**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA95/19

In the matter between:

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| **PHIL SKINNER & 208 OTHERS** | **Appellants** |
| and | |
| **NAMPAK PRODUCTS LIMITED** | **First Respondent** |
| **MAIN STREET 1301 (PTY) LIMITED** | **Second Respondent** |
| **MAIN STREET 1310 (PTY) LIMITED** | **Third Respondent** |
| **SACKS PACKAGING 1301 (PTY) LIMITED** | **Fourth Respondent** |

**Heard:** **04 November 2020**

**Delivered:** **24 November 2020**

**Summary: Contract---Breach----Medical aid contributions----clause conferring discretion on employer to cap employees' post retirement contribution not unreasonable---Employer's decision to cap contribution in order to increase profitability an entirely legitimate commercial rationale.**

**Coram: Davis JA, Murphy AJA and Kathree-Setiloane AJA**

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**JUDGMENT**

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MURPHY AJA

[1] The appellants appeal against the judgment of the Labour Court (Moshoana J) holding that the respondents' decision to cap the employer's contribution to their post-retirement medical aid benefits ("PRMA") was not in breach of contract or an unfair labour practice.

Factual background

[2] The appellants are or were employees of the respondents at various workplaces throughout the country. As part of their contracts of employment the appellants qualified for medical aid benefits in terms of a policy (Medical Aid Society Contributions: Employees and Pensioner Policy) dated 1 August 2006 which is incorporated into the terms and conditions of their employment. During 2015-2016, some of them were transferred from the first respondent ("Nampak") to the other respondents.

[3] The policy states that it is Nampak's practice to provide, as an employee benefit, membership of a medical aid society, as set out in the policy. Employees are eligible to join a medical aid society of their choice as recognised by Nampak. While membership of a medical aid society is not compulsory, it is recommended. Nampak agreed to assist with contributions towards medical aid society membership but limited its contribution to 50% of the normal premium payable by a member.

[4] The policy provides for PRMA in a limited manner for employees who commenced employment with Nampak before 1 June 1996. Clause 2.3 of the policy stipulates that it is a condition of service, in respect of all employees engaged on or after 1 June 1996, that Nampak will not assist with the payment of contributions for continuation of membership of the medical aid society after retirement. Clause 3.1.2 of the policy encourages employees who joined the company after 1 June 1996 to make provision for their own future contributions whilst on retirement. All the appellants were employed prior to 1 June 1996 and are thus entitled to PRMA. Clause 3.3 of the policy governs PRMA. It reads in relevant part as follows:

> '3.3.1 No assistance will be provided on retirement in respect of any employee who joined the Company on or after 1.6.1996. In the case of other eligible employees the Company will contribute towards medical aid benefits in respect of the employee and current dependants at date of retirement (or death in service)
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> 3.3.3 Subject to the provisions of clauses, 3.3.6, 3.3.7 and 4, the Company will pay 100% of the medical aid contribution where the employee has at least 25 years' continuous years' service in the Company and 10 years' membership of a Company acknowledged medical aid society at date of retirement and was employed prior to 1 June 1996 …
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> 3.3.5 Subject to the provisions of clauses 3.3.6, 3.3.7 and 4, the Company will pay 50% of the medical aid contributions where the employee has been a continuous member of a medical aid society offered by the Company for more than 5 years and has completed at least 5 years but less than 25 years' continuous service in the Company and was employed prior to 1.6.1996 …'

[5] Clauses 3.3.6 and 3.3.7 referred to in clause 3.3.3 and clause 3.3.5 are not germane. However, clause 4.1 of the policy is particularly relevant. It reads:

> '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.'

[6] Medical aid