⁹⁹ The governing body of the CCMA has the power to appoint commissioners to perform the functions of dispute resolution within the CCMA either on a full time or part time basis.²⁰⁰ These commissioners must be people of skills and experience in the labour relations as well as the resolution of disputes.

The main functions of the CCMA are to try to resolve disputes referred to it through the processes of mediation, conciliation and arbitration.²⁰¹ The CCMA, through its Commissioners, presides over disputes upon request by the parties, namely the employers and the trade unions representing employees within a bargaining unit. The CCMA has jurisdiction to conciliate disputes over the operation of closed shop agreements after which they may be referred to the Labour Court for adjudication. However, the CCMA may also arbitrate over issues which ordinarily fall within the jurisdiction of the Labour Court from the process of conciliation by consent of the parties concerned.²⁰²

¹⁹⁵ See *Wanenburg v. Motor Industry Bargaining Council* (2001) ILJ 242 (LC). The court in this matter expressed the view that the Bargaining councils must in terms of the LRA follow the procedures outlined in their Constitutions in their undertakings.

¹⁹⁶ Act 66 of 1995 as amended, section 151

¹⁹⁷ Grogan J *op cit*

¹⁹⁸ Act 66 of 1995 as amended, section 113

¹⁹⁹ Act 66 of 1995 as amended, section 116

²⁰⁰ Christianson M *et al op cit*

²⁰¹ Act 66 of 1995 as amended, section 115

²⁰² Van Eck S and Van jaarveld F *op cit*

The CCMA has powers to make rules on the practice and procedures to be followed in relation to the lodgement of complaints and grievances for mediation, conciliation and arbitration within its structures.²⁰³ Thus the CCMA has the authority and power to determine the representation rights of parties to disputes at both the conciliation and arbitration processes.²⁰⁴ The CCMA may provide advice to the registered trade unions or registered employer's organizations with regard to the procedures to be followed, on the establishment of workplace forums and any other issues concerning the workplace.²⁰⁵

The CCMA also has the power to subpoena persons, administer oaths, enter and inspect premises for purposes of resolving disputes referred to it. A person who refuses to appear before the Commissioner in terms of a subpoena may be held in contempt of court and face contempt charges at the Labour Court.²⁰⁶ The case of *Ntombela v. Herridge Hire & Haul CC & Another*²⁰⁷ illustrates the principle of contempt of court. In this case an employer had failed to comply with an arbitration award and he was charged with contempt of court at the Labour Court. He was found guilty of contempt and fined R5000 or 25 days in prison.

Furthermore, the LRA²⁰⁸ provides for the establishment of accredited agencies to perform the functions of conciliation and arbitration. In terms of the Act, the agencies must apply to the governing body of the CCMA for accreditation to perform these functions. These agencies are private dispute resolution structures that are primarily meant to aid in the reduction of bag lock resulting from centralised early dispute resolution mechanisms within the CCMA in the form of conciliation and mainly arbitration. The purpose for accreditation is similar to the reasons behind the accreditation of both the statutory and bargaining councils.

Moreover, the LRA provides for the establishment of the Labour Court as the Court of law and Equity thus giving it the power and authority to consider issues of fairness in making its decision

²⁰³ Act 66 of 1995 as amended, section 115 (2A)

²⁰⁴ Act 66 of 1995 as amended, section 115 (2A) (k)

²⁰⁵ Grogan *J op cit*

²⁰⁶ Act 66 of 1995 as amended, section 142

²⁰⁷ (1999) 3 *BLLR* 253 (LC)

²⁰⁸ Act 66 of 1995 as amended, section 151 (1)

over labour disputes.²⁰⁹ The Labour Court has jurisdiction that is tantamount to that of the High Court in matters within its jurisdiction. In terms of the Act, the Labour Court is composed of the Judge President, the Deputy Judge President as well as a number of Judges to aid in the processes of adjudication of disputes.

The Act vests authority on the Labour Court to grant urgent interim relief, interdicts, order specific performance, make declaratory orders, award compensation, make orders as to costs as well as to make arbitration awards and settlements agreements orders of court.²¹⁰ The Labour Court also has the power and authority to review arbitration awards handed down by the Commissioner of the CCMA.²¹¹ Persons may appear in person at the Labour Court or they may be represented by a legal practitioner, an employee, director, a member, an office bearer of the party's registered trade union or employer's organisation or a bargaining council official.²¹²

Lastly, the LRA provides for the establishment of the Labour Appeal Court as the court of law and equity and the final court of law in respect of matters decided upon by the Labour Court.²¹³ In terms of the LRA, the Labour Appeal Court is not the court of first instance but rather an Appeal Court with respect to matters within its exclusive jurisdiction. It has the power to hear and determine all appeals from the Labour Court and its judgements are binding on the Labour Court.²¹⁴ The Labour Appeal Court is composed of the Judge President, the Deputy Judge President of the Labour Court as well as other Judges of the High Court. However, the Labour Appeal Court may sit as the Court of first instance over matters that fall within the jurisdiction of the Labour Court and thus make judgments which the Labour Court would otherwise make.²¹⁵ Although, the Labour Appeal Court is the final court of appeal in respect of all judgements from

²⁰⁹ Christianson M *et al op cit*

²¹⁰ Christianson M *et al op cit*

²¹¹ See section 145. also see *City of Tshwane Metropolitan Municipality v. Campanella NO & Others* (2004) BLLR 1 (LAC)

²¹² Act 66 of 1995 as amended, section 161

²¹³ Act 66 of 1995 as amended, section 167

²¹⁴ Act 66 of 1995 as amended, section 182. Also see *The case of Bargaining Council for the Clothing Industry v. Confederation of Employers of Southern Africa & Others* (1998) 19 ILJ 1458 (LC)

²¹⁵ Act 66 of 1995 as amended, section 175

the Labour Court, matters involving rights contained in the Constitution may be appealable to the Supreme Court of Appeal from the Labour Appeal Court.²¹⁶

3.3.2 Mechanisms for the Resolution of Closed Shop Related Disputes

At the crux of the enforcement of the labour rights are the processes of conciliation, arbitration and adjudication. The process of conciliation is regulated under section 135 of the LRA. In terms of the LRA, conciliation can be defined as the process through which a third party called a conciliator is appointed by either a bargaining council, statutory council or an accredited agency to aid in the conclusion of an agreement in an effort to resolve a labour dispute.²¹⁷ Any party wishing to contest the fairness of the dismissal based on the closed shop agreements application may refer the matter for conciliation either at the Bargaining Council or statutory Council, accredited agencies and the CCMA where there is no bargaining council in the bargaining unit in which the dispute arose. In terms of the LRA, in the event of the dispute not being resolved, it must go for adjudication at the Labour Court.

The process of conciliation can take two forms, that is, a compulsory and a voluntary form. On the one hand, a compulsory form takes place where one of the parties refers the dispute for conciliation and the other is compelled to attend the process of conciliation.²¹⁸ On the other hand, a voluntary form of conciliation takes place where both parties agree to refer the dispute for conciliation. Therefore, if one of the parties refers the dispute about dismissals based on closed shop agreements, then the other party is compelled to attend the conciliation unless both parties have agreed to refer the matter for conciliation in which they will both voluntarily attend the hearing.

The LRA also provides for two different methods in which conciliation may take place. In terms of the LRA, conciliation may be through mediation or a fact finding mission. Mediation involves the role played by the Commissioner in which the Commissioner's role is to merely aid the parties to reach a settlement over their disputes. A fact finding mission involves the commissioner's role as being to aid the parties in determining the main issues behind the disputes with the view to make recommendations towards their resolution. In terms of the LRA,

²¹⁶ The right to appeal to the Supreme Court of Appeal in respect of constitutional matters dealt with at the Labour Appeal court was confirmed in the matter of *NUMSA & Others v. Fry's Metal (Pty) Ltd* (2005) ILJ 2156 (LAC)

²¹⁷ Van Eck S and Van jaarveld F *op cit*

²¹⁸ Christianson M *et al op cit*

legal representation at the conciliation stage is not allowed however, parties may be represented by their organisations, or colleagues.

Despite different forms in which conciliation may manifest itself, it is based on consensus on the part of the parties to the dispute. This is premised on the fact that the one appointed as the conciliator merely aids parties to reach an agreement and thus may not impose consensus on the parties.²¹⁹ The aim behind the processes of conciliation as the first step in labour disputes, as well as the decentralisation of conciliation powers to both the bargaining and statutory councils as well as the accredited agencies, is to attempt to resolve labour disputes in a speedy and cost effective manner while at the same time reducing the burden of the CCMA at the arbitration stage.

In terms of the LRA once a dispute has been referred for conciliation it must be resolved within 30 days of its referral by one or both of the parties to the dispute whichever the case may be. There is however an exception with regard to the time periods of resolution which include an agreement to extend the period of resolution beyond the statutory 30 days period. The manner in which the process of conciliation is to take place lays wholly within the discretion of the Commissioner.²²⁰ The aim is to make the process as flexible as possible to make it easy to reach a resolution in the most expedient manner. In the event of conciliation failing or 30 days lapse from the date of referral or period of extension as the case may be, the LRA provides that a certificate must be issued by the Commissioner indicating the position of the dispute as far as its resolution is concerned. The purpose of the certificate is to prove that the preliminary measures have been exhausted before the dispute may be arbitrated or adjudicated upon.

The LRA also provides for the process of arbitration as an enforcement mechanism in relation to labour rights. Arbitration can be defined as a process through which an arbitrator appointed by the bargaining council, statutory council, accredited agency or the CCMA hears the causes of the disputes between parties and makes a final determination on the dispute in issue.²²¹ Thus the process of arbitration relies on the intervention of the third party, namely, the Commissioner of the bargaining council, the statutory council, the accredited agency or the CCMA. In terms of the LRA, the process of arbitration is compulsory and once a determination has been made it can

²¹⁹ Grogan J *op cit*

²²⁰ Christianson M *et al op cit*

²²¹ Grogan J *op cit*

only be reviewed at the Labour Court. An exception is with regard to disputes over the interpretation and application of closed shop agreements. These disputes may be referred to the CCMA for arbitration in terms of section 24 (6) of the LRA. However, jurisdiction of the commissioner may be found by consent over matters that ordinarily ought to go for adjudication. The implication is that dismissals based on closed shop agreements may go for arbitration by consent of the parties from conciliation.

In terms of section 136 of the LRA, arbitration follows where a dispute has not been successfully resolved through the process of conciliation. Referral for arbitration must be made within 90 days of the date of the issuance of the certificate that the dispute remains unresolved. Late filing of a referral may be condoned on the good cause being shown by the party making the application.²²² Requirements for representation are similar to those in respect of conciliation save for the fact that a legal practitioner may appear with consent of both parties to the dispute.²²³ A further limitation on the right to legal representation is with regard to dismissals concerning misconduct and incapacity as legal representation is not allowed in these matters. The view of the court in *Netherburn Engineering CC t/a Netherburn Ceramics v. Mudau & Others*²²⁴ illustrates the principle that the right to legal representation in the arbitration proceedings is limited.

