By Christopher Albertyn, labour lawyer

Many employers are facing a situation of actual or potential conflict on the shop floor between the members of competing unions. In certain industries governed by industrial councils, this conflict may be between long-established unions which have secured preferential rights through closed shop agreements and younger emergent unions which enjoy majority support among employees. Ultimately the employers concerned have to make a choice between the claims of the competing unions – a choice which if incorrectly made might ramify to their disadvantage.

Christopher Albertyn gives the background to the peculiarly South African twist to the closed shop question, and provides a framework in terms of which a fair application of the closed shop principle may be ensured.

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Many of the South African unions which enjoy closed shop agreements were, until recently, racially exclusive organisations.

Employers in certain industries governed by industrial councils are being forced to choose between two conflicting trade union principles:

- the union which enjoys majority support among the employees should be recognised as the collective bargaining representative of those employees
- unions which have secured preferential rights or rights to some form of closed shop should be protected.

Advantages of the Closed Shop

The justification for a closed shop agreement is that all who benefit from the intercession of the trade union should be obliged to contribute to it. No person should be able to benefit from the collective bargaining activity of the union without sharing the burdens of maintaining the union. There are certain practical advantages which usually stem from closed shop arrangements with a union:

- they stabilise union membership
- they tend to reduce tension on the shop floor (e.g. between union members and non-members)
- the union is able to speak on behalf of all the workers
- the struggle between militant and non-militant workers is removed from the workplace into the union meeting
- it militates against the proliferation of rival unions.

Disadvantages of the Closed Shop

There are certain disadvantages of closed shop agreements. Certain workers, obliged to be union members by the closed shop, may have no interest in the union or its activities. They may even be hostile to the union. Their membership might give a false impression of the extent of support enjoyed by the union among the employees. A union might even be unpopular among the majority of the employees concerned, yet the union would be apparently representative of those employees. A union which established its closed shop rights during a period of militancy and widespread support among workers might decades thereafter have become a dull, bureaucratic organisation with little knowledge of the demands and concerns of its members.

The South African Version

In South Africa these disadvantages are compounded by the fact that many of the unions which enjoy closed shop agreements...
were, until recently, racially exclusive organisations. Only in the few years since the post-Wiehahn amendments to the Labour Relations Act have they admitted African workers to their ranks. Often this has been done without physically signing the new members into the union (which would, at least, entail an encounter between a union official and the new members and the possibility of some confidentiality developing between them). The new members have been merely informed by notice, or by their employer, that they have become members of the closed shop union. Unions that operate in this way have given the closed shop a bad name.

The European Comparison

In Europe (excluding the United Kingdom) pre-entry closed shop agreements are not lawful. Even post-entry closed shop agreements are discouraged. The principle applied more widely in Europe is that on being employed (ie post-entry) an employee is encouraged or obliged to belong to a trade union of their choice — not a specific trade union, nor even necessarily a majority trade union.

However, in most European countries and in the United States a right to conscientious objection is recognized. If a conscientious objector genuinely and consistently has a moral or religious objection to being a member of a trade union, and an informed conscience, then he may be able to claim a right to dissociate himself from trade union membership.

Response of the Closed Shop Unions

In South Africa the application of the closed shop principle and the principle of majority unionism is complicated by the fact that formerly racially exclusive unions now find themselves to be representative of only a section of the workers in any establishment. Unions in this situation, which, in the pre-Wiehahn period established closed shop rights, have responded to the changed circumstances in one of two ways. Either they have tolerated the presence of other unions in the industry, or they have extended the closed shop provisions to all employees and thus endeavoured to resist the entry into the industry of more recently established unions, which might in fact be more representative than they are.

The Principle of Majority Unionism

The principle of majority unionism has much to commend it. The principle is that the union which enjoys support from the majority of the employees in any factory or establishment should be entitled to bargain collectively on behalf of those employees. This ensures that the union can be properly mandated by the employees to represent them, and the decisions reached between the representative union and the employer can be made effective and carried out properly. In normal circumstances the closed shop union is the majority union. However, in South Africa, due to the disjunctures that occurred as a result of the racist provisions in the law until 1981, the closed shop union is frequently not the majority union.

A typical situation of conflict in contemporary South African labour relations is between a new, progressive, non-racial union which has majority support competing with a long-established union which has relatively little contact with the mass of employees who are nominally members of the union on account of the closed shop.

In the post-Wiehahn period many closed shop unions have endeavoured to resist the entry into the industry of emergent unions which may be more representative.

The conflict between the closed shop union and the representative union can result in antagonism and disruption on the shop floor.

Faced with this choice, the employer may apply to the industrial council for an exemption from the closed shop agreement.
If exemption is refused by the industrial council, the employer may appeal to the Industrial Court.

Employers would be well advised to secure the principle of majority unionism in their factories.

The conflict between the representative union and the closed shop union can become antagonistic and can result in disruption of production, serious divisions on the shop floor, and other unacceptable developments. What should be the employer response to this situation?

Exemption from the Closed Shop

Faced with the choice between an unrepresentative closed shop union and a representative union which is not a party to the industrial council that agreed upon the closed shop provision, the employer is entitled to apply to the industrial council for an exemption from the closed shop provisions of the relevant council agreement.

Closed shop provisions usually entail a restriction on what money may be deducted from the wages of employees so that only closed shop unions are entitled to deduction of trade union dues. The provisions also usually state that the employer is only entitled to employ workers who either belong to or who join the closed shop union or unions within a specified period.

The industrial council is empowered to exempt an employer and its employees from any or all of the provisions of the council agreement. Hence the council may exempt employers and employees from the closed shop provisions of the agreement concerned.

Certain industrial councils have adopted a tolerant attitude towards such applications, and they are given almost as a matter of course. Such instances occur principally in circumstances where the closed shop union which is represented on the industrial council has decided to tolerate the emergence of other unions within the industry.

When Exemption is Refused

The problem arises where an industrial council adopts a policy to refuse to exempt any employer and that employer's employees from the closed shop provisions of the agreement in order to protect the closed shop union. What is the employer's remedy in these circumstances?

Appeal to the Industrial Court

The employer is empowered in terms of Section 51 of the Labour Relations Act, 1956, to appeal to the Industrial Court within a specified period against the decision of the council to refuse to grant the exemption sought. The Court has yet to decide the issue but at least one appeal is due to come before the Court and a decision should be made in the matter soon.

The Court is likely to weigh up the relative advantages for healthy labour relations in South Africa in deciding whether long-term industrial peace and effective collective bargaining would be better fostered by strictly applying the closed shop rules, or whether the principle of majority unionism should be allowed to predominate.

Conclusion

Whatever the outcome of the Court's decision, there can be no doubt that individual employers would be far better served both in the short and the long term if they endeavoured to secure the principle of majority unionism. Employers would be well-advised to cooperate in whatever manner they can to secure the recognition and establishment of majority unions in their factories, rather than to follow the status quo merely because certain long-established rights have afforded preference to some unions over others. The fair application of the closed shop principle is that all workers should belong to a trade union, but that the union to which they belong should be a matter of their own free choice.

The profit incentive of a business is to reward those contributing to its creation. People are our most important asset.