THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 197/16

In the matter between:

PHIL SKINNER AND 208 OTHERS **Applicants**

and

NAMPAK PRODUCTS LIMITED **First Respondent**

MAIN STREET 1301 (PTY) LTD **Second Respondent**

MAIN STREET 1310 (PTY) LTD **Third Respondent**

SACKS PACKAGING (PTY) LTD **Fourth Respondent**

Heard: **27 - 31 May 2019 (Further written submissions made on 14 June 2019)**

Delivered: **20 June 2019**

Summary: Change in provision of post-retirement medical aid (PRMA) benefits – breach of contract – interpretation of terms of the policy – exercise of discretion – whether reasonable or not. Unfair labour practice – whether committed or not - remedies. Held: (1) The claims for breach of contract as well as for unfair labour practice are dismissed. Held: (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The task to interpret a document, including a policy, remains that of the court. This matter has its genesis at the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicants referred a dispute alleging an unfair labour practice in relation to provision of benefits. It turned out at the CCMA that the dispute also involves an alleged breach of a contract of employment. By virtue of the powers bestowed on the CCMA Director in terms of section 191(6) of the Labour Relations Act[1] (LRA), the dispute was referred to this Court for adjudication. The Judge President of this Court exercising a discretion in terms of clause 11.1.2 of the Practice Manual[2] allocated the matter to me for case management. Given the number of applicants involved, the parties agreed and this Court sanctioned the agreement to separate issues with regard to the alleged unfair labour practice dispute. The Court was to adjudicate the alleged substantive unfairness aspect of the unfair labour practice dispute first.

[2] Initially, the applicants were 209 in number. This judgment only concerns 156 individuals.[3] In this referral, the applicants firstly allege that the first respondent, breached the provisions of the policy by capping their PRMA benefits. This claim was brought to this court under section 77(3) of the Basic Conditions of Employment Act[4] (BCEA). Secondly, the applicants allege that by capping the PRMA benefits and retaining the PRMA liability, the first respondent committed an unfair labour practice in relation to provision of

[1] Act 66 of 1995 as amended.
[2] April 2013.
[3] Amended annexure A to the amended statement of case.
[4] Act 75 of 1977.

benefits. Given what turned out in Court, the remaining respondents would only feature in relation to the issue of a relief, if any. The first respondent had sold portions of its business to these respondents, accordingly, the provisions of section 197 of the LRA, in particular subsections 6, 7 and 8, comes to play.

[3] On the facts, both claims – breach of contract and unfair labour practice are predicated on the same set of facts. On the contractual claim, the first respondent alleges that a term in the policy, if interpreted in its favour, entitled it to cap the benefit. To this defence, the applicants replicated by stating that the first respondent did not acquire unfettered discretion to cap. It had to act reasonably and in good faith for its exercise of discretion to be upheld by this Court. On the unfair labour practice claim, the applicants allege that the first respondent was bound to act fairly when it capped the benefit. The first respondent suggests that it acted fairly and thus did not commit an unfair labour practice.

[4] Therefore, in this judgment, the Court shall deal with the contractual claim, by firstly engaging in an interpretation exercise, whereafter, consider whether the exercise of discretion, if any, was reasonable to be accepted by this Court. If the applicants come home on the contractual claim, consider the issue of the remedy. Should it be necessary, gravitate to the unfair labour practice claim and its remedies in the LRA.

[5] At the conclusion of evidence, the Court heard oral submissions from both parties. Applicants' counsel submitted written heads in addition. After hearing oral submissions, the Court indulged parties to augment the oral submissions in writing should they wish to do so on or before 14 June 2019. The Court received very lengthy written submissions[5] from the respondents on the appointed date. On 18 June 2019, I received the applicants' further written submissions. The Court takes this opportunity to thank both counsel for the well-researched submissions.

[5] To be precise a 61 paged document was submitted.

Background facts

[6] To a greater degree, facts pertinent to the breach of contract claim are common cause. Therefore, it is unnecessary to recount them in any greater details. The first respondent has in place a policy named Nampak Policy and Guidelines: Medical Aid Society Contributions; Employees and Pensioners Policy (Policy). This policy became part of the terms and conditions of employment of all the applicants before me. On the applicants' interpretation of the policy, they were entitled to 100% contribution post retirement, should an employee complete 25 years in service and 10 years in membership of the medical aid scheme. Also, 50% entitlement for employees with less than 25 years but with 5 years' service and 5 years of being a member of the scheme. Around 2012, the in-house medical scheme was taken over by Discovery Medical Aid Fund as it was, as testified, costly to operate it in-house.

[7] After obtaining legal opinions, the first respondent introduced a change to the benefits. The applicants were notified in writing of the change on 25 September 2014. The change was that the 100% or 50% contribution as at 30 September 2014 would be capped by a percentage equal to the annual change in consumer inflation as measured by the official Consumer Price Index (CPI) published by Statistics South Africa.

[8] Subsequent thereto, the first respondent sold parts of its businesses to the second and third respondents but retained the PRMA liability. The first respondent's packaging business was sold to the fourth respondent together with the PRMA liability in respect of certain of the applicants.

[9] Aggrieved by the capping of the benefit, the applicants referred a dispute to the CCMA. After considering an application within the contemplation of section 191(6) of the LRA, the dispute was referred to this court by the Director of the CCMA. Following that, the applicants referred the dispute in terms of rule 6 of the Rules of this Court. As pointed out earlier, the applicants also referred a civil claim under the rubric of section 77(3) of the BCEA.

Issues to be decided by the Court.