In the same vein at the case with conciliation, the arbitrator has wide powers to determine the means and ways of conducting the arbitration process.²²⁵ The aim is once again to ensure flexibility in the conduct of the arbitration processes to allow for a speedy and effective resolution of disputes in the most appropriate manner. Failure by one of the parties to the dispute at the arbitration gives rise to either judgment by default, in the absence of the defending party or dismissal of the matter for arbitration in the absence of the applicant party.²²⁶ An arbitration award must be made within 14 days of the day on which the arbitration proceedings were

²²² Act 66 of 1995 as amended, section 136 (1) (b). Also see *Tyler v. Donaldson Filtration Systems (Pty) Ltd* (1999) 4 LLD 125 (LC). The court expressed the view that a party may apply for condonation of late filing. Failure to do so means that both the CCMA and the Labour Court lack jurisdiction hear and determine the dispute being referred. Also see Cheadle H *et al* (1998) *Current Labour Law 1998* Juta & Co: Cape Town

²²³ Rule 25 of the CCMA Rules

²²⁴ (2003) 24 ILJ 1712 (LC)

²²⁵ Act 66 of 1995 as amended, section 138 (1)

²²⁶ Act 66 of 1995 as amended, section 138 (5). Also see Cheadle H *et al op cit*

concluded, irrespective of whether parties were both present or in the presence of just one party to the dispute.²²⁷

Arbitration awards are rescindable by the Commissioner who made them on varying grounds ranging from common mistake to parties, order wrongly sought, order made in absence of the other party to the dispute as well as on grounds of ambiguity, error in the award made.²²⁸ An arbitration award handed down by the Commissioner on the interpretation and application of closed shop agreements is appellable at the Labour Court.²²⁹ This is an exception to the general rule that decisions of the Commissioner are final and binding as if they are orders of the Labour Court in terms of section 143 of the LRA. In terms of the LRA failure to comply with these orders amounts contempt of Court triable at the Labour Court.

Reviews and appeals to the Labour Court must be referred within 6 weeks of notice of judgments except where an award is defective due to corruption on the side of the Commissioner in which case the period is 6 weeks from the date of awareness of the corrupt acts. Unresolved disputes from the conciliation on the fairness of the closed shop agreements related dismissal may be referred to the Labour Court for adjudication or for arbitration as already alluded. Although, arbitration awards are final in nature, they may be appealed against at the Labour Court if they concern the interpretation and application of closed shop agreements. Parties may appear before the Labour Court by themselves or through legal representation or an official of their organisations.²³⁰

The Act provides that if the Labour Court finds that an employee has been unfairly dismissed, an employer may be ordered to reinstate or reemploy the concerned employee in the former position or in another suitable position and/or an order of compensation which must be made against the trade union party to the closed shop agreement. Both an order for reinstatement and re-employment depend of the willingness of the employee to be reinstated or reemployed as well as the circumstances surrounding the dismissal which would make it impracticable for reemployment relations to continue between the two.²³¹ Where it is impracticable for the

²²⁷ Act 66 of 1995 as amended, section 138 (7)

²²⁸ Act 66 of 1995 as amended, section 144

²²⁹ Act 66 of 1995 as amended, section 24 (7)

²³⁰ Grogan op cit

²³¹ Act 66 of 1995 as amended, section 193 (2)

working relations between an employer and an employee to continue, an order for compensation may be made in the place of both re-employment and reinstatement..

An order for compensation is limited to payment of remuneration from last date of dismissals to last date of hearing for a procedurally unfair dismissal, remuneration from last date of dismissal to last date of hearing plus an employees annual salary for substantively unfair dismissals and with regard to automatically unfair dismissals compensation will be remuneration from last date of dismissal to last date of hearing plus a maximum of 2 years salary of the concerned employee.²³² However, in the case of dismissals based on closed shop agreements an order for either re-employment or reinstatement would not pose a problem as the closed shop dismissal has no correlation with the working relations between an employer and an employee but rather an employee and the union

Where a party is dissatisfied with the decision of the Labour Court, they may lodge an appeal with the Labour Appeal Court. Therefore, all decisions of the Labour Court in relations to the fairness of dismissals based on closed shop agreements as well as on the interpretation and application of closed shop agreements are appellable at the Labour Appeal Court from the Labour Court. The Procedure for noting an appeal requires that leave to appeal to the Labour Appeal Court against the decisions of the Labour Court must be lodged with the registrar of the Labour Court. Leave to appeal must be sought from the judge who granted the order or delivered the judgement against which leave to appeal is sought.²³³ Within 21 days of the granting of the leave to appeal, a notice of appeal must be lodged with the Labour Appeal Court specifying the part of the Labour Court Judgement which is being appealed against.²³⁴ The Labour Appeal Court may set aside or confirm the judgement of the Labour Court. Parties that may appear at the Labour Court are equally entitled to appear at the Labour Appeal Court on behalf of the disputing parties.²³⁵

Through these structures and mechanisms, the LRA thus attempts to provide the employee affected by the application of closed shop agreements, particularly those who have been dismissed, with the opportunity to recuperate their jobs as well as to invoke their workplace

²³² Act 66 of 1995 as amended, section 194

²³³ Act 66 of 1995 as amended, section 166 (1) and (2). Also see Grogan J *op cit*

²³⁴ Grogan J *op cit*

²³⁵ Van Eck S and Van jaarveld F *op cit*

democracy rights to try and influence workplace decisions which have caused their dismissals through the processes of conciliation and adjudication. Belated as this opportunity may be, it marks an attempt by the LRA to bolster the workplace democracy as one of its purports.

The purpose of these enforcement structures and mechanisms is to discourage trade unions from resorting to the abuse of their powers under the LRA as well as to provide dismissed employees with the opportunity to recuperate their jobs and to secure job retention. However, to offer protection to employees against the abuse of union powers at this stage renders the effort rickety particularly because the justice system is dawdling and as such complaints of this nature take a long time to finalise. The sluggish nature of the justice system acts as a discouraging factor for employees to query their dismissals. This is one of the reasons for the scarcity of case law on closed shop related dismissals.

Although, the LRA has put in place the structures and mechanisms with the view to promote and protect the labour rights towards the achievement of economic development, the attainment of social justice, the achievement of labour peace as well as the promotion of workplace democracy, the protection afforded is limited. This is particularly because, the structures and mechanisms so established are only concerned with unfair dismissals whereas the emasculation of both social justice and labour peace do not result in dismissals yet they have a negative effect on the spirit and purport of the LRA. The limitation in protection of the labour rights, particularly, social justice and labour peace and consequently the main purposes of the LRA leads to the insinuation that the attainment of economic development and workplace democracy are accorded higher value to the labour rights, thus perpetuating social injustice and labour feud in the labour relations

3.4 CHAPTER CONCLUSION

In conclusion, the purposes the LRA namely, economic development, social justice, labour peace and workplace democracy are very important in the South African labour relations. This is particularly the main reason behind their inclusion in the centre piece legislation in the South African labour legislation, the LRA, as the main purposes. Due to their importance, they need to be given sufficient protection to ensure that they are not negated in any way by any provisions, particularly provisions from other labour legislations including the provisions of the LRA itself. The closed shop agreements, being the main subject matter of the research are thus no exception and they are established, regulated and terminated under the LRA. Despite the protection afforded to the main purposes of the LRA, the application of closed shop agreements nonetheless

negate them in a number of ways. This is primarily because the closed shop agreements application is arranged in such a manner that it favours the interests of the majority to the prejudice of the minority and hence biased. These are summarised as follows.

Firstly, on the advancement of economic development, the application of closed shop agreements leads to the loss of employment for workers on the grounds of their refusal, being refused and/or their expulsion from union membership as well as for participating in a collective action particularly where it is not protected. The closed shop agreement extends the grounds for dismissal of employees even to circumstances not based on their performance, conduct or the employer's operational requirements all of which are recognised by the ILO, to include refusing to join, refusal and expulsion from union membership. The effect of the extension, the ease with which employment is caused to cease as well as the failure to promote job retention all carry the apparent negation of this purpose of the LRA while it also leads to the exclusion of the best man from the job.

Secondly, with regard to social justice, the application of closed shop agreements distorts the promotion and attainment of social justice in that it is majority biased as it gives the advantages in the industrial relations to the majority. These range from the determination of the coming into effect of the closed shop agreement, the determination of who qualifies for membership, opportunities and exemptions all which are not in conformity with the purport of social justice. This is particularly so because social justice is based on fairness and equity in the distribution of both advantages and disadvantages arising from the workplace activities.

Thirdly, the application of closed shop agreements is based on the use of compulsion and the threat of termination of employment. All these elements are the ingredients of industrial tensions which cannot co-exist with labour peace. Closed shop agreements provide for the use of compulsion in making membership as well as in partaking and supporting the union activities irrespective of whether they serve one's best interests or not. Compulsion into activity carries a prejudicial effect on the party being compelled and the result is antagonistic tendencies such as sabotage. Therefore, the Act through the application of closed shop agreements promotes labour feud rather than to promote and protect labour peace.

Lastly, workplace democracy is utterly undermined in the application of closed shop agreements particularly with regard to the minority workers in terms of masses. This is premised on the fact that workers democratic rights are not protected in form but rather in substance only. This is

visible from the coming into effect of the agreement itself where the ballot is already predestined to reflect the wishes of the majority workers and further in the inability of these workers to influence decisions that affect them by reasons of their refusal or expulsion from union membership. When democratic rights are extended to the minority workers, this is done in a biased manner to certain categories of employees to the exclusion of the others.

CHAPTER 4: A COMPARATIVE EVALUATION OF THE APPLICATION OF CLOSED SHOP AGREEMENTS: THE SOUTH AFRICAN AND GERMAN PERSPECTIVES

4.1 INTRODUCTION

The achievement and attainment of economic development, social justice, labour peace and the promotion of workplace democracy are very important rights of workers in the South African industrial relations. This owes largely to the South Africa industrial relations history in which these rights were crossly ignored. As a result these rights are provided for in the main and most comprehensive legislation on labour matters, the LRA, as the main purposes. Therefore, due to their importance, they require enormous promotion and protection because without them, the LRA becomes baseless and thus redundant. The operation of closed shop agreements in the South Africa industrial relations has proved to be an utter negation of the purposes of the LRA. As a result, a need has arisen to embark on a quest to search for an alternative means, in place of closed shop agreements, that can be able to eliminate free riding without unavoidably negating the purpose of LRA and render it baseless and redundant.

An attempt will be made to study the German legal system in the promotion and protection of the worker's rights to economic development, social justice and labour peace as well as workplace democracy while also eliminating free riding from union activities by employees. The aim is to derive lessons from the successes of the German model for application in South Africa. In an attempt to find an alternative to eliminating free riding, Germany fits the profile on the grounds that it prohibits the operation of closed shop agreements yet it managers to achieve high success rates in the elimination and reduction of free riding from union activities by employees who are not union members.²³⁶ Further, several aspects of the German labour law are similar to those found in the South African labour laws and these will be reflected in the analysis.²³⁷ To achieve the aims of the comparison, the following issues will be discussed; the achievement of economic development, the attainment of social justice, giving effect to labour peace and the promotion of workplace democracy in Germany as well as the German practice in the elimination of free riding from union activities. As a point of departure, the sources of law regulating the operation of closed shop agreements in Germany will be discussed.

²³⁶ Goerke L and Punnenburg M "Norm Based Trade Union Membership: Evidence for Germany" available at www.fta.iza.org/dp962.pdf (Accessed on the 27th August 2008)

²³⁷ See Liliane J *op cit* and Bhoola U *op cit*.

4.2 THE LEGAL FRAMEWORK REGULATING CLOSED SHOP AGREEMENTS

Germany, like any member of the world community of nations including South Africa, is a member of several international organisations and these organisations bear greater influence upon it. Firstly, like South Africa, Germany is a member of the ILO and by virtue of that membership it is bound by the ILO conventions, particularly conventions 87 of 1948 and 98 of 1949.²³⁸ It ratified these conventions on the 20th March 1957 and 8th June 1956, respectively.²³⁹ By ratifying these conventions, Germany bound itself to ensure that they are both implemented and complied with within its national jurisdictional territory. These instruments are similar in interpretation and are equally binding on Germany as they do in South Africa. As a result, they demand the same level of observance and compliance from the two countries in the application of their labour laws.

