IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J1337/02

In the matter between:

Applicant

and

First Respondent

A Second Respondent

PERSONS LISTED IN ANNEXURE "A" TO THE NOTICE

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This application relates to a strike which commenced on 3 April 2002. The strike was in response to the applicant's decision to implement a Health Management Organisation ("HMO") instead of private medical aid for its employees, the third and further respondents with effect from 1 April 2002.

2. On 3 April 2002 the applicant approached this Court on an urgent basis for the following relief:

1. 1. "1. Dispensing with the provisions of the Rules relating to times and manner of service referred to therein and dealing with the matter as one of

urgency in terms of Rule 8 of the Labour Court Rules;

2. Ordering that a Rule Nisi do issue calling upon the respondents herein to appear and show cause on a date and time to be determined by this Honourable Court why an Order should not be granted in terms of Section 68 of the Labour Relations Act 66 of 1995 ("the Act"), in the following terms:

2. Declaring that the industrial action which the 3rd and Further Respondents ("the individual Respondents") have given notice of their intention to embark on, with effect from 06:00 on 2 April 2002 and any continuation or repetition thereof constitutes a strike as defined in section 213 of the Act which is and will continue to be unlawful and unprotected industrial action as contemplated in section 64(1)(b) of the Act ("the unprotected strike");

3. Interdicting and restraining the First and Second Respondents from promoting, inciting and instigating its members to participate in the unprotected strike;

4. Ordering that the provisions of 1 to 4 shall operate with immediate effect as an interim order pending the finalisation of this application;

5. Ordering that the costs of this application be paid by the Respondents in the event of the Respondents opposing the relief sought in this application;

6. .....

7. .....".

3. The matter came up before Landman J who granted a postponement to 9 April 2002. The respondents were directed to file their answering affidavits by 16h00

on 5 April 2002 and the applicants their reply by 16h00 on 8 April 2002. Costs were reserved.

4. The matter came up before me on 9 April 2002. I was advised by Mr Cassim who appeared for the applicant that the applicant was no longer seeking interim relief but final relief. The relief that the applicant is seeking is to have the strike declared unprotected and to interdict the first and second respondents from promoting, inciting and instigating its members to participate in the strike.

The issue in dispute

5. The issue in dispute is whether the strike that the respondents have embarked upon since 3 April 2002 is a protected one. It will be a protected strike if it is found that the applicant has unilaterally changed the conditions of employment of the individual respondents. This depends on what construction is given to the following clauses which forms part of the issue in dispute:

"Agreement of Service

7.2 The employee shall join and conform with the rules of the Pension Fund/Provident Fund or insurance arrangement or medical aid/benefit society nominated by the Company when required to do so as a condition of employment".

d in a contract of employment entered between the applicant and some individual respondents after 1994;

and

7.1 Medical Aid

7.1.1 Employees must join and conform to the rules of the relevant Medical Aid Society.

7.1.2 The Company subsidises 60% of the monthly premiums and the employee pays 40%".

This clause relates to medical aid and is part of the terms and conditions of employment of all employees of the applicant.

Background facts

6. The applicant provides beneficiation services to the platinum mines within the Anglo Platinum Group. The Anglo Platinum Group is the largest platinum producer in the world. All platinum is to be processed, together with the ancillary precious and base metals through the applicant. Several of the applicant's processes are continuous activities, and for this reason, the applicant requires its operations to run on a twenty four hours per day and seven days per week basis.

7. The applicant contended that it has entered into a standard contract of employment with each of the individual respondents in terms of which the individual respondents are obliged to join a medical aid nominated by the applicant. The medical aid schemes nominated by the applicant at the stage when the individual respondents commenced their services were the Good Hope Medical Society ("Good Hope") and the Anglo American Management Care Plan ('AACMED").

Since 1 March 2002, the applicant has nominated a Health Management Organisation ("the HMO") named Platinum Health which is owned and managed by Anglo Platinum Management Services (Pty) Limited.