[10] On 19 December 2016, parties concluded a pre-trial minute and identified the following issues as issues that are to arrest the attention of this Court:

> 'The parties agreed that the Labour Court is required to decide the following issues:
>
> 10.1.1.1.1.1. Whether the first respondent's decision to cap the post-retirement medical aid benefit with regard to all the applicants and retain liability thereof in respect of the applicants… constitutes a breach of the applicants 'conditions of employment in terms of their contracts of employment; *alternatively*
>
> 10.1.1.1.2. Whether the first respondent's exercising of its decision construe (*constitute*) an unfair labour practice relating to a benefit.
>
> 10.1.1.1.3. Whether the first, second, third and fourth respondents should implement the post-retirement medical aid as it was applicable before 1 June 2016 as a condition of employment of the applicants employed by the respondents as listed…
>
> 10.1.1.1.4. Whether the second and third respondents should take over the liability regarding the post-retirement medical aid benefit of the applicants as listed… with effect from the date when the section 197 transfers were effected.'

Preliminary ruling

[11] Prior to the commencement of the trial, Mr Snider, appearing for the respondents raised a preliminary point of lack of jurisdiction of the Labour

Court. He contended that a portion[6] of the alleged substantive unfairness of the unfair labour practice claim was not conciliated and on the authority of the Constitutional Court[7] and this Court[8], jurisdiction should not be accepted. This Court, on an *ex-tempore* basis, refused to uphold the contention *in limine*. Briefly, the reasons are; the nature of the objection required this court to hear evidence in order to arrive at a legal conclusion. The issue of retention of the liability was not a self-standing unfair labour practice claim. It was part and parcel of the benefits dispute. A dispute which was required to be referred and or conciliated upon is one involving an alleged unfair labour practice relating to benefits. It is common cause that such a dispute was referred and conciliated upon. This objection came as a surprise to the applicants, as it was literally sprung on them a day before. The Court understood their astonishment because in the pre-trial agreement, it became common cause that this Court has jurisdiction.[9] I do accept that where the Labour Court does not have jurisdiction, it shall not exercise one simply on the basis of an agreement between the parties. In *casu*, I am of a firm view that the Labour Court retained jurisdiction, in respect of the unfair labour practice claim, under the provisions of section 191(6) of the LRA.

[12] In any event, at the closing argument stage, I did not hear Mr Snider persisting with the objection. Also, in the written submissions, this point is not dealt with. The issue is dealt with in this judgment simply because, I did not hear Mr Snider abandoning it.

Evidence received.

[13] Owing to the fact that the applicants bore the *onus* in respect of the two claims before court, the applicants led evidence first. The evidence was carefully restricted to substantive fairness in as far as the unfair labour

[6] Para 16.1 of the amended statement of case: "*and the retention of the liability by the First Respondent in respect of the applicant listed…"*

[7] *September and others v CMI Business Enterprise* CC [2018] ZACC 4.

[8] *Tlou v University of Zululand* (2018) 39 ILJ 1841 (LC).

[9] Para 2.2 *The Labour Court has jurisdiction to resolve the applicants' dispute*.

practice claim was concerned. In relation to damages and or compensation, both parties submitted actuarial reports and a joint statement of both the experts.

Phillip John Skinner

[14] He is one of the applicants. He commenced employment in 1983 and retired on 31 December 2015. With reference to the respondents' defence on the breach of contract claim, he testified that his maximum level was set at 100% from 1983 and he has earned and or met the conditions because he remained in employment for a period of 25 years. He testified that there was no provision made in the policy for the amendment of the set maximum level. He did not have knowledge of the sale of the businesses of the first respondent. A letter of 25 September 2014 was received by him and the cap so introduced was effected from 1 January 2016. In that year, he had to effect co-payments on the medical bills.

[15] Officially, he heard about the sale of the businesses in April 2015. He raised concerns with Ms Kidd in various emails. He was made an offer to purchase the liability. According to the calculation of the actuary supporting their case, there is a shortfall on the offer made. Having earned the benefit, he believed that there was a breach of the policy, alternatively, an unfair labour practice being committed. He gathered data of the other applicants for the actuary. As a relief, he and others sought reinstatement of the benefit alternatively damages and or compensation. During cross-examination, he was referred to a contract of employment signed around the year 2001. He testified that some clauses he assented to under protest. At the time when the cap was introduced, he was not retired yet. He was a future pensioner.

[16] He disagreed with the version of Ms Kidd that the only way to keep the medical aid scheme alive was to put the cap. In his view, an increase of the premiums was an option. When the businesses were sold, the first respondent became smaller and the proceeds were ploughed into businesses

in Africa, which did not support the PRMA liability. This, to him was reckless. When he joined the scheme, it was compulsory to become a member. He was not aware that 75% of the employees accepted the cash offer that was made. He did not believe it as true that the respondents were entitled to change and introduce a cap without their consent or agreement. He disagreed with the version that if a lower option is selected at retirement, then the maximum paid will remain at the actual capped contribution for the higher option, since the letter of 25 September 2014 indicated that should one switch to a lower cost option thereafter, the value of the subsidy would be reduced.

[17] In his testimony, the respondent did not encounter financial difficulties. At the time when the investments were injected into Africa, the rest of Africa did not support the PRMA. That decision to inject the investments into Africa was a reckless business behaviour.

Lynne Dorothy Kidd

[18] She is employed by Nampak for over 21 years. She became aware of the issue when the liability grew in the balance sheet after the move to Discovery Medical Fund. She gave evidence with regard to the history of the scheme. When she joined Nampak, in 1997, it had a staff compliment of about twenty thousand. In 2019, the staff compliment emaciated to a meagre four thousand employees.