Secondly, similarly like South Africa,²⁴⁰ Germany is a member to regional and continental organisations. It is geographically located within the European continent and a member of the European Union²⁴¹ regional organisation. Due to its membership it is bound by the European Union legal instruments,²⁴² and these have influenced its labour laws significantly. The most important EU legal instruments for this analysis are the European Human Rights Conventions,²⁴³ European Social Charter²⁴⁴ and the European Community Charter of the Fundamental Social Rights of Workers.²⁴⁵ Due to the obligations of Germany to these instruments, their provisions are effectuated through a series of the German national statutory instruments which include but not limited to the Basic Law, the Protection Against Dismissals Act, the Civil Code, the Works Constitution Act and the Act on Collective Agreements. The most relevant pieces of legislation in this analysis are the Basic law and the Protection Against Dismissals Act.

²³⁸ ILO conventions 87 of 1948 on Freedom of Association and Protection of the Rights to Organise and 98 of 1949 on the Application of the Principles of the Right to Organise and Bargain Collectively.

²³⁹ *'Ratifications of Fundamental Human rights Conventions by Country'* op cit. Germany had ratified about 82 of the ILO conventions and it has since denounced about 10, some denounced due ratification of other conventions which rendered them redundant. See *"List of Ratifications of International Labour Conventions"* available at www.webfusion.ilo.org/public/db/standards/norms/appl (accessed on 19th August 2008)

²⁴⁰ South Africa is a member of many regional and continental organisations within the region such as the SADC and the AU.

²⁴¹ Hereinafter called the EU

²⁴² These are the European Legislation and case law.

²⁴³ Charter of 1951

²⁴⁴ Charter of 1961

²⁴⁵ Charter of 1989

4.2.1 European Legal Instruments as the Basis of the German Law

There are a number of European legal instruments that touch on the subject of closed shop agreement. As already mentioned in the foregoing, the most important legal instruments are the European Human Rights Conventions, European Social Charter and the European Community Charter of the Fundamental Social Rights of Workers. These instruments play a very important role on the subject in that they set standards and are a benchmark against which the standards set by the regional organisations are measured within the member states. These instruments are discussed separately in detail in the subsequent part of the research analysis.

4.2.1.1 European Convention on Human Rights

This convention has inherited the ILO conventions approach of neutrality in that it does not directly provide for the closed shop agreements and neither does it prohibit their operation. However, unlike the ILO conventions which were interpreted by the Committee of experts, in the European Union much aid has come from the interpretations of the provisions of the convention through several case law to establish a firm connection of how they stand as far as closed shop agreements are concerned. The provisions of the European Convention on Human Rights²⁴⁶ on closed shop agreements provide that everyone has the right to associate freely including the right to form and join trade unions to promote and protect their rights.²⁴⁷ However, the Convention goes on further to impose a limitation on this right to freedom of association by making room for the lawful restriction for those with properly vested authority such as the police, army as well as the administration of the state. This is akin to the provisioning in the ILO conventions which vest authority and allow for each member state's national legislation to establish, regulate and terminate the application of closed shop agreements according to the dictates of their peculiar environment.

In its interpretative role on the provisions of this Charter the case of *Chaeall v. United Kingdom*²⁴⁸ has been helpful in providing an interpretation to Article 11. According to the this case, this provision provides for the legal rights of trade unions to refuse their membership to

²⁴⁶ Hereinafter referred to as the ECHR

²⁴⁷ Article 11 of 1951, provides that “11.1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join the trade union for the protecting of his rights. 11.2 No restriction shall be placed on the exercise of these rights other than such as are prescribed by the law and are necessary in the democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of rights and freedom of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.”

²⁴⁸ 10550 of 1983

any employee that they feel may deter their interests.²⁴⁹ This provision is akin to the South African section 26 (6)²⁵⁰ which gives trade unions party to the closed shop agreement, the right to refuse union membership to employees whose conduct is inconsistent with the collective exercised on the union's rights. Through this interpretation, it is clear that while courts avoid to expressly refer to the application of closed shop agreements, they are however recognised within the European Union and as such they cannot be held to be contrary to article 11. However, they are subjected to certain limitations as alluded to in the foregoing.

This convention is clear as far as the positive right to freedom of association is concerned²⁵¹ although there is ambiguity as far as the right not to join a trade union is concerned.²⁵² However, the case of *Young, James and Webster v. The United Kingdom*²⁵³ sheds more light with regard to this right. In this case, Article 11.2 was interpreted to mean that employees could not be compelled to join a trade union as this was a direct violation of Article 11 of the convention in that it struck its vital substance. This has been particularly said to be due to the fact that it involved compulsion to join a trade union by employees who were already in employment at the time the agreement came into place.²⁵⁴ Resemblance of this can be found in the South Africa position under section 26 (7) of the LRA²⁵⁵ which affords protection to both the conscientious objectors and the employees who were in employment prior to the conclusion of closed shop agreements.

²⁴⁹ Also see Olivier M. P and Potgieter O "The Rights to Associate Freely and the Closed Shop" (1994) Vol. 2 TSAR 289

²⁵⁰ LRA Act 66 of 1995 as amended

²⁵¹ The positive right to freedom of association is the right to form and join organisation of one's choice without interference by those in authority.

²⁵² Petersen K. F. V "The Practice of Closed Shop Agreements under Pressure" Available at www.eurofound.europa.eu/eiro/1998/02/feature/dk9802153f.htm (accessed on 27th August 2008)

²⁵³ 1981 ECHR. This matter involved the closed shop agreements which came into force after the strike, that is, Young, James and Webster were already in employment with the British Railways. This agreement compelled them to join any one of the three trade unions which has a closed shop agreement with their employer or face dismissal. The trio opposed the demand and they were dismissed. It was held that the compulsion to join the union directly denied the right to freedom of association guaranteed by article 11 of the convention. Also see *Sigurbur Sigurjonsson v. Iceland* (1993) ECHR where the use of closed shop agreements was overruled.

²⁵⁴ Also see Drzenczewski A and Wooldridge F "Closed Shop Case in Strasbourg" (1982) vol. 31 International and Comparative Law Quarterly. 396 available at www.jstor.org/stable/759140 (Accessed on 30th July 2008)

²⁵⁵ Act 66 of 1995 as amended

The case of *Sorensen and Rasmussen v. Denmark*²⁵⁶ has also played a role in the interpretation of the provisions of Article 11. This case involved the dismissals of certain employees who had prior to their employment been informed that they would later on be required to join union membership of a certain trade union. They had accepted employment under these conditions when later required to deliver on their promise they refused to join that particular trade union and as a result they were dismissed. They lodged their case with the European Human Rights Court which decided that their dismissal was in violation of article 11. It was held that it is a violation of article 11 to compel people as a requirement of employment to join trade union membership. This is clearly an extension of the interpretation of article 11 to include a prohibition on pre-entry closed shop agreements. In South Africa, there is a similar provision which can be found under section 26 (3) (c) of the LRA.²⁵⁷

From the above account, it is observable and worth noting that while the Charter does not expressly pronounce itself on the application of closed shop agreements, case law has come a long way to take a stance and pronounce the operation of the closed shop phenomenon as being contrary to the provision of the charter on the right to freedom of association. This is indeed a long way in that in the earliest decision of *Young, James and Webster supra* of 1981 employees could not be compelled to join unions, to the subsequent decision of *Chaell supra* of 1983 in which the closed shop application was extended to give unions specific rights to dissociate workers and to the much later decision of 1999 in *Sorensen supra* which ultimately resulted in the prohibition of both pre-entry and post entry closed shop agreements. However, these are only opinions of the courts and different countries within the union are at liberty to take a stand to either recognise or prohibit the closed shop phenomenon as some do while others do not.

Germany is a member of the EU and by virtue of its membership to the union, it is bound by the provision the ECHR to promote and protect the right to freedom of association. However, it reserves the right to choose the measures to employ to secure the principles on freedom of association as laid down by the ECHR. As alluded to in the foregoing, the decisions of the European Human Rights Court are opinions of the court which individual EU countries have the right to elect either to consider and rely or not.

²⁵⁶ Application 5262/99 & 52629 of 1999 (ECHR).

²⁵⁷ Act 66 of 1995 as amended

4.2.1.2 European Social Charter

In the same manner as the abovementioned EU Charters, the European Social charter does not make an express provision for the closed shop agreements. It provides for the freedom of workers to form and join organisations of their choice without undue limitation on same.²⁵⁸ In this way, this provision of the European Social Charter carries the same neutrality as does the ILO conventions on closed shop agreements. It only provides for workers and employers rights to freedom of association while it does not confer any specific rights not to join a trade union.²⁵⁹ However, the interpretative clause in the annexure to the Charter provides some aid concerning what article 5 dictates. It states that article 5 does not prohibit or authorise the practice of closed shop agreements but rather meant to regulate them.²⁶⁰

The European Social Charter is binding on all members of the EU including Germany. Its effect on Germany is the same that of the European Convention on Human Rights,²⁶¹ and as such the South African provisions that are similar to the provisions of the European Convention on Human rights to the extent that these two are also similar. The difference between the ECHR and the Charter is that the interpretative clause of the Charter makes an express provision regarding closed shop agreements, which neither the European Human Rights Court as well as the ECHR expressly, refer to. The provisions of the Charter illuminate the acceptance of the closed shop agreements in the Union while the charter retains some neutrality as far as their prohibition and use are concerned. While the charter is neutral on closed shop agreements its conviction on right to freedom of association is commendable.

4.2.1.3 European Community Charter of Fundamental Social Rights of Workers

This charter, unlike other EU charters provides in a manner that affects the application of closed shop agreements in a much more direct manner as it makes reference to the right not to associate, though it does not per se refer to closed shop agreements. The charter provides that employers

²⁵⁸ Article 5 of the Charter provides that, [w]ith the view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair nor shall it be so applied as to impair this freedom...."

²⁵⁹ Drzenczewski A and Wooldridge F *op cit*

²⁶⁰ Olivier M. P and Potgieter O *op cit*

²⁶¹ Also see Olivier M. P and Potgieter O *op cit*

and workers of the European Communnality shall have the right to freedom of association without interference that might cause them damage to their person or on their occupation.²⁶²

This provision protects both the rights of employers and workers not to be compelled to any organisation or union membership. It directly provides for the negative right to freedom of association which limits the application of closed shop agreements generally, that is, to include even the protection of all employees²⁶³ who are compelled to join trade unions on account of either pre-entry or post-entry closed shop agreements which are allowed in many jurisdictions such as South Africa.²⁶⁴

The provisions of this charter are equally binding on Germany as does the foregoing Charters. Although the Charter does not expressly provide on closed shop agreements like the Social Charter, however, it elevates the promotion and protection of the right to freedom of association to a position in which it is interpretable to mean that the closed shop agreements application is highly constrained if not totally prohibited in the EU. The levitation of the right to freedom of association in the EU serves as the main reason why closed shop practice is prohibited in certain EU countries while it not in other EU countries. This charter has been greatly influential in Germany as the closed shop practice is totally prohibited. The subsequent discussions attempt to discuss how the law is applied on closed shop agreement in Germany.

4.2.2 German Law on Closed Shop Agreements.

In Germany, there is no consolidated labour code as opposed to the situation in South Africa where there is a consolidated labour legislation namely the LRA.²⁶⁵ As a result, minimum standards in labour matters, deriving from the foregoing legal instruments are found in a plethora of labour Acts on various labour related matters. The most important pieces of legislation are the Basic Law and the Protection Against Dismissals Act. These are discussed separately in detail in the subsequent part of the analysis. As a point of departure, the following caption will discuss and analyse the German legal position on closed shop agreements under the Basic Law.

²⁶² Article 11 of the Charter provides that “[e]mployers and workers of the European Community shall have the right of association in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests. Every employer shall and every worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him.”