8. The respondents denied that the applicant nominated the HMO named Platinum Health since 1 March 2002. The respondents contended that during February 2002 the applicant indicated that it was going to implement the new HMO with effect from 1 April 2002. The respondents denied that any nomination occurred as contemplated in clause 7.2 of annexure "PJ7." It gave an example of one Joseph Thiti ("Thiti"), a shop steward of the second respondent who when he was employed by the applicant in February 1989 signed a contract which made no mention to any obligation to join a medical aid. He has signed no contract of employment since February 1989, and stated that his conditions of employment have since then only been varied by collective agreements concluded among the first/second respondents and the applicant. Thiti when he was employed by the applicant was informed that it was a condition of his employment for him to join Good Hope. Hundreds of the applicant's current employees are in exactly the same position as he is. From 1994 the applicant required all its new employees to sign contracts of employment which differed from the one that he signed in February 1989. The other contract of employment which was signed by John Mafifi, an individual respondent on 25 March 1994 contains clause 7.2.

9. It is common cause that some discussions took place between the applicant and the respondents around the issue of them joining HMO. There is a dispute about when the discussions took place and what was discussed at those meetings. The exact nature of the discussions and the frequency thereof does not have a bearing on the issue that I am required to resolve. What is clear however is that the dispute could not be resolved. The respondents did not give their consent to joining HMO.

10. On 28 March 2002 the first and second respondents declared a dispute and referred it to the CCMA. The applicants summarised the facts of the dispute as 'unilaterally implementation of Health Management Organisation (HMO) which is a condition of employment'. The outcome that the respondents sought was for the applicant to restore the terms and conditions of the present medical aid, Good Hope.

11. After the applicant failed to restore the old medical aid, Good Hope, the respondents gave the applicant 48 hours notice that they would be embarking on a protected strike which would commence on 2 April 2002.

12. On 3 April 2002 the applicant's launched this application.

The Parties contentions

13. The applicant contended that it had entered into a standard contract of employment with those individual respondents who were employed before 1 March 2002. During the course of February 2002, the applicant entered into consultation in respect of the nominated medical aid with the third and further respondents about its intention to change the nomination of the medical aid from Good Hope alternatively ACCMED to Platinum Health. The applicant contended that upon a proper construction of clause 7.2 of the contract of employment, the individual respondents are obliged in terms of their contracts of employment to join a medical aid nominated by the applicant when required to do so by the applicant.

14. The applicants contended that the strike action was unlawful conduct in contravention of the provisions of section 64 and 68 of the Act in that there was no unilateral change in the terms and conditions of employment of the individual respondents. In terms of clause 7.2 of the contract of employment, the individual respondents are not entitled as of right to belong to a medical aid. They are obliged to belong to a medical aid provided that the applicant as an employer so determines. The capacity or ability of the applicant to change the identity of the medical aid is a right which vests in the applicant in terms of the contract of employment. The individual respondents' obligation to agree to such a change also arises from the contract of employment.

15. The applicant's contended that on a proper construction of clause 7.2 of the contract of employment, the applicant as an employer has the right to renew, cancels, or change the identity of the medical aid provider without the consent of the individual respondents. The industrial action was accordingly unlawful.

16. The respondents contended that the terms and conditions of employment were not only regulated by the individual contracts of employment but that further conditions of employment were contained in a document entitled "conditions of employment" which is the second document referred to in paragraph 5 above. The change from Good Hope to HMO will be in breach of clause 7.1.2 of the conditions of employment as HMO requires a 50/50% share in the cost of contributions between employees and employers whereas clause 7.1.2 stipulates that the employer contributes 60% to the employee's 40%.

17. The respondents contended that the attempt by the applicant to terminate the membership of those employees with Good Hope and to compel them to become members of HMO, is a change to a right vested in them in terms of their contract of employment. The issue in dispute so it was contended was a strike able issue.

Analysis of the facts and arguments raised

18. It is trite that if a final interdict is sought in motion proceedings, relief can only be obtained if a case is made out on the respondent's version together with those facts

alleged by the applicant which the respondent cannot dispute.

19. It is also trite that 'unilateral' in the context of section 64(4) of the Act does not mean 'without consultation', it means without consent.

20. There are three categories of employees employed by the applicant. The first categories of employees are those who were members of AACMED. They do not form part of the dispute. The second categories of employees are those who did not sign the terms of conditions of employment that contains clause 7.2. There are 53 individual respondents under this category. They signed contracts termed "Agreement of Service for a Black Employee" which was before 1994. These are referred to as the pre 1994 contracts. They do not contain any clauses dealing with medical aid. The third categories of employees are those who signed contracts of employment after 1994 which contains clause 7.2 of the contract of employments. There are 82 individual respondents under this category.