[19] In terms of the policy, clause 4 applied to current employees and not pensioners. Around June or July 2014, legal advice was sought and obtained in order to introduce the capping. Later on, a proposal was prepared and presented to the Board of Nampak[10]. Following that, a letter was provided to the applicants informing them of the capping. An offer to purchase the liability

[10] Issues specifically flagged in the proposal were that: No limit was ever placed on the rand value of the subsidy Nampak would pay for individual pensioners. The high rate of increase in medical scheme contributions over the past decade or more has resulted in the rand value of the subsidies increasing significantly. In addition, with the sale of a number of businesses in recent years, the cost of subsidies for pensioners of those businesses has remained with the group. This has placed financial strain on margins and weakened the competitive position of the group. (Own underlining and emphasis)

was to saddle Nampak with about R390 million. Such an offer was made to the active employees and about 70% of them accepted the offer. She gave an explanation of how the offer would have penned out with regard to the CPI. After realising that employees were upset by the change, she prepared and made a presentation[11] to the staff members. From 1 June 1996, the PRMA was removed as a benefit and new entrants did not have it as a benefit.

[20] According to her, Mr Skinner, having taken an early retirement, was not disadvantaged by the capping because, he received the benefit earlier. Nampak took a knock financially and its share price plummeted to R10 a share from R45 a share. Although the figures she testified about were not supported by financial documents, she had amassed experience in financial matters during her stint in the banking industry. In her evidence, the first respondent was fortified by clause 4.1 of the Policy to introduce the capping. She was part of the team that drafted the proposal on the capping that was made to the Board. Prior to the issuing of the letter of 25 September 2014, there was no discussion with the active employees. The retention of the liability was not disclosed to anyone since the deal had not been concluded yet. She disagreed with a proposition that the first respondent acted in bad faith. In the presentation she made to the employees, she clarified the issue of a lower option as set out in the letter of 25 September 2014. She also disagreed with a proposition that an unreasonable offer was made. The offer referred to in the proposal made to the Board is not the cash offer made to active employees as same was made after the decision to cap was taken by the Board.

Patrick Niel O'Brein

[21] A former employee of Nampak. He was part of the Board meeting that considered the proposal to cap the benefit. The proposal served at the Board meeting around late August/September 2014. The Board was appropriately manned, with notable individuals, under the stewardship of the current

[11] Dated November 2014 appearing on pages 28-68 of volume 4.

Minister of Finance, Honourable Tito Mboweni, who served as a Minister of Labour at some point. The discussions over the proposal were robust. The Board raised concerns around the staff morale and the legalities of the proposal, which concerns were addressed. In 2012, an attempt was made to sell some of Nampak's businesses but there was no buyer. In 2013, a buyer was found. A concern was raised by the buyer over the PRMA liability for reasons that it would not be able to sell further and that the liability was open-ended and uncapped. The proceeds of the sale were injected into the plastic and metal divisions of the business. A strategic decision was taken to explore expansion into Africa. No cash injection was made into the expansion strategy into Africa. The expansion was funded through borrowings. In 2014, the Nampak Group faced challenges informed by the state of the South African economy in general, stiffness of competition and rising of costs with a drop in prices.

[22] He confirmed that a legal opinion was sought and obtained. Minutes were kept for the Board meeting. He could not tell when the Policy was put in place. There was no connection between the sale of the businesses and the capping of the benefit. Capping would still have taken place even if the sale did not happen.

Evaluation

Is the capping of the benefit a breach of contract?

[23] In order to address this question, it is important for the Court to engage in an interpretation task. There is no dispute between the parties that the Policy constituted a term of the employment contract. This Court enjoys concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. The applicants allege breach of a term or terms of an employment contract. The introductory part of the Policy provides that the Policy is there to deal with company medical aid contributions in respect of membership for in-service employees and continuation membership on death

or retirement. The clauses allegedly breached are 3.3.3 and 3.3.5. They are similarly worded except for the percentages and the number of years in service and membership. For the purposes of this judgment, clause 3.3.3 reads thus: -

> 'Subject to the provisions of clauses 3.3.6, 3.3.7 and 4[12], the Company will pay 100% of the medical aid contribution where the employee has at least 25 years' continuous service in the Company and 10 years' membership of a company acknowledged Medical Aid Society at the date of retirement and was employed prior to 1.6.1996.'

[24] The respondents' case drew sustenance from their own interpretation of clause 4.1, which reads thus: -

> 'The Company may, at its sole discretion, in respect of future pensioners, set a maximum level at which it is prepared to contribute towards medical aid society benefits. The pensioner will be responsible for the difference between the actual medical aid society contribution levied by the applicable medical aid society and the maximum level set by the Company.'[13]

[25] The submission by Mr Snider is that the phrase "*subject to"* introduce a limitation to clauses 3.3.3 and 3.3.5. There is merit in this submission. In *Awumey and Another v Fort Cox Agricultural College and Others*[14]*,* the Court stated the following:

[12] Own underlining and emphasis.

[13] Own underlining and emphasis.

[14] 2003 (8) BCLR 861 (Ck).

> 'In my view the ordinary meaning that must be given to the words "*subject to*" in the context in which they are used is that any appointment is conditional upon the approval of the Minister…'[15]

[26] In other judgments, the phrase was interpreted to mean "*except as curtailed by*".[16] It is clear to me that the phrase means no more than that a qualification or limitation is introduced. In *Premier, Eastern Cape, and Another v Sekeleni*[17], the Supreme Court of Appeal (SCA) reasoned that the subsections of the section being interpreted by it contained an exception to the general rule. In my view, clauses 3.3.3 and 3.3.5 creates a general rule that Nampak shall pay 100% contributions without any conditions. Clause 4.1 introduces an exception to the general rule. There is no dispute in this matter that all the applicants were, as at 30 September 2014, future pensioners. Therefore, clause 4.1 refers to them. As an indication that clause 4.1 was inserted to limit the 100% or 50%, reference in it is made to a difference between what is levied by a medical society and the maximum set by the Company.