²⁶³ It covers both the Conscientious objectors, the employees who were already in employment at the time the agreement was concluded as well as the employees not covered in the two categories.

²⁶⁴ These are allowed in South Africa under sections 26 (6) of the LRA 66 of 1995 as amended.

²⁶⁵ Act 66 of 1995 as amended

4.2.2.1 Basic Law

The Basic law is the constitution of the Federal Republic of Germany and it was adopted on the 23rd May 1949.²⁶⁶ The Basic law guarantees the basic rights of all the peoples of the Federal Republic of Germany which according to its dictates must be observed by all state powers.²⁶⁷ It provides for labour rights just as South Africa does in its Constitution²⁶⁸ while also giving a lee-way for other national legislation subordinate to the Constitution to provide for labour rights.²⁶⁹ The Federal Republic of Germany's Basic Law provides that all Germans have the right to freedom of association to safeguard and improve their working and economic conditions and that any undertaking or arrangements that restrict this freedom are null and void.²⁷⁰

Article 9 of the Basic Law guarantees the right to freedom of association of both the workers and the employers and this includes the rights of individuals to form associations, join those that are already in existence, to participate in their lawful activities as well as the right to leave those associations or not to belong to any association at all.²⁷¹ As a result, according to the Basic Law, in the Federal Republic of Germany, closed shop agreements are prohibited and any measures that are aimed at expelling employees from an enterprise due to their union membership are unlawful as they are regarded as an infringement to the right to freedom of association.²⁷² The court in the case of **BAG**²⁷³ affirmed the position of the law that closed shop agreements are prohibited in Germany on the ground that they are an infringement of the right to freedom of association.

²⁶⁶ Liliane J *op cit*

²⁶⁷ *Ibid*

²⁶⁸ Act 108 of 1996, section 23

²⁶⁹ Liliane J *op cit*. South Africa provides for Labour Rights under the LRA and other supplementary labour legislations such as the Basic Conditions of Employment and the Employment Equity Act.

²⁷⁰ See Article 9 (1) and (3) which read as follows, "(1) [a]ll Germans shall have the right to form corporations and other associations." "(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to end this shall be unlawful. Measures ..."

²⁷¹ Liliane J *op cit*

²⁷² "Closed Shop Clauses in Germany" available at www.eurofind.europa.eu/emere/Germany/Closed_Shop_Clauses_De.htm. (Accessed on 27th August 2008). Also see *Mazibuko and Others v. Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC) *supra*. See also Olivier M. P and Potgieter O *op cit*.

²⁷³ (1968) NJW 1903. also see Oliver M. P and Potgieter O *op cit*

By declaring the operation of closed shop agreements contrary to the right to freedom of association and prohibiting same within the German industrial relations, this is not to suggest in any manner that free riding is not a matter of concern for Germany. In fact, it is and this only goes to show that there are other methods used by Germany to deal with free riding other than the operation of the closed shop agreements. This coupled with the fact that no legal challenge has been laid against the prohibition of the closed shop agreements only goes to show that there are other methods which are as much effective, or even more, as the resort to closed shop agreements which the Germans are aware of and are accordingly making use of to deal with free riding. These methods shall be discussed at a later stage of the analysis.

This marks a distinguishing feature of the systems of both Germany and South Africa in dealing with the issue of free riding. While, it is true that the most effective way of dealing with free riding is prohibited in Germany, same is expressly provided for under the South African Constitution. The German position is analogous to the South Africa position during the earlier development of its labour relations law when at that time, closed shop agreements were prohibited. Unlike Germany, South Africa re-introduced the closed shop phenomenon because their operation appeared to make out more to benefit than without them. This is particular so because in its earlier historical development, the operation of closed shop agreement managed to assist in the establishment of stronger bargaining agents and made the collective bargaining system much more coherent for South Africa.

4.2.2.2 Protection Against Dismissals Act

This Act came into force in 1969. It is concerned with the protection of employees against unfair and wrongful dismissals. It applies to employees who work in establishments with more than 10 employees who have at least 6 months period of service with an enterprise.²⁷⁴ Apprentices are not considered for purposes of the calculation of the size of the workforce and while part-time employees are considered only proportionally.²⁷⁵ As a result employees who work in establishments with less than 10 employees and/or those who have under six months period of service are not covered by the Protection Against Dismissals Act. It protects employees against dismissals on grounds of association membership and on grounds other than

²⁷⁴ Forsyth A "Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries" available at www.business.vic.gov.au/busvicwr/_asserts/main/lib60148/economic%20dismissals-artfinal.pdf (accessed on 28th August 2008)

²⁷⁵ Dribbucsh H "Laws on Protection Against Dismissals and Unemployment Amended" available at www.eurofound.europa.eu/eiro/2004/01/feature/de041205f.htm (accessed on 28th August 2008).

conduct, personality, behaviour as well as the economic reasons also called the employer's operational requirements.²⁷⁶ The LRA which covers all employees save for members of the National Defence, South Africa Secret Service as well as the National Intelligence Agency²⁷⁷ allows for the grounds of dismissal to extend beyond the trio which are allowed under the German system to include the grounds based on the closed shop practice.

The Act affirms the a ban on the application of closed shop agreements in Germany through the provision of remedies against any dismissals other than on conduct, capacity and operational requirement. The affirmation of the ban on closed shop agreements is premised on the fact that the full operation of closed shop agreements has a consequential loss of employment due to either grounds of refusal to join a union or expulsion from a union. The protection of employees against dismissals of this nature is a sign of how undesirable the application of closed shop agreements is in Germany unlike in South Africa where the practice is not only promoted but also extremely protected.

4.3 COMPARING AND CONTRASTING THE APPLICATION OF THE LAW ON THE LABOUR RIGHTS AND CLOSED SHOP AGREEMENTS IN GERMANY AND SOUTH AFRICA

Economic Development, social justice, labour peace and workplace democracy are very important labour rights. Their importance is illuminated by their inclusion into the South Africa LRA as its main purposes. For their full enjoyment, these rights must be promoted and protected in such a manner that an employee as individuals is able to benefit from their provisioning. However, in South Africa, these rights are provided to employees as a collective, particularly due to the practice of closed shops. The South African approach has led to the negation of the purposes of the LRA, thus rendering it redundant. It is thus important to investigate the promotion and protection of these rights under the German system, particularly where closed shop practice is prohibited.

4.3.1 Achievement of Economic Development and Closed Shop Agreements

In the preceding discussions, economic development has been defined as a policy or program that is concerned the creation and retention of jobs to enhance the well being and quality of life. The prohibition of closed shop practice in Germany under Article 9 of the German Basic Law

²⁷⁶ Forsyth A op cit. Also see Carsten J "*ECHR Rules Against Closed Shop Agreements*" available at www.eurofound.europa.eu/eiro/2006/01/feature/dk601104f.htm (accessed on 27th August 2008).

²⁷⁷ Act 66 of 1995 as amended. section 3

has led to the extension of extensive protection of jobs both in terms of accessibility as well as in terms of security. The extensive protection is evidence of the high level of jealous protection that is afforded to the formal sector employment in Germany to ensure that employment is not only protected but also retained, a feature that is scarce in the South African protection of the right to advancement of economic development.

Therefore, the Basic Law provides a conducive framework within which the well being and standards of living of employees can be enhanced thus lead to the reduction of poverty. This is achieved through the prohibition of both pre-entry and the post entry closed shop practices. Pre-entry closed shop practices, on the one hand require that an employee join union membership as a precondition to obtain employment, while post-entry closed shop practices, on the other hand, require an employee to join union membership within a specified period after employment.

Contrary to the German position, is the South African position in which closed shop agreements are permitted under section 23 (6) of the South African Constitution.²⁷⁸ The provision for closed shop agreements in the South African Constitution is made under the umbrella provision for the establishment of union security arrangements subject to the law regulating collective agreements. While permitting the closed shop practice and unlike in Germany, South Africa only prohibits pre-entry closed shop agreements. The limited prohibition application of closed shop agreements places a limitation on the protection that is afforded to the labour right towards the achievement of economic development as elucidate in the foregoing chapters. The limited protection of employment in South Africa is elucidative of the lack of importance that is placed on the right to economic development, particularly in the light of the contributions of its protection on general economic growth.

Through the prohibition of these two union security practices, Germany is able to ensure that employment is easily accessible to all workers without prejudice while it also affords job security for those workers who are newly employed. The extension of job security to employees' means that employees can only be dismissed on three internationally recognised and acceptable grounds namely; conduct, capacity and operational requirements. The German position is dissimilar to what transpires in South African position where dismissals on ground of closed shop practice are recognised. The South African labour legislation affords protection to the job seekers through the prohibition of pre-entry closed shop agreements.

²⁷⁸ Act 108 of 1996 as amended

However, newly employed workers are subject to prejudice emanating from the application of closed shop agreements in the form of compulsion to join union membership, expulsion from union membership as well as refusal into union membership all of which have the consequential effect of termination of employment for the employees affected. Unlike the German employees, the South Africa employees often find themselves having to concede to the decisions of the unions which could at times lead to the termination of their very employment.

The South African grounds for dismissal have extended through closed shop practice to include acting contrary to the union's activities, refusal to join union membership, expulsion from union membership as well as due to provisions of the union's constitution and this poses enormous threat on job security and consequently the achievement of economic development. This is not only a threat to the right to economic development but also a contradiction of the ILO standards on Convention on Termination of employment which spells out the recognised grounds for dismissal. The German practice has however managed to restrict their ground for dismissal within the ILO standards prescribed grounds for dismissals.

4.3.2 Attainment of Social Justice and Closed Shop Agreements

The German Basic Law seeks to ensure the attainment of Social justice. Social justice is social justice is concerned with the spread of advantages and disadvantages arising from the industrial relations in an equitable manner among and between employees and employers alike. The practice of closed shop agreements in South Africa has proved to extent advantages to the unions by vesting them with the power to compel employees' non-union member to join their membership as well as to the conscientious objectors and those in employment prior to the agreement's conclusion by granting them the immunity from being compelled into union membership.

The prohibition of closed shop agreements in Germany has resulted in the consequential elimination of the augmentation of labour rights of others thus resulting in an even and unbiased distribution of advantages and consequently the definitive promotion and protection of social justice. The German practice is able to ensure that advantages and disadvantages within the workplace are spread evenly in the most possible ways and thus avoid acts which are demonstrative of favouritism tendencies in the legal system. Union membership is left at the discretion of employees and employees do not need to be classified as conscientious objectors to avoid union membership and mostly they do not have to pay any fees for the good deeds of union activities, unlike the case under the South African labour relations system.

4.3.3 Giving Effect to Labour Peace and Closed Shop Agreements

Giving effect to labour peace rests upon the elimination of labour feud, resulting from tensions, and achieving harmony of interests of parties in the industrial relations. This is premised on the fact that labour peace and labour feud are extreme opposites and as such they cannot co-exist. In the industrial relations, labour peace is fully taken advantage of where interests of all stakeholders are considered and incorporated into decisions within the workplace. This ensures that decisions are equilibrium of the interests and leads to the successful organisation of labour relations in the labour relations system. Contrary to this is the closed shop practice which is the common practice in South Africa.

The closed shop practice confers on the unions the power to impose their interests over those of employee non-union membership through compulsory union membership, compulsory collective exercise of union rights whether such acts are positive or negative on the non-union employees. The closed shop practice institutionalises the domination of interests of trade unions over those of individual employees. The institutionalisation of the domination of interests of trade unions over those of individual employees is observable South Africa where trade unions have the power to compel other non-union employees into union membership with the threat of dismissal emanating from an obligation by an employer that stems from the conclusion and application of closed shop agreements. The institutionalisation of domination of interests of the unions over those of employees' non-union members under the South Africa is backed by threats of sanctions.