21. Sometimes later, it is not clear when, all employees of the applicant became members of a medical aid. The general conditions of employment contain clause 7.1.1 and 7.1.2 as referred to in paragraph 5 above. This was a term and condition of employment. It will be noted that clause 7.1.1 and 7.1.2 are materially different to clause 7.2. It will be noted that the pre 1994 employees of the applicant were not made to sign the post 1994 contracts.

22. The applicant admitted that it nominated Good Hope as the medical aid to be joined by Thiti and most of the other individual respondents upon them commencing employment with the applicant. The applicants did not dispute that there are hundreds of employees employed by the applicant who falls under the second category of employees. The applicants contended however that clause 7.2 of the standard contract of employment as read with clause 7.1.1 of the written terms and conditions of employment entitled the applicant to change the identity of the medical aid provider without obtaining the permission of the respondents. I do not agree. This is not the case which the applicant made out in its founding affidavit. It is something new which was now raised for the first time in its replying affidavit. The applicant's case in its founding affidavit is that the individual respondents signed clause 7.2 which gave it the right to choose a Medical Aid Society which does not amount to a unilateral change to the terms and conditions of employment. The applicant did not refer to the provisions of clause 7.1.1 and 7.1.2 in its founding affidavit. No facts were placed before me to indicate whether clause 7.2 was also made applicable to all the individual respondents.

23. It appears from clause 7.2 that is applicable to the third category of employees that those individual respondents who had signed the conditions of employment are obliged in terms of their contracts of employment to join a medical aid nominated

by the applicant when required to do so by the applicant. In terms of clause 7.2 of the contract of employment, the said individual respondents are not entitled as of right to belong to a medical aid. However they are obliged to belong to a medical aid provided that the applicant as an employer determines so. The capacity or ability of the applicant to change the identity of the medical aid is a right which vests in the applicant in terms of the contract of employment. Those individual respondents' obligations to agree to such a change also arise from the contract of employment. The applicant as an employer has the right to renew, cancels, or change the identity of the medical aid provider without the consent of the individual respondents who had signed clause 7.2.

24. The membership of the Good Hope Medical Aid Scheme of those employees who commenced their employment before 1994, is regulated only by clause 7.1.1 of the conditions of employment. That clause does not empower the applicant to change the medical aid society of the individual respondents without their consent. The attempt by the applicant to terminate the membership of those individual respondents with Good Hope and to compel them to become members of Platinum Health, is a change to a right vested in them in terms of their contract of employment. The applicant was required to obtain the consent of those individual respondents which it clearly failed to do. The issue in dispute between the parties is accordingly a strike able issue.

25. Mr Cassim had submitted that the strike action of the respondents was premature in that the changes were going to be brought into effect either in May or June 2002. The individual applicants could only embark on a strike thereafter. There is no merit whatsoever in this argument. The provisions of section 64(4) of the Act are quite clear. It envisages two scenarios. The first is where the employer wants to implement unilaterally changes to the terms and conditions of employment or when the employer has already implemented such changes. Once an employer has indicated that it intends to unilaterally implement changes to the terms and conditions of an employee, an employee need not wait until the changes have been implemented but can declare a dispute and refer it to the Commission or council with a demand not to implement the changes. Should the employer fail to comply nothing prevents the employee to proceed with strike action provided that it has given 48 hours notice to do so.

1. 26. It does however not follow that the third categories of employees are not permitted to take part in the strike action. I agree with the sentiments expressed in *Afrox Limited v SACWU & Others* [1997] 4 BLLR 376 (LC) AT 379 H - J:

"In my judgment once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike. Once SACWU acquired the right to call a strike against the applicant in respect of that dispute, its members who are employed by the

applicant acquired the right if called upon by SACWU to strike".

This passage was also cited with approval in *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC).

27. The applicant's application should fail.

28. I do not believe that this is a matter where costs should follow the result. I have taken into account the fact that the parties have an ongoing relationship. Both parties indicated that they wished to leave the matter of costs in my hands

29. In the circumstances it is ordered that:

1. The application is dismissed;

2. There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT

PLICANT : N CASSIM (SC) WITH VAN AS INSTRUCTED BY LEPPAN BEECH ATTORNEYS

SPONDENTS : H VAN DER RIET (SC) INSTRUCTED BY CHEADLE THOMPSON & HAYSOM INC

ARING : 9 APRIL 2002

DGMENT : 11 APRIL 2002