[27] The SCA in *Intech Instruments v Transnet Limited t/a SAPO*[18] reconfirmed the position thus:

> '[24] The correct approach to the interpretation of contracts is well established. We must give meaning to the words used in the contract applying the normal rules of grammar and syntax viewed with attendant factual context, in order to determine what the contracting parties intended. In addition, contracts must be interpreted in a manner that makes commercial sense'.

[15] Page 874 of the judgment.

[16] See *Hawkins v Administrator of South-West Africa 1924 SWA 67 and Premier, Eastern Cape, and Another v Sekeleni* 2003 (4) SA 369 (SCA).

[17] Id n 16.

[18] (1165/18) [2019] ZASCA 79 (31 May 2019)

[28] It is beyond question in my mind that when the parties employed the phrase *subject to*, they intended to create a condition upon the contribution to be made by the company in the future. In search for commercial sense, in my view, it makes no commercial sense to read clause 4.1 as not placing a limitation to the 100% or 50% contribution. When the company approbated to itself, the sole discretion, the intention must have been to allow it to wiggle in so far as its contribution is concerned. It was, in my view, for this reason that the word "*prepared*" was employed in the clause. Any other interpretation would lead to absurdity. In commercial parlance, contribution to a medical aid is a financial cost. Any company attracting a financial cost would create a room to wiggle, given the unforeseen financial quagmire that may manifest in the not so distant future. That was the intention when clause 4.1 was inserted.

[29] Obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or in a wrong manner, the party on whom the duty of performance lay is said to have committed a breach of the contract[19]. Therefore, in order to succeed in a claim for breach of contract, the applicants need to show that there was no performance or there was malperformance. In this matter, capping the benefit was not contrary to the provisions of the contract between the parties. I therefore conclude that there was no breach of the terms of the contract. I do not accept as a submission, the fact that the clause is illegal and thus severable. However, that is not the end of the enquiry. Since I found that clause 4.1 applies, the question I must turn to, is whether the discretion exercised by the respondents is one that was reasonably exercised. Should I find that the discretion was exercised unreasonably, I must conclude that such a discretion should not be allowed to be exercised and the general terms of 100% or 50% without tampering should apply. I now turn to that question.

<u>Is the sole discretion unfettered?</u>

[19] See Christie's The Law of contract in South Africa 6th edition.

[30] Undoubtedly, the discretion to tamper with the agreed contribution level lies solely within the province of the Company. Van Der Heever DCJ in *NBS Boland Bank v One Berg River Drive and Others, Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA*[20] carefully considered the issue relevant herein. After considering various cases and the test in the Dutch law, the learned DCJ concluded thus:

> '[24] In sum I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party to determine a prestation is unobjectionable. Second, and has been said above, there is an additional reason for holding that the clause under discussion is valid. Of course, in some cases providing a discretional determination there may not be an enforceable contract until the determination is made…
>
> [25] All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such discretion must be made *arbitrio bono viri'.*

[31] Unfortunately, the learned DCJ did not provide guidance as to how a Court of law determines an intention for the discretion to be completely unfettered. To my mind, the task is left to a Court of law, applying the interpretation tools to establish that clear intention. In any event, interpretation rules are there to search the ever so elusive intention of the parties. In clause 4.1, the parties employed the words "*in its sole discretion*". The grammatical meaning of the word *sole* is being the only one, of or relating to only one individual or group; exclusive. A discretion is unfettered when it is free from any restraints or inhibitions or it is liberating. To my mind, where a party is given an exclusivity, it follows axiomatically that such a party may act without any restraints or inhibitions. I am of a view that it was the intention of the parties that

[20] [199] 4 All SA 183 (A).

determining contribution for future pensioners is within the unfettered discretion of the Company.

[32] Having exercised the contractual discretion, there can never be any objection from a common law point of view. The decision of *Coop and Others v South African Broadcasting Corporation*[21], although upheld on appeal[22] is not helpful to the applicants before me. There, the rules of the SABC did not have a clause similar to clause 4.1. The SABC simply decided to withdraw the benefit with no proper legal basis to do so as correctly found by the High Court and upheld by the SCA.

[33] In the event that I am wrong in concluding that the discretion is unfettered, I must then consider whether the discretion was exercised *arbitrio bono vino*. The learned DCJ pointed out that it is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the contracting parties. The suggestion being that the situation where absolute discretion is conferred to one party does exist but it is unlikely. Unfortunately, the learned DCJ did not say that it cannot happen but that it is unlikely. With that caution, this Court would rather err on the side of caution. The question that immediately crop up is who bears the *onus* to show that the discretion was not made like a good man? The general principle is that he or she who alleges must prove. The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it.[23] The applicants are the ones that are alleging that the exercise is not that of a good man. It is denied by the respondents. The SCA in *ABSA Bank Limited v Lombard*[24], assumed without deciding that the submission made before it was correct. The submission was to the effect that Lombard bore the *onus* of establishing an unreasonable exercise the

[21] Case 2001/23604 (WLD).

[22] [2006] 1 All SA 333 (SCA).

[23] *Ei incumbit probation qui dicit, non qui negat*.