Under the South Africa labour relations system, trade unions are lawfully authorised to impose their will on the individual employees through the extension of the authority to compel them into union membership, to expel them from union membership as well as to refuse their request for union membership. Trade unions are vested with a free hand to exercise these powers irrespective of the views and opinions of the employees on whom they are exercised with the exception of the least minority conscientious objectors and those employed prior to the conclusion of the closed shop agreement.

By prohibiting the closed shop practice, the Basic Law seeks to ensure that labour peace is guaranteed in the industrial relations through the elimination of the unions powers to dominate the interests of employees who are non-union members. Under the German labour relations

system labour peace is the dominant character as opposed to labour feud. Trade unions are under a self imposed obligation to consider the interests of all employees in order to secure their continued union membership. This is made possible by the fact the German Basic law prohibits forced union membership as it is regarded as being contrary to the right to freedom of association. In Germany, employees have the right to join union membership or to refrain from same.

4.3.4 Promotion of Workplace Democracy and Closed Shop Agreements

Workplace democracy is concerned with the involvement of employees in the decision making within the workplace. The involvement of workers is secured through the conferment of power on the individual employees to influence matters that affect them in the workplace. Workplace democracy seeks to ensure that employees have the ability to influence decisions that affect them and that the choice to partake in workplace activities is within their election. The prohibition of closed shop practices in Germany has contributed towards the extension of the protection of the workers right to workplace democracy.

This is true based on the fact that closed shop practices entail the imposition of compulsion on individual employees to partake in workplace activities whether it is against their will or not. The South Africa position serves as exemplar to this in that decision to join unions, with the view to employ them as the vehicle of influencing decisions on behalf individual employees, does not rest with the employees as individuals but rather the sole determination of the trade unions which operate closed shop agreements. With the prohibition of closed shop agreements employees are able to exercise their will to either involve in workplace activities or not to.

In Germany, employees have the ability to influence matters that affect them in the practical sense rather than just administratively. The administrative influence in workplace matters is particularly true of South Africa where due to guarantees of continued and growing membership, trade unions have grown complacent towards the needs and demands of employees. Due to the absence of compulsion to join union membership which gives union's unwarranted security that results is their complacency, German workers have the ability to influence trade unions which are at the mercy of the workers union membership for their own continuity. As a result, the German system secures against the probability of complacency of unions towards the rights of workers in that it ensures that workers rights are given the necessary recognition.

Therefore, from the foregoing, Germany is able to promote and protect the labour rights of employees namely, the right to economic development, social justice, labour peace and workplace democracy, through the prohibition of the closed shop practices. Unlike, the situation operating in South Africa, Germany adopts an individual approach in the promotion and protection of labour rights and this has largely accounted for its successes.

4.4 ENFORCEMENT STRUCTURES AND MECHANISMS

The German legal system takes cognisance of the threat facing the exercise of labour rights. As a result, structures and mechanisms are in place to ensure that these rights are afforded sufficient protection. As earlier mentioned, these rights include achievement of economic development, attainment of social justice, giving effect to labour peace and the promotion of workplace democracy. The German legal system affords protection through the Labour Courts, namely the Local Labour Court; the Regional Labour Court; and the Federal Labour Court as well as the Federal Constitutional Court through the processes of conciliation, arbitration and adjudication. The structures and mechanisms are discussed hereunder.

4.4.1 Structures for the Resolution of Closed Shop Related Disputes

The Basic Law provides for the establishment of the Federal Constitutional. In terms of the Basic law the Federal Constitutional Court shall be established and it shall exercise judicial powers through judges so appointed.²⁷⁹ The Federal Constitutional Court has jurisdiction to hear and determine disputes arising out of the rights contained in the Basic Law. These rights include the protection of the right to freedom of association through the elimination of agreements that limit or restrict its exercise.²⁸⁰ The Federal Constitutional Court is composed of the federal judges and other members of the Court half of whom are elected by the *Bundestag* while the other half is elected by the *Bundesrat*.²⁸¹ The Federal Constitutional Court has similar jurisdictional powers tantamount to those of the Constitutional Court of South Africa.

The Labour Court Act establishes three Courts namely the Local Labour Court, the Regional Labour Court and the Federal Labour Court.²⁸² The Local Labour Court is made up of a judge who is a chairman of the Court and two other honorary Judges with similar powers appointed from the ranks of both the employers and the employees each. The Local Labour Court has

²⁷⁹ Article 92

²⁸⁰ Article 9

²⁸¹ Article 94 (1)

²⁸² Liliane J *op cit*

conciliatory powers with respect to Labour disputes similar to the powers of the Bargaining Councils, Statutory Councils and Accredited Agencies established under the LRA in South Africa. The Regional Labour Court is made up of composed in the same manner as the Local Labour Court with one Judge who is a professional judge and two other honorary judges from the ranks of the employers and employees.²⁸³ The Regional Labour Court has powers to both conciliate and arbitrate and is at the same rank as the South African CCMA.

The Federal Labour Court composes of three professional judges also called senates and two untrained judges from both the ranks of the employers and employees each.²⁸⁴ The Federal Labour Court has powers to adjudicate over labour disputes and is at the rank of the Labour Court in South Africa. In terms of the Basic Law, the Federal Labour Court is established under the by the Federation of Supreme Federal Courts.²⁸⁵ Appeals from the Federal labour Court are heard at the Federal Supreme Courts. The Basic Law provides that the Judges of the Federal Labour Court are chosen by the competent Federal Minister and a Committee for the selection of judges made up of competent ministers of the Land and an equal number of members elected by the *Bundestag*.²⁸⁶ In the interest of preserving the uniformity of decisions in the Federal Labour Court, a joint chamber of court shall be established.²⁸⁷

4.4.2 Mechanisms for the Resolution of Closed Shop Related Disputes

In terms of the Basic Law, the Federal Constitutional Court adjudicates over the violation of rights contained in the Basic Law. The Federal Constitutional Court considers the cases of violations of the provisions of the Basic law brought before it with the view to determine if they are rightly instituted. The Court may make an order to the effect that recourse be had to other forums, such as the Federal Labour Court before the matter can be brought before it.²⁸⁸ Thus the Federal Constitutional Court can order that a party bringing a matter before it first exhaust all the local remedies. The Federal Constitutional Court may provide for the alternative procedures and mechanisms that are to be followed to have the matter resolved. The Federal Constitutional

²⁸³ Liliane J *op cit*

²⁸⁴ *Ibid*

²⁸⁵ Article 95 (1)

²⁸⁶ Article 95 (2)

²⁸⁷ Article 95 (3)

²⁸⁸ Article 94 (2)

Court can declare the acts or agreements that impair the alleged violation of the rights contained in the Basic Law null and void and measures directed to the undesired end unlawful.²⁸⁹

In terms of the Protection Against Dismissals Act, an employee who wishes to contest the fairness of his/her dismissal, particularly one based on the violation of the right to freedom of association, must lodge his/her claim with the Federal Labour Court within a period of three weeks from the time they became aware of the dismissal, which ordinarily is the time they received the notice of termination of their employment.²⁹⁰ The German Federal Labour Court has the power to grant an order of reinstatement into the old job with back payment to the date of dismissal or compensation where the relationship between the employer and the employee has broken down beyond rehabilitation and it is unlikely that they can ever work together again.²⁹¹

The maximum amount of compensation differs according to the employees' period of service. For employees under the age of 55 year they are to be paid one month pay per each month of service with a maximum of 12 months while employees above 55 years of age with 20 years of service or more are to be paid one month pay per each month of service with a maximum of 18 months.²⁹² Legal representation is allowed in both the proceedings before the Federal Labour Court and the Federal Constitutional Court as it in the South Africa Labour Court and Labour Appeal Court.

From the foregoing discussion, Germany is acute about the protection of its labour rights. This is apparent in the prohibition of the closed shop agreements as well as the provision of remedies against grievances based on their operation. Accordingly, Germany is able to ensure that the achievement of economic development, attainment of social justice, giving effect to labour peace and the promotion of workplace democracy are actualised with relative ease and in continuity.

²⁸⁹ Article 9 (3)

²⁹⁰ Liliane J *op cit*

²⁹¹ Forsyth A *op cit*

²⁹² Liliane J *op cit*

4.5 THE GERMAN PRACTICE IN ELIMINATING FREE RIDING FROM UNION ACTIVITIES BY NON-UNION EMPLOYEES: LESSONS FOR SOUTH AFRICA

By virtue of the Basic Law's provisioning which outlaws closed shop agreements as an infringement to the right to freedom of association, in Germany trade unions negotiation outcomes apply not only to trade union members but also to the non-union member employees.²⁹³ This has had a tremendous change to the fundamental services of trade union in that to a large extent they take the form of public goods which are non-excludable.²⁹⁴ Statistics indicate that between the years 1991 and 2000, trade unions in Germany have lost over four million of their membership.²⁹⁵ Therefore, there is still the free rider problem in Germany, although unionism is still maintained to some extent through a number of strategies which shall be discussed hereunder.

In order to address the issue of free ridding, trade unions in Germany offer selective incentives over and above the non-exclusionary benefits that tend to overflow onto non-union member employees.²⁹⁶ These selective incentives may include, though not limited to the provisioning of legal aid services and grievance procedures, accident insurances, education and further training to trade union members only.²⁹⁷ These incentives tend to serve as a form of social security measures for union-member employees and they are solely intended to encourage and entice employees to both join and retain their union membership.²⁹⁸ They provide employee union-members with greater job security, more than they do to non-union members, in the form of reduced possibility of dismissal particularly due to reasons other than redundancy.²⁹⁹ In order to befit the purpose of encouragement and enticement, these incentives may be offered at no extra cost to the monthly trade union subscription fees payable by employee members or at a very minimal extra cost.

²⁹³ Fitzenberger B et al "The Erosion of Union Membership in Germany: Determinants, Densities, Decomposition" available at www.ftip.iza.org/dp2193.pdf (accessed on the 27th August 2008)

²⁹⁴ *Ibid*

²⁹⁵ Goerke L and Punnenburg M *op cit*

²⁹⁶ Fitzenberger B et al *op cit*

²⁹⁷ *Ibid*. Also see Goerke L and Punnenburg M *op cit*

²⁹⁸ Olivier M. P and Potgieter O *op cit*. However, this is closely regulated so as not to result in undue influence which is prohibited. See *BAG Supra*.

²⁹⁹ Schnabel C and Wagner J "Determinants of Trade Union Membership in West Germany: Evidence from Micro Data" Available at www.ftip.iza.org/RePec/Discussionpaper/dp708/pfd (Accessed on 27th August 2008)

Three of the major union in Germany, namely the German Metal Works, the IG Metall and the Steel Company, have put in place measures that have proved a success in the elimination of free riding in Germany.³⁰⁰ The German Metal Workers is one union that has been greatly affected by union-membership decline and free riding. In order to stop this trend from continuing, it has introduced a system called the *premium system* that is aimed at making its membership attractive by offering selective incentives to union members only as a result of this system it was able to attract new membership. The IG Metall is another union which made use of the *premium system* by negotiating with the employer on behalf of its members longer working hours in exchange for special dismissal protection limited only to its members. Another union is the Steel Company which negotiated a supplementary grant for its members in exclusion of the non-union member employees.

Further, trade unions in Germany allow for workers to maintain their trade union membership even when they are no longer working.³⁰¹ Therefore, all employees who have lost employment for whatever reason are allowed to remain union members even if they are unable to pay their monthly union subscription fees. This implies that trade union services that are normally afforded to union members only, are still extended to these unemployed workers to guard against their free-riding when they have again secured employment.

Furthermore, some of the trade unions have reduced their monthly trade union subscription fees.³⁰² This has been done out of the realisation that heavy trade union subscription fees are a contributing factor towards the decline in trade union membership which accounts largely for employee free-riding. This strategy helps to entice employees to join trade unions, particularly due to the selective incentives that derive from trade union-membership. This reduction in trade union monthly subscription fees makes the provisioning of trade union incentives seem affordable and proportional to the costs they carry.

Through the approach employed by the German trade unions to address the problem of free riding it is clear that, much attention is given to the individual rights of workers unlike in South

³⁰⁰ Lesch H "Premium System for Union Members in Metal Working" available at www.eurofound.europa.eu/eiro/2005/09/feature/de059106f.htm (accessed on 28th August 2008). The author describes the Premium System to involve the offering of personal services such as legal services to union members at no extra cost at all.

³⁰¹ Goerke L and Punnenburg M *op cit*

³⁰² Schnabel C and Wagner J *op cit*

Africa where the current labour legislations is pro collective rights.³⁰³ The worker's individual rights are protected to the extent that though unions are allowed to offer incentives to entice and attract workers into their membership, but such should not be such a manner that it induces an undue influence on the workers by stir up feelings of duress to join union membership.³⁰⁴

In this way, the German system of dealing with free riding is able to escape the tribulations facing South Africa due to its collective rights based approach. By focusing on the individual rights, the German system is able to protect the individual right to freedom of association both in the positive and negative³⁰⁵ of every individual worker. Consequently, workers can and are able to advance their economic development in that job acquisition is not dependant on the preconditions to join union membership.

Further, workers operate within an environment that they can influence whose existence depends upon their continued membership, which membership is solely their own determination. Furthermore, opportunities are scattered with the view to attract and entice workers to make union membership and this makes them equally accessible to all workers. Lastly, because trade unions need to maintain their membership to exist, they have consider, promote and protect the diverse views of workers with the view eliminate the possibilities of tensions which may lead to industrial disputes that can drive away workers from union membership.

4.6 CHAPTER CONCLUSION

In conclusion, the free riding phenomenon is of great concern in many counties irrespective of their level of economic development. Germany, in as much as South Africa, is no exception to this problem and as such it has put in place a number of measures that guard against same from continuing. While it seeks to achieve this task through its national laws, it must do so in compliance with the dictates of all it's the international and regional obligations. In terms of its international obligations, particularly under the ILO and the EU it has an option to either address the free rider problem through the application of closed shop agreements as both neither prohibit nor expressly allow for the application of same. The same opportunity to make an election of this kind was also available to South Africa which nevertheless elected to permit the operation of closed shop agreements within its industrial relations system under both pressure and influence from the major trade unions in the country.

³⁰³ LRA 66 of 1995 as amended, which is largely concerned with the collective rights.

³⁰⁴ Oliver MP *op cit*

³⁰⁵ The right to join and not to join a trade union.

However, Germany under influence to a certain extent of the interpretations found in the decision of the ECHR has outlawed closed shop agreements and in so doing it has taken its stance as far as they are concerned. This stance has been reinforced by the total prohibition of the operation of closed shop agreements in its Basic law as well as the availability of recourse to remedies for workers who are victims of the operation of the closed shop phenomenon. In the place of the closed shop agreements which are operative in many countries including South Africa, Germany relies on the method of enticing and attracting the workers to join trade unions.

Germany puts more priority on the rights of workers as individuals rather than as a collective. It is thus able to deal with its free riding issues without compromising the advancement of economic development, the promotion of social justice, labour peace and workplace democracy all of which are rights of workers and key pillars to a stable industrial relations system. Clearly, Germany deals with the issue of free riding from the perspective of an error in management of union affairs and as such attempts to correct the mismanagement. This strategy has by and large proved a success as many trade unions continue to exist with increasing membership.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The elimination of free riding and the protection of labour rights is the concern of every labour relations system. There are a number of means and methods that deal with free riding while ensuring the protection of labour rights. Some jurisdictions use closed shop agreements while others employ other means. The cases of South Africa and Germany serve exemplar to this. Germany has prohibited closed shop agreements and relies on the system of enticements to the employees to join unions while South Africa relies on the closed shop agreements.

An attempt is made to make concluding remarks on the findings about the impact of the application of closed shop on the purposes of the South African LRA in their application to rid off free riding from union activities by employees' non-union members. In order to achieve this, the findings are discussed under different headings namely, the Conceptual and legal framework; Analysis of the Application of Closed Shop Agreements in South Africa; and A Comparative Evaluation of the Application of Closed Shop Agreements: The South African and German Perspectives. Recommendations are also proffered towards the elimination of free riding from union activities without a negation of the labour rights contained in the LRA as its main purposes.

5.2 FINDINGS

5.2.1 The Conceptual and Legal Framework

Closed shop agreements are a form of union security arrangements intended to eliminate the occurrence of free riding from union activities. Their earlier traces in South Africa can be traced as far back as the last quarter of the 19th century. They were used to advance the policies of the then apartheid government to reserve certain categories of jobs mainly for the white workers as well as to exclude the black workers from the industrial relations system. They have however, now come to be used to serve their intended purposes among which is to rid off free riding from union activities by non-union members in the South African industrial relations.

Their current application and operation in South Africa under the democratic dispensation has coincided with the new government's policies which are intended to redress the ills of the past on the black South African workers. These policies include advancing economic development, social justice, labour peace and the promotion of workplace democracy. These policies have

been incorporated into the LRA in its preamble as the main purposes and they have thus become the main workers rights which require enormous promotion and protection. The inclusion of these rights in the preamble of the LRA is indicative of the importance and the high esteem with which they are taken. As a result, these rights must be afforded to every individual worker to achieve maximum protection and promotion and consequently the effectiveness of the LRA.

5.2.2 Analysis of the Application of Closed Shop Agreements in South Africa

The concurrence of the application of the closed shop agreements in the South African labour relations with the incorporation of these workers rights into the LRA has devastating effects on the purposes of the LRA. The devastation evolves from the fact that the provisioning for closed shop agreements has proved to be an exercise that negates the provisioning for these workers rights and consequently the purposes of the LRA thus rendering the Act redundant and baseless. These agreements place the rights of the workers as a collective at the front thereby ignoring the individual rights of workers.

The purposes of the LRA require that employees must have the right to easy access to employment opportunities and to job security. These rights entail elimination of practices and policies that hinder employment acquisition as well as those that make termination of employment easy. Therefore, termination of employment must be restricted to the internationally acceptable dismissal grounds contained in the ILO standards namely, conduct, capacity and operational requirements. The closed shop practice, on the contrary, extends the grounds of dismissal to include dismissal based on refusal to join union membership, refusal to accept membership request as well as expulsion from union membership.

According to the closed shop practice, a trade union party to the closed shop agreement has the power and authority to compel employees to join union membership, to refuse union membership and to expel an employee from union membership. The effect of the extension of the grounds for dismissal is to expose workers to loss of employment thereby increasing the probabilities of violation of the workers rights to job security. The probabilities of the violation is fortified by the fact that the closed shop practice leaves upon unions to determine the grounds for refusal of union membership as well as expulsion by their mere inclusion into a union's constitution. Thus the practice of closed shops is a system that encourages policies and practices that pose threat to the worker's right to retention of jobs.

While it is acknowledged that employees must be afforded job security, the LRA provides for their right to social justice with entails the right to a fair and equitable distribution of advantages and disadvantages within the workplace. The acquisition and continuous provision of the right to social justice depends on the acquisition of the right to economic development. The dependency arises from the fact that to qualify for the right to social justice, a worker must first be part of the labour force. The right to social justice requires the elimination of policies and practices that call for the distribution of advantages and disadvantages in a single directional manner. For social justice to prevail, advantages and disadvantages must be spread in a multidirectional manner to affect every employee similarly.

The closed shop practice counteracts the objectives of the right to social justice. The practice allows for the single directional distribution of both advantages and disadvantages towards unions and non-union employees respectively. Therefore, while trade unions stand to enjoy the advantages, the disadvantages of industrial relations are swayed towards the employee non-union members. The closed shop practice confers on unions the power to compel employees to join union membership, to refuse employees union membership as well as to expel them from union membership with the resultant of loss of employment. Therefore the closed shop practice extends advantages to unions at the disadvantage to non-union employees. The practice vests the power to determine the fate of employees on the unions within the bargaining unit in which the agreements are in place.

With the achievement of fairness and equity in the distribution of both advantages and disadvantages in the workplace, workers also have the right to labour peace in term of the LRA. The right to labour peace insists on the elimination of workplace tensions through harmonisation of divergent interest between and amongst workers and employers alike. For both the elimination of workplace tensions and harmonisation of divergent interests of both workers and employers, both between and amongst themselves, to be achieved it is necessary to consider with the view to incorporate such diverse interests in subsequent actions. As a result, the achievement of labour peace is not limited to consideration but also incorporation of diverse interests in the successive undertakings.

Conversely, the closed shop practice discourages both the elimination of workplace tensions as well as incorporation of diverse interests of worker in the union's successive undertakings. The practice of closed shop agreements is based on the imposition of the will of the might over the weak. The closed shop practice's bestowal of the power to compel employees into union

membership, to refuse employees union membership and to expel employees from union membership offsets the objectives of the right to labour peace. Compulsion and unilateral determination by employers regarding union membership are all the ingredients of industrial tensions which cannot co-exist with labour peace.

Where tension is minimal, it is possible to achieve a democracy. The LRA provides for the right of workers to workplace democracy as one of its main purposes. Workplace democracy requires that employees be given the opportunity to partake in industrial activities and to be able to influence the determinations of issues that affect them in the workplace. Thus workplace democracy necessitates the involvement of workers in the processes leading to decisions that affect them and the actual ability to have an effect on the resolutions reached. Therefore, any policy or action that is contrary to the objectives of workplace democracy negates the purport of the LRA.

Counter to the objectives of workplace democracy the closed shop practice hinders the promotion and protection of the workers democratic rights in the workplace. The closed shop practice relegates the protection afforded to workers to a mere formality as opposed to real protection. The practice inhibits the ability of workers to make a choice of unions, thus exercise their right to workplace democracy, to represent their interests through compulsion, unilateral determination of membership to the representative union in the bargaining unit concerned with the threat of loss of employment.

5.2.3 A Comparative Evaluation of the Application of Closed Shop Agreements: The South African and German Perspectives

Taking cognisance of these outcomes of the operation of closed shop agreements and with due consideration of the interpretations of the ILO in conjunction with the EU legal instruments, Germany has outlawed the closed shop practice. This stance has been concretised by the total prohibition of the operation of closed shop agreements in its Basic law as well as the availability of recourse to remedies for workers who are victims of the operation of the closed shop phenomenon in the Protection Against Dismissals Act. From the German's perspective, free riding is an existing phenomenon that requires attention, although in dealing with it, the right to freedom of association must be safeguarded at all times in all aspects.

Unlike South Africa, Germany provides for the right to freedom of association both in the positive and negative. This is to include the rights of workers to form and join organisations of

their choice without undue interference for authorities as well as the right to be free from association. For South Africa, the workers' right to freedom of association is protected only in the native as they cannot claim the protection of this right not to join union membership in the impending compulsion from unions to join as well as the refusal and expulsion from union membership with consequential loss of employment. The protection of the worker's rights to freedom of association in the negative is indicative of the individualist approach of the German system in safeguarding worker's interests.

This individualist approach towards the protection of right of workers in Germany is responsible for the demise of the closed shop practice. Therefore, unions in Germany have had to seek alternative arrangements to address the free riding issues without emasculating the rights of workers which emanate from the exercise of the right to freedom of association. Through the protection of the right to freedom of association and the prohibition of the closed shop practice, workers are able to enjoy their rights to economic development, social justice, labour peace and workplace democracy, which South African workers do not have the courtesy to enjoy. Workers cannot be compelled to join unions as the decisions to join unions rest with individual workers.