[24] Case 178/04 dated 30 March 2005.

discretion.[25] Botha JA in *Basson v Chilwan and Others*[26]*,* in the context of a restraint of trade agreement said:

> '…the covenanter seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint…The covenanter is burdened with the onus because public policy requires that people should be bound by their contractual undertakings'.[27]

[34] In *ABSA*[28]*,* the SCA concluded that the evidence of Lombard constituted a *prima facie* case that the bank and its predecessor had acted unreasonably. Further, it concluded that since the evidence of Lombard was not rebutted, the discretion in question was not exercised reasonably. In the present matter, the evidence of Mr Skinner was that the discretion was exercised unreasonably and that evidence was rebutted by both witnesses of the respondent. I conclude that the *onus* to prove on the preponderance of probabilities that the respondent exercised the discretion not in *arbitrio bono viri* lies with the applicants.

[35] The determination of what is reasonable is largely a matter of discretion and good sense and is therefore not capable of being subjected to hard and fast rules. The test for reasonableness is an objective one and may be determined *ex post facto* or *ex tante*[29]. Grammatically, one is reasonable when one behaves in a fair and sensible way[30]. On the facts of this case, it is uncontested that before exercising the discretion, the respondent took steps to establish the legality of its intended actions. Before proposing the capping to its Board it engaged in an exercise that considered all angles of its intended action. Its Board, which is appropriately manned, robustly engaged with the

[25] At para 19 of the judgment.

[26] 1993 (3) SA 742 (A).

[27] At pages 776H-J and 777A-B. Own underlining and emphasis.

[28] *Supra* n 24.

[29] Determination from the perspective of a reasonable person in the position of the defendant.

[30] See *S v Burger* 1975 (4) SA 877(A).

issue and considered all the angles including the possible termination for operational requirements had the discretion not been exercised. To my mind, all these are actions of a good man. A good man, whilst appreciating the rights he has, considers the effect of the exercise of the right towards another man.

[36] Both counsel placed reliance on the decision of Du Plessis J in *Erasmus and Others v Senwes Ltd and Others*[31]*.* Mr Snider submitted that on the facts, *Senwes* is distinguishable from the facts of the present case. I agree. He, however, agreed that it is an authority on point with regard to the legal principle under consideration. In the first place, the *Senwes* matter involved an application for an interim interdict pending an action. In considering the reasonableness of the decision, the learned judge said the following:

> 'The proposed changes were not necessitated by any change in the medical scheme market, such as the discontinuation of suitable options. The changes were not necessitated by financial need on the part of Senwes. Considering the evidence as a whole, the proposed changes were probably motivated by a desire to increase its profitability.'

[37] In *casu*, I am unable to make similar observations, regard being had to the evidence before me. It is true that the respondents did not present financial documents to support the escalating costs. However, Ms Kidd presented objective evidence that the graphs set out in the presentation demonstrated an escalation in costs. This evidence was not seriously challenged. What the applicants attempted to do was to introduce some media releases aimed at showing that the respondents did not have financial difficulties. I ruled that such documents could be introduced at that late stage. At that time, the applicants had closed their case. On the uncontested evidence, I am satisfied that in exercising its discretion, the respondent acted reasonably. A good man would take steps to arrest a financial situation that may have serious ripple effect – loss of employment. I come to this conclusion after applying value

[31] 2006 JOL 16483 (T).

judgment and having had regard to the facts of this case. Mere evidence that the first respondent did not face financial difficulties is not enough to discharge the *onus* that the first respondent acted not like a good man.

[38] One more point to be made is that a contract of employment is like any other commercial agreement and it is to be interpreted by applying the same principles applicable to interpretation of a contract. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[32], the SCA had aptly said the following:

> 'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production'. [My underlining and emphasis].

Du Plessis, J in *Senwes*[33] concluded that when interpreting an employment agreement, it must be borne in mind that parties have certain protected constitutional rights and thus the right to fair labour practices add impetus to the general rule that a court should endeavour to enforce rather than to invalidate a contract. I respectfully part ways with this approach. Section 23 (1) of the Constitution of the Republic of South Africa[34], provides that everyone has the right to fair labour relations. As it is trite by now that where there is national legislation dealing with a right in the Bill of Rights, no direct reliance should be placed to a right in the Bill and disregard the national

[32] [2012] 2 All SA 261 (SCA).

[33] *Supra* n 31.

[34] Act 108 of 1996.

legislation. With that in mind, where a party is seeking to enforce a common law right, it shall be inappropriate, in my view, to conflate the principles applicable to interpretation of contracts with a right to fair labour practice as set out in the Bill of Rights. By way of an example, restraints of trade clauses are often located in the contracts of employment. However, when courts interpret them, courts do not take into account a right to fair labour practices. In my view, a contract of employment ought to be interpreted like any other contract. Section 39 of the Constitution, enjoins the courts to have regard to the Bill of rights when interpreting any legislation or developing the common law. I doubt that when a court interprets a contract, it necessarily develops the common law. In my view, it applies the common law as it should. In *Juglal N.O v Shoprite Checkers (Pty) Ltd*[35], the SCA cited with approval what Hurt J stated, which is:

> 'A Court should be chary of developing the common law in a way which impinges upon fundamental principles of contract such as the freedom to contract on properly consensual terms and the principle of *pacta sunt servanda* which I think can safely be said, are fundamentally consistent with the Bill of Rights.'

[39] I am in full agreement with Hurt J. A similar issue received attention in *Potgieter v Potgieter*[36], Brand JA, writing for the majority, stated amongst other things the following:

> '[31] As the second basis for its authority to deviate from common law principles, the court *a quo* relied on the majority judgment of the Constitutional Court… According to the court *a quo's* interpretation of that judgment, it provides authority for the following propositions:

[35] 2004 (5) SA 248 (SCA).

[36] (629/2010) [2011] ZASCA 181 (30 September 2011).

(a) under our new constitutional dispensation, it is part of our contract law that as a matter of public policy, our courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair, and

(b) the same principle should be applied in other spheres of private law.

[32] I find the court *a qou's* approach fundamentally unsound… Reasonableness and fairness are not free-standing requirements for the exercise of a contractual right…

[34] Unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this court, for an example, in the cases of *South African Forestry, Brisley, Bredenkamp* and *Maphango* which do not support the first proposition relied upon by the court *a quo*… The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge … if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.

[36] …I do not believe that the court *a quo* had any option but to follow the tenets of common law… I thus find myself in agreement with Harms DP when he said…

> "A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made is the principle of legality. Making rules of law discretionary or subject to value judgment may be destructive of the rule of law.'

[40] I, therefore conclude that the applicants' claim of a breach of contract must fail. In exercising the contractual discretion in clause 4.1, there is no evidence to gainsay the fact that the first respondent acted like a good man.

Did the respondent commit an unfair labour practice in relation to benefits?

[41] It is common cause that the PRMA is a benefit within the contemplation of the applicable section. It is also common cause that it arises *ex contractu*. In this part of the case, the question that falls to be decided is whether in exercising its contractual discretion to cap the benefit, did the respondent act unfairly or not? Section 186 (2) of the LRA defines an unfair labour practice to be any unfair act or omission involving unfair conduct by the employer relating to, in this case, provision of benefits to an employee. First of all, there must be an act or an omission which is, in itself, unfair. The substantive unfairness pleaded by the applicants in this matter is the following:

41.1 The decisions were exercised arbitrarily;

41.2 The decisions were exercised to accommodate the transfer of the first respondent's business as going concerns to the second respondent, the third respondent and the fourth respondent;

41.3 The decisions were exercised without considering the consequences to the applicants;

41.4 The decisions were exercised without considering the contractual rights of the applicants;

41.5 The decisions were exercised without considering the availability of funds to secure the subsidizing of the medical aid contributions.

[42] In addition, Mr Kirsten, for the applicants, submitted that if the respondents had a discretion, they failed to exercise it in a reasonable and fair manner because the first respondent sold off divisions whilst it was planning to cap the benefit. At no stage were the applicants informed when the decision to cap the benefit was taken, that there will be a section 197 of the LRA transfer of their employment, so the submission went. According to the applicants, the

respondents failed to comply with clause 16 of the section 197 of the LRA agreements.

[43] A further submission was made that the financial liability complained of was due to the first respondent's making. It lowered the pension age; sold divisions and kept liability; amalgamated the in-house scheme with Discovery and mapped employees; failed to limit the liability since 1996 until 2004 and lost control of the liability when there was an amalgamation. After a number of judgments seeking to give meaning to the word *benefit*, which has been described as a vexed and thorny issue[37], the LAC in *Apollo Tyres South Africa v CCMA and Others*[38] somewhat resolved the issue. Some authors[39] are of the view that the LAC has not effectively resolved the issue. However, as pointed out above, before me there is no dispute that the PRMA is a benefit within the contemplation of the section. In *Apollo*[40], the LAC held thus:

> '[51] … On the other hand, where an employee wants to use the same remedy in relation to the provisions of benefits such an employee has to show that he or she has a right or entitlement sourced in a contract or statute to such benefit.'

[44] In *casu*, the applicants have a benefit sourced from a contract of employment. That being the case, it is unnecessary, in my view, to look at other possible sources of the benefit. Based on my views above, what the first respondent did, by exercising a contractual discretion, was not a breach of contract under the common law. The question is, in this part of the case, whether the exercise of the discretion to cap the benefit may be seen as an unfair conduct or not? In *Apollo*[41], the LAC said:

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[37] Moshoana 'The vexed concept of benefits' (2004) *De Rebus* 47.

[38] (2013) 34 ILJ 1120 (LAC)

[39] Resolving the 'benefits' dilemma 2018 SA Merc LJ 91 by Ms K Newaj.

[40] Ibid.

[41] Ibid.

> '[47] … Therefore even where the employer enjoys a discretion in terms of a policy or practice relating to the provisions of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of section 186…When the appellant decided to accelerate the existing contractual benefits and retained a discretion to grant accelerated benefits, the benefits would strangely morph into something less than benefits because according to the *Hospersa* approach she does not have a contractual right to the accelerated retirement benefits. The employer would then have licence to act with impunity… Clearly the notion that the benefits must be based on an *ex contractu* or *ex lege* entitlement would, in cases like this, render the unfair labour practice jurisdiction sterile.'

[45] I therefore understand the LAC[42] to be saying that in cases like the one before me where the actions of an employer are fortified by the contractual provisions, the CCMA is still empowered, where a discretion is exercised in relation to the provision of benefits, to scrutinize the exercise of the discretion. In buttressing this point I am making, the LAC went on to say:

> '[52] … It is common cause that she did not have a contractual entitlement to the early retirement benefits and that the benefits were to be granted at the employer's discretion. The issue that remains to be considered is whether that discretion was exercised unfairly.'

[46] Unlike in *Apollo*[43], the discretion in this matter is sourced from the terms of a contract of employment. From a common law point of view, the actions of the respondents are lawful. In my view, it as this point that the common law sharply clashes with a right guaranteed in the Constitution. This is where the common law position is to be trumped by the LRA, being the legislation passed to protect the rights in section 23 of the Constitution. As pointed out

[42] At paragraph 46 the court stated that: … The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

[43] Id n 38.

earlier, a court of law is constitutionally empowered, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. By acknowledging the right not to be subjected to an unfair labour practice, I shall be promoting[44] the labour rights as set out in section 23 of the Constitution.

[47] The guiding principle in labour law is fairness. In *Apollo*[45], the LAC said:

> '[53] It has been said that unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct whether negligent or intended'.[46]

[48] Therefore, I am enjoined to measure the conduct – the capping of the benefit and the retention of liability – on the objective standard. This is a difficult horse to ride. Arbitrary and capricious means being authoritative, baseless, dictatorial, fanciful, groundless, impetuous, motiveless, purposeless, unduly and whimsical. The applicants allege that the decisions of the respondent were arbitrary. In *Apollo*, the Court concluded that because Hoosen was sent from pillar to post when she made enquiries, she qualified to participate in the scheme and was unfairly disallowed to participate therein.

[49] In the matter before me, it is without doubt that the first respondent was forced into the decision because of the financial costs considerations. In other words, the respondents had, in my view, a commercial rationale. Therefore, can it be said that where there is commercial rationality, there is unfairness? I reckon not. To borrow from the jurisprudence developed in dealing with dismissal for operational requirements, the LAC reasoned thus, in the matter of *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*,[47]:

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[44] See: *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) and *S v Thebus and Another* 2003 (6) SA 505 (CC) on the constitutional imperatives to develop the common law.

[45] *Supra* n 38.

[46] Du Toit et al: *The Labour Relations Act* of 1995 2nd ed at 443.

[47] (2001) 22 *ILJ* 2264 (LAC) at para 19.

> '… Viewed accordingly, the test becomes less differential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

[50] I find no reason why this approach cannot be adopted in this regard. It is not for this Court to decide whether capping of the benefit and retaining liability was the correct answer to the rising financial costs. I have already pointed out that even though there are no supporting documents of the financial situation, the probabilities support a conclusion that the first respondent faced insurmountable and or insuperable financial difficulties. The applicants, in bolstering the substantive unfairness claim, submitted that the decisions were made to accommodate the transfer. In other words, the first respondent had ulterior motive. I do not believe that, that was the case. On the unchallenged evidence of Mr O'Brein, even if the sale did not happen, the capping would have happened. Beside, contractually, the first respondent was entitled to exercise the discretion in order to attract the needed sale of the non-performing businesses. Further, a submission made is that the decisions were oblivious of the consequences to the applicants. Again this cannot be correct. The presentation made by Ms Kidd cleared amongst others the issue of the consequences of moving to a lower option. She was unchallenged when she testified that Mr Skinner was not disadvantaged because he took an early retirement.

[51] It was submitted that the decisions were exercised without considering the contractual rights of the applicants. The evidence before me does not bear this submission out. It is common cause that before capping, the first respondent sought and obtained legal advice. Mr O'Brein was not challenged when he testified that one of the concerns raised by the Board of the first respondent was the legalities surrounding the proposed move and the Board was assured of the presence of such legalities. It must follow axiomatically that all of that was done in consideration of the applicants' contractual rights.

[52] A further submission was made that the availability of funds to secure the benefit was not considered. This seems to be bolstered by the evidence of Mr Skinner that he was informed[48] that the proceeds of the sale were injected into entities in Africa, which do not support the liability. Allegedly an amount of R 1.5 billion was planted there. This evidence was disputed. The unchallenged evidence of O'Brein is that the expansion into Africa was funded by borrowings. There is no concrete evidence that the proceeds were planted into Africa as opposed to supporting the metal and plastic divisions as testified. It may have well been the intention to plant the funds into Africa but there is no evidence that this was indeed done. Therefore, this Court cannot accept the uncorroborated evidence of Mr Skinner, which in itself is based on hearsay evidence.

[53] There is a further issue which seems to be part of the substantive fairness claim. It appears to be the applicants' contention that by retaining the liability in respect of certain applicants, the first respondent committed an unfair labour practice. In the written submissions there lay a submission that the first respondent attracted certain statutory obligations in terms of section 197 of the LRA, which the first respondent failed to discharge. Although this issue was not pursued with any vigour by Mr Kirsten during oral submissions, it was never mentioned that it was abandoned. In opposing the jurisdictional attack, Mr Kirsten submitted, correctly so, that this issue of retaining liability is not a stand-alone claim but part of the unfair labour practice claim. During the cross-examination of Ms Kidd, it was suggested to her that by failing to disclose the retention of the liability to the applicants, the first respondent acted contrary to subsections 6 and 7 of section 197 of the LRA. My reading of those subsections do not reveal the suggestion. In any event, section 186 of the LRA defines what an unfair labour practice is and nothing around

[48] In precise terms Mr Skinner was informed thus: I can mention that if you attended the results presentation on 20 November 2014 you would have heard Andre de Ruyter explain that the paper business had in the past year achieved a profit margin of less than 5%, whereas the funds from the sale of those businesses could be invested in businesses in the rest of Africa, where profit margins were in excess of 18%.

section197 of the LRA is being mentioned as a species of an unfair labour practice. For this reason alone, this contention is equally rejected.

[54] It could be argued, as it was, that the first respondent, in order to ensure fairness, should have informed the applicants of the impending decision to cap. The evidence demonstrated that without any warning, on 25 September 2014, the applicants were informed of the decision. Mr Skinner described this as a *fait accompli*. To my mind this falls outside the issues to be decided at this stage, in as far as the alleged unfair labour practice claim is concerned. Therefore, I shall leave the issue open and not decide it.

[55] In conclusion, I reach an irresistible conclusion that the applicants failed to discharge their *onus* to show that there was substantive unfairness. As closing remarks on this point, I fail to appreciate any harm to the applicants when the amount increases by a percentage equal to the annual change in consumer inflation measured officially. The applicants were informed in no uncertain terms that the declining profitability in South Africa was part of the reasons why it is incumbent on Nampak management to investigate ways of limiting the PRMA liability. I may mention in passing that this Court and the LAC accepted that it may be fair to dismiss an employee for operational requirements if he or she refuses to accept a change to the terms and conditions of employment[49].

Concluding remarks

[56] In terms of the agreement between the parties as sanctioned by this Court, this judgment does not finally resolve the dispute between the parties. The parties may return to this Court for the determination of the alleged procedural unfairness. That being a possibility, it shall be remiss of this Court not to make its views known on an issue argued before it relating to the reports of the actuaries. As pointed out elsewhere in this judgment, both parties submitted actuarial reports as well as a joint minute. Generally, the opinion of expert

[49] See: *Maritime Industries Trade Union of SA and Others v Transnet Ltd and others* [2002] 23 ILJ 2213 (LAC). See also *Numsa and Another v Aveng Trident (JA25/18) [2019] ZALAC 36 (13 June 2019*) and *Mazista Tiles (Pty) Ltd v NUM and others [2005] 3 BLLR 219 (LAC)*

witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer.[50] Where a judicial officer is capable of drawing inferences, evidence of an expert witness is futile.

[57] Mr Kirsten, argued that in the event that this Court would consider compensation as a remedy, the opinions of the actuaries would come in handy. I disagree. It is clear to me that the opinions were sought in order to deal with the cash offer made to the applicants in order to purchase the PRMA liability. It follows axiomatically that the numbers mentioned by the actuaries are to be attached to the monetary value of the liability. The remedy sounding in money that may be made for any unfair labour practice is referred to as compensation in the LRA. First of all, it is capped and has to be just and equitable in terms of the LRA. Secondly, it is computed with reference to a salary of an individual. Thirdly, and most important it is a *solatium*.

[58] It is instructive to note what the LAC said in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*.[51] It said:

> '[22] The compensation that an employee, who has been unfairly dismissed or subjected to unfair labour practice, may be awarded is not aimed at making good the patrimonial loss that s/he suffered. The concept of loss or patrimonial loss may play a role to evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under the LRA is a statutory compensation and must not be confused with a claim for damages under the common law, or a claim for breach of contract or a claim in delict. Hence, there is no need for an employee to prove any loss when seeking compensatory relief under the LRA.
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> [23] Compensatory relief in terms of the LRA is not strictly speaking a payment for the loss of a job or the unfair labour practice but in fact a

[50] See: Hoffman and Zeffert: The South African Law of Evidence 4th Ed page 97.

[51] [2015] 36 ILJ 2989 (LAC).

monetary relief for the injured feeling and humiliation that the employee suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a *solatium* and it constitutes a solace to provide satisfaction to an employee who's constitutionally protected right to fair labour practice has been violated. The *solatium* must be seen as monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalizing the employer. It is not however a token amount hence the need for it to be "just and equitable" and to this end salary is used as one of the tools to determine what is "just and equitable".

[24] The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride…In my view, and as I said earlier, because compensation awarded constitutes *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation awarded in unfair dismissal or unfair labour practice matters is more comparable to a delictual award for non-patrimonial loss. While a delictual action…for non-patrimonial loss is fashioned as a claim for damages, it is no more than a claim for a *solatium* because it is not dependent upon patrimonial loss actually suffered by the claimant. Hence, awards made under a delictual claim for non-patrimonial loss may serve as a guide in the assessment of just and equitable compensation under the LRA. In *Minister of Justice & Constitutional Development v Tshishonga*, this court in an award of *solatium* referred to a delictual claim made under the *actio iniuriarum* for guidance in what would constitute just and equitable compensation for non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these cases included but not limited to:

"…the nature and seriousness of the iniuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the

plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the iniuria had taken place…"

[25] The above *dictum* should serve as an appropriate guideline in determining what is just and equitable compensation that can be awarded under s 194 (3) of the LRA.'

[59] For reasons set out above, I firmly take a view that the expert testimony of the actuaries is of no use in a claim for unfair labour practice. The applicants placed reliance on the decision of this Court in *Minister of Labour v PSA and Others*[52], when it said that section 194 (3) of the LRA empowered a commissioner to place the individual respondents in a similar financial position to what they would have been. In my view, this judgment is at odds with the decision of the LAC above. It must have been overruled by the LAC. In any event, my conclusion on this point is more directed to the value of the experts' testimony.

[60] With regards to costs, although elsewhere I held a view that in section 77(3) of the BCEA claims, this Court may act like a civil court when it comes to costs, guided by section 162 of the LRA, I conclude that an order of costs is altogether unwarranted in this matter.

[61] In the results, I make the following order:

Order

1. The applicants have failed to show that the respondents breached their contracts of employment.

2. The applicants also failed to show that the respondents substantively committed an unfair labour practice.

[52] JR 2007/09 [2014] ZALCJHB 51 (25 February 2014).

3. The applicants' claims as dealt with in this part of the trial are dismissed.

4. There is no order as to costs.

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GN Moshoana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicants	: Advocate PH Kirsten
Instructed by	: Marius Scheepers & Co Attorneys, Pretoria.
For the Respondents	: Advocate AN Snider
Instructed by	: Cliffe Dekker Hofmeyr Inc, Sandton.