Based on the sky-scraping protection on the right to freedom of association, rather than relying on closed shop agreements to rid off free riding, Germany relies on the method of enticing and attracting the workers to join trade unions. It is able to deal with its free riding issues without compromising the advancement of economic development, the promotion of social justice, labour peace and workplace democracy all of which are key pillars to a stable industrial relations system. Clearly, Germany deals with the issue of free riding from the perspective of an error in management of union affairs and as such attempts to correct the mismanagement. This strategy has by and large proved a success as many trade unions continue to exist with increasing membership.

5.3 GENERAL CONCLUSION

From the foregoing findings, the South African legislation fails dismally protect and promote the purpose of the LRA contained in section 1 of the Act, namely the achievement of economic development, attainment of social justice, giving effect to labour peace and the promotion of workplace democracy. The findings have proved that the application of closed shop agreements results in loss of employment, the promotion of favouritism in the distribution of both advantages and disadvantages in the workplace which results in the instigation of labour

divisions and the consequent tensions while employees are also disarmed of their ability to influence workplace activities.

All of these above result in the negation not only of the purposes of the LRA but also the undue limitation of the exercise of the rights of workers contained the Act as its purposes. From the analysis, these rights are clearly intertwined, thus the negation of one particular right has a bearing on all other rights. The uneven distribution of advantages and disadvantages concentrates on certain categories of employees thus limiting the ability of all employees to influence workplace activities resulting in labour divisions and vice versa. As a result, there is evidence of the absence and lack of sufficient protection and promotion of the workers rights in South Africa. These rights are violated through the operation of closed shop agreements in an effort to rid off free riding by non-union members from union activities.

However, Germany has proved successful in the recognition, protection and the promotion of these rights. Much of the success has come from the individualist approach adopted under the German legal system in which great emphasis is placed on the protection of individual rights. The Basic law serves as one of the examples as it affords protection against individuals' right to both the positive and negative right to freedom of association., Thus due to the successes of the German system towards the elimination of free riding whilst protecting labour rights, south Africa can learn and adopt the German practices as will be recommended, to enhance its own labour relation system in the succeeding caption.

5.3 RECOMMENDATIONS

There are a number of strategies that can be employed to deal with free riding in South Africa without negating the spirit and purport of the LRA and Germany, serves as testimony to this. Clearly, closed shop agreements have proved not to be the best strategy as they tend to create other social and economic problems in the workplace. In order to address free riding while at the same time protecting and promoting the workers rights contained in the purpose of the LRA, the following recommendations are proffered.

South Africa must adopt the German exemplar and eliminate the closed shop practice. The closed shop agreements operation must be discontinued primarily because the closed shop practice is based on the protection and promotion of collective rights as a primary concern. This is accounted for by the heavy focus and protection that is extended to employees as a collective through trade unions which to the large extend is to the prejudice of individual labour rights.

Consequently, the closed shop practice fricas the spirit and purport of the LRA which is based, to the contrary, on both the protection and promotion of individual labour rights. The individuality approach in the affording labour rights in South Africa derives from its peculiar history in which individual labour rights were violated whose only redress insists on individual protection of labour rights.

Further, the closed shop practice should be abolished on the ground that the LRA provides for the application of one of the union security arrangements namely the agency shop agreements. The agency shop agreements equally address the problem of free union riding by requiring employees who are non union members to pay a certain agency fee monthly in return for both the non-excludable benefits that they derive from union activities as well as their freedom not to belong to union membership.³⁰⁶ In terms of the LRA, the fees must be equal to the amount payable as subscription by the union members.

Further, section 187 of the LRA must be amended to include dismissals based on refusal by the trade union to allow an employee to join its membership, expulsion from union membership as well as refusal by employee to join union membership, automatically unfair. This amendment will mark the extension of the automatically unfair grounds for dismissal and consequently the extension of protection to employees against power and authority abuses by both unions and employers whether in concert or individually while also limiting the grounds for dismissal to those recognised under the ILO Conventions.

Although, agency agreements as criticised of breeding what is termed “forced riding” in the place of free riding, they are a diplomatic practice that is aimed at influencing non-union employees to join membership of the representative trade union in the bargaining unit workplace.³⁰⁷ The practice of agency shop agreements gives employees an opportunity to retain their employment, while giving them access to the fair and equal distribution of both the advantages and disadvantages in the workplace leading to the promotion of peaceful labour relations resulting from a fair and equal treatment of all employees. These agreements also allow for employees to freely make their selection with regard to their own union membership as well as who is best suited to represent their interests.

³⁰⁶ Act 66 of 1995, section 25

³⁰⁷ Baird C *op cit*

Further, to strengthen efforts aimed at eliminating free riding while extending protection and promotion to the purposes of the LRA and also the labour rights, the South Africa labour legislation may provide for the use of incentives to entice employee's non-union members to join into union membership. However, this practice must be carefully regulated to avoid the possibility of abuse which may carry and/or translate into undue influence or an infringement of the freedoms of the employees.

Therefore, the use of incentives must be provided for in a manner that does not affect the substance of the individual's right to freedom of association while at the same time they do not amount to discrimination of employment or workplace opportunities and benefits. An example of this may be the provisioning of legal services to union members by the unions in times of need without a further requirement of payment or at least at a low price, or maybe the extension of this service even to the family of the union member employees.

In the alternative to the proscription of closed shop agreements, their continued application must be regulated in a strict and limited manner. Section 26 (5) and (10) to (14) of the LRA should be restricted to divest the trade unions the sole power and authority to determine union membership of an employee and a trade union whose members are covered by the closed shop agreement, respectively. The determination of union membership, it being through expulsion, refusal or compulsion in terms of the Constitution of the trade union and being party to the agreement, should be subjected to affirmation by the Commissioner of the CCMA and appellable to both the Labour Court and the Labour Appeal Court in terms of chapter VII of the LRA. This practice will eliminate the possibility of engineered refusals of, expulsion from and compulsion into union membership which negatively affects all the labour rights contained in the LRA as its purposes.

In exchange for the limitation of the trade unions determination powers in respect of union membership, the refusal by a non-union employee to pay an agency fee for the non-excludable benefits should be treated as tantamount to revocation of the benefit. This may be done by amending and substituting section 26 (6) of the Act to provide for the rights of trade unions to demand the refusal of benefits from their activities to employees who are unwilling to either join union membership or to pay an agency fee. The amendment should also reflect an obligation on the part of the employer to withhold such benefits as requested by the registered representative trade union. All these should also be subject to affirmation by the Commissioner of the CCMA and appellable to the Labour Court and the Labour Appeal Court.

Consequently, the amended section 26 (6) should establish and regulate the occurrence of exceptional circumstances under which the distribution of benefits may be discriminated. An arrangement of this nature will also guarantee the protection of employees, who do not wish to associate or to be associated with registered and representative trade unions, against trade union activities which impose a burden rather than a benefit. The protection will derive from the fact that forfeiture of benefits includes both positive and negative benefits that derive from the registered and representative trade union activities. The proposed amendment will also eliminated the need for the special protection that is currently extended to the conscientious objectors as well as employees who were in employment prior to the coming in to operation of closed shop agreements.

Section 26 (9) which entirely places focus on the remedial procedures in respect of dismissals due to refusal of union membership, expulsion as well as the refusal to submit to compulsion to union membership should be amended and substituted with provisions for remedial procedures in respect of alleged unfair discrimination of benefits. With the eradication of the employers obligation and powers to terminate employment on the basis of the closed shop agreements activities, the current section 26 (9) is obsolete. The amended section will serve as a system of checks and balances against the fairness of the discrimination of both the positive and negative benefits that derive from a registered and representative trade union within the bargaining unit of a workplace.

Further, the political orientation of the trade unions is another factor that needs to be considered.³⁰⁸ Trade unions must be politically neutral and divorce their activities from those political in nature so as not to appear to belong or to side with a particular political party. This means that affiliation with political parties must cease to exist as it discourages employees who may wish to join into union membership but are discouraged due to political ties of trade union. Therefore, COSATU being one of the largest trade unions must disaffiliate and withdraw from political affinity so that it can attract all employees from across all political parties following.

To guard against the decline in union membership, the trade unions must keep or allow workers who are temporarily out of employment to maintain their union membership. During the period of the unemployment, these workers must continue to benefit from the union activities. This will act as an incentive for them to maintain their membership as well to attract new employees to

³⁰⁸ Schnabel C and Wagner J on cit

join. This strategy imposes a social obligation and allegiance on the employees particularly those who benefited from unions during their period of unemployment to maintain their membership in future when they attain employment.

The successful of the adoption and application of these recommendations depends on the will as well as the perceptions of all the stakeholders and not the legislature alone. These recommendations are not guaranteed to succeed but are rather a reasonable way in an attempt to secure the promotion and protection of the purposes of the LRA, hence the workers rights, while free riding from union activities is also eliminated.

BIBLIOGRAPHY

Primary Sources

International Instruments

ILO Convention 87 of 1948 on Freedom of Association and Protection of the Rights to Organise

ILO Convention 98 of 1949 on the Application of the Principles of the Right to Organise and Bargain Collectively

European Union Instruments

European Community Charter of the Fundamental Social Rights of Workers 1989

European Human Rights Conventions 1951

European Social Charter 1961

African instruments:

The African Charter on Human and Peoples Rights of 1981

German instruments

Basic Law 1949

Protection Against Dismissals Act 1969

South Africa Statutes:

Constitution of South Africa Act 108 of 1996 as amended

Education Labour Relations Act 146 of 1993

Government Notice R1329GG 7103 of the 27th June 1980

Interim Constitution of South Africa Act 200 of 1993

Labour Relations Amendment Act 83 of 1988

Labour Relations Amendment Act of 1991

Labour Relations Act 66 of 1995 as amended

Labour Relations Act 83 of 1988

Labour Relations Amendment Act of 1991

Labour Relations Act 66 of 1995 as amended

Public Service Labour Relations Act 102 of 1993

International Cases:

BAG (1968) NJW 1903

Chaeall v. United Kingdom 10550 of 1983

Sigurbur Sigurjonssons v. Iceland (1993) ECHR

Sorensen and Rasmussen v. Denmark 5262/99 & 52629 (ECHR).

Young, James and Webster v. The United Kingdom 1981 ECHR

South African Cases:

ACTWUSA v. Veldspun (Pty) Ltd 1994 (1) SA 162 (A)

ACTWUSA v. Veldspun Case 97/1992 (SCA)

ACTWUSA v. Veldspun (1991) 1 SA 162 (A).

AngloGold Health Service Centre (Pty) Ltd v. The National Union of Mineworkers and Others J1143/1999 (LC)

BAMCWU V. Linfries Timbercity Jutastat, NW 18491, 29th January 2001

Bargaining Council for the Clothing Industry v. Confederation of Employers of Southern Africa & Others (1998) 19 ILJ 1458 (LC)

Black Allied Workers union and Others v. Asoka Hotel (1989) 10 ILJ 167 (IC)

BTR Industries South Africa (Pty) Ltd and Others v. Metal and Allied Workers Unions and Another (1992) (3) SA 673 (A)

Cape Local Authorities Employers Organisation v. Independent Municipal (1997) (1) SA 656 (C)

Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v. LT Cordero and Another JS546/2005 (LAC)

City of Tshwane Metropolitan Municipality v. Campanella NO & Others (2004) BLLR 1 (LAC)

Fidelity Guards Holdings (Pty) Ltd v. EPSTEIN L. M N. O and others DA 25/99 (LAC)

FOODGRO v. Keil (1999) 20 ILJ 2521 (LAC) at 2524

Great North Transport v. TAWU (1998) BALR 470 (IMMSA)

Kylie v. CCMA and Others C52/2007 (LC)

Mazibuko and Others v. Mooi River Textiles Ltd (1989) 10 ILJ 875 (IC)

Media Workers Association of South Africa and Others v. Die Morester and Noord-Transvaal (EDMS) Bpk, Pietersburg (1990) 11 ILJ 703 (IC)

NAAWU v. Borg-Warner SA (Pty) (Ltd) (1994) ILJ 509 (A)

National Education Health and Allied Workers Union v. University of Cape Town and others (2003) 3 SA 1 (CC) at 18

National Entitled Workers Union v. Sithole and Others (2004) 25 ILJ 2201 LAC.

National Union of Metal Workers of South Africa v. The Persons listed in Annexure "A" and another (2002) 23 ILJ 895 (LAC)

NEHAWU v. UCT and Others 2003 (3) SA 1 (CC)

Netherburn Engineering CC t/a Netherburn Ceramics v. Mudau & Others (2003) 24 ILJ 1712 (LC)

North Transport v. TAWU (1998) BALR 470

Ntombela v. Herridge Hire & Haul CC & Another (1999) 3 BLLR 253 (LC)

NUMSA & Others v. Fry's Metal (Pty) Ltd (2005) ILJ 2156 (LAC)

Ralph Joey Langeveldt v. Vryburg Transnational Local Council and Others JA21/00 (LC)

S. v. Solberg (1997) (4) SA 1176 (CC)

S. v. Universal Iron and Steel Foundries (Pty) Ltd 1971 (4) SA 355 (A)

SACTWU and others v. Novel Spinners (Pty) Ltd C257/1998 (LC)

SATAWU v. North West Star (2008) 29 ILJ 224 (BCA).

South African Chemical Workers Union and Others v. Storm Plastics (Pty) Ltd (1993) 14 ILJ 367 (LAC)

Taylor v. Kurtstag NO and Others (2004) (4) ALLSA 317 (W)

Theron v. Food Allied Workers Unions (1997) ILJ 1046 (LC)

Tyler v. Donaldson Filtration Systems (Pty) Ltd (1999) 4 LLD 125 (LC)

Veldspun c ACTWUSA 1990 (4) SA 98 (SE)

Veldspun (Pty) Ltd v. ACTWUSA and Another No (1992) (3) SA 880 (SE)

Wanenburg v. Motor Industry Bargaining Council (2001) ILJ 242 (LC)

Wittman v. Deutscher Schulverein, Pretoria (1999) (1) BCLR 92 (T)

Secondary Sources:

Textbooks:

Carrel M and Heavrin C. (6th Ed) (2001) *Labour Relations and Collective Bargaining*. New Jersey: Prentice Hall

Cheadle H *et al* (1998) *Current Labour Law 1998*. Juta & Co: Cape Town

Lanclis H (2nd Ed) (2005) *Employment and the Law: A Practical Guide for the Workplace*. Cape Town: Juta & Co.

Christianson M *et al* (2000) (2ⁿ Ed) *Essential Labour Law* Labour Law Publications: Cape Town

Davies D et al (1997) *Fundamental rights in the Constitution: Commentary and Cases*. Juta & Co: Cape Town

Du Plessis J. V et al (2006) (6th Ed) *A Practical Guide to Labour law* Butterworth's Durban

Du Toit D et al (2006) (5th Ed) *"Labour Relations Law: A Comprehensive Guide* Lexis Nexis Butterworth's: Durban

Grogan J (2007) (9th Ed) *Workplace Law* Juta & Co.: Cape Town

Olivier M. P et al (2005) *Introduction to Social Security Law* Lexis Nexis Butterworth's: Durban

Van Rensburg Finnemore (2001) *Contemporary Labour Relations* Butterworth's: Durban

De Waal J and Currie I (5th Ed) (2005) *The Bill of Rights Handbook*. Juta & Co: Cape Town

Articles:

Albertyn C. S., "Freedom of Association and the Morality of the Closed Shop." 1989, Vol. 10, *ILJ* 98

Benjamin P and Cooper C "Innovations and Continuity: Responding to the Labour Relations Bill" (1995) 16 *ILJ* 258 (A)

Brand J et al., "Opening the Doors of the Closed Shop." 1991 Vol. 7, Issue 4, *Employment Law Journal*, 73

Brand J et al., "The Closed Shop and Fairness." 1991. Vol. 7, Issue 4. *Employment Law Journal* 74-77

Burns Y., "Freedom of Association and the Right to Fair Labour Practice and Collective Bargaining in the Defence Force." 1994 (19) *African Defence Review*

Emslie T. S., (1980) *The Incidence and effects of the closed Shop in South Africa With Particular Reference to the Diamond Cutting Industry*. A Dissertation submitted in fulfillment of an MBA Degree. UCT.

Landman A. A., "Statutory Inroads into a Trade Union's Rights of Disassociation." 1997 Vol. 18, *ILJ* 22

Le Roux P. A. K "The Closed Shop and the Industrial Conciliation Act" (1980) 2 *Modern Business Law* 69

Olivier M., "Managing Employment Relations in South Africa"

Olivier M. P "Social Protection in SADC: Developing an Integrated and Inclusive Framework – A rights-based Perspective" in Olivier M. P and Kalula ER *Social Protection in SADC: Developing and Integrated and Inclusive Framework* (CICLASS & Institute of Development and Labour Law, 2004) 21-70

Olivier M. P and Potgieter O., "The Right to Associate Freely and the Closed Shop." 1994 (2) *TSAR* 289-305

Olivier M. P and Potgieter O., *"The Right to Associate Freely and the Closed Shop."* 1994 (3) TSAR 443-469

Website/Internet Sources:

"1994, Freedom of association and collective bargaining: Right of workers and employers to establish and join organizations" available at

http://training.itcilo.it/ILS/foa/library/general_surveys_en/25943.htm (accessed on 21 April 2008)

"Affiliation" available at <http://en.wikipedia.org/wiki/Affiliation> (accessed on 19th August 2008)

Baird C *"Permissible Uses of Forced Union Dues: From Hanson to Beck"* available at

<http://www.cato.org/pubs/pas/pa-174.html> (accessed on 19th August 2008)

Beaumont M *"Agency Shop and Closed shop agreements"* available at

www.butterworths.nwu.ac.za/ntx/gateway (accessed on 16th October 2008)

Bhoola U *"National Labour Law Profile: Republic of South Africa"* available at

www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm (accessed on 27th August 2008).

Burns Y., *"Freedom of Association and the Right to Fair labour Practice and Collective Bargaining in the Defence Force."* 1994 (19) *African Defence Review*. Available at www.issafrica.org (accessed on the 15th April 2008)

Carsten J *"ECHR Rules Against Closed Shop Agreements"* available at

www.eurofound.europa.eu/eiro/2006/01/feature/dk601104f.htm (accessed on 27th August 2008)

"Closed Shop Clauses in Germany" available at

www.eurofind.europa.eu/emere/Germany/Closed_Shop_Clauses_De.htm. (Accessed on 27th August 2008)

"Confederation of South Africa Workers Union Policies." Available at www.consawu.co.za (accessed on the 9th April 2008)

"Conscientious objector" available at

http://www.labour.gov.za/basic_guides/bgguide_display.jsp?id=5893 (accessed on 19th August 2008).

Cordova E and Ozaki M *"Union Security Arrangements: An International Overview"* (1980)

Vol. 119, No. 1, *International Labour Review* 19. Available at

<http://web.ebscohost.com/ehost/pdf?vid=2&hid=115&sid=1783dba8-92d5-45be-bb1b-95285df2eca7%40sessionmgr104> (accessed on 19th August 2008)

Cradden C., *"The Free Rider Problem."* 2004. Labour and Policy Business Research 1-8 available at www.conorcradden.com (accessed on the 9th April 2008)

Dribbucsh H *"Laws on Protection Against Dismissals and Unemployment Amended"* available at www.eurofound.europa.eu/eiro/2004/01/feature/de041205f.htm (accessed on 28th August 2008)

Drzenczewski A and Wooldridge F *"Closed Shop Case in Strasbourg"* (1982) vol. 31 International and Comparative Law Quarterly. 396 available at www.jstor.org/stable/759140 (Accessed on 30th July 2008)

Du Tiot D and Potgieter M *"Labour and the Bill of Rights"* available at www.butterworths.nwu.ac.za/nxt/gateway (acceded on 16th October 2008)

"Economic Development" available at www.en.wikipedia.org/wiki/Economic_Development (accessed on 30th October 2008).

"Economic Development" available at www.urbanplan.org/UP_Glossary/UP_Glossary.html (accessed on 30th October 2008)

Fitzenberger B et al *"The Erosion of Union Membership in Germany: Determinants, Densities, Decomposition"* available at www.ftp.iza.org/dp2193.pdf (accessed on the 27th August 2008)

Forsyth A *"Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries"* available at www.business.vic.gov.au/busvicwr/_asserts/main/lib60148/economic%20dismissals-artfinal.pdf (accessed on 28th August 2008)

"Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body", 4th Edition, 1996 Union security clauses (Right of workers and employers freely to establish and join organizations of their own choosing)" para 324 available in Digest of Decisions at http://training.itcilo.it/ils/foa/library/digestdecisions_en/23087.htm (accessed on the 16th October 2008)

Goerke L and Punnenburg M *"Norm Based Trade Union Membership: Evidence for Germany"* available at www.ftp.iza.org/dp962.pdf (Accessed on the 27th August 2008)

Gopalakrishnan R *"Freedom of association and collective bargaining in export processing zones: the role of ILO supervisory mechanisms"* International Labour Office Geneva (2007) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087917.pdf (accessed on 19th August 2008)
<http://en.wikipedia.org/wiki/Globalization> (accessed on 25th August 2008)

Lesch H *"Premium System for Union Members in Metal Working"* available at www.eurofound.europa.eu/eiro/2005/09/feature/de059106f.htm (accessed on 28th August 2008)

Liliane J “*National Labour Law Profile: Federal Republic of Germany*” available at www.ilo.org/public/english/dialogue/ifpdial/info/national/ger.htm (accessed on 27th August 2008)

“*List of Ratifications of International Labour Conventions*” available at www.webfusion.ilo.org/public/db/standards/norms/appl (accessed on 19th August 2008)

Olivier M., “*Reshaping the Private and Public Employment in South Africa: The Impact of the Constitution and the Bill of Rights.*” 2005. Conference paper presented on the 8th to 10th March 2005 at Stellenbosch South Africa. 1-20. available at www.law.sun.ac.za (accessed on the 15th April 2008)

Petersen K. F. V “*The Practice of Closed Shop Agreements under Pressure*” Available at www.eurofound.europa.eu/eiro/1998/02/feature/dk9802153f.htm (accessed o 27th August 2008)

“*Ratification of Fundamental Human Rights Conventions by Country*” available at www.ilo.org/ILOLEX/English/Docs/declwrld.htm (accessed on 25 August 2007)

Schnabel C and Wagner J “*Determinants of Trade Union Membership in West Germany: Evidence from Micro Data*” Available at www.ftp.iza.org/RePec/Discussionpapper/dp708/pfd (Accessed on 27th August 2008)

“*Union Security Arrangements*” available at http://www.capegateway.gov.za/Text/2004/4/know_your_lra_chap4.pdf (accessed on 19th Augusts 2008)

Victor B and King R “*Agency chop and closed shop agreements*” available at [http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu), (accessed on 14th October 2008)

www.lanecountry.org/CAO_EconDev/Glossary.htm (Accessed on 24th July 2008)

www.museumsgallariesscotland.org.uk/about/glossary_Hens/s.asp (Accessed on 24th July 2008)

www.usnews.com/articles/bussiness/carrests/2008/04/24/why-workplace-democracy-can-be-good-in-bussiness.html (Accessed on 24th July 2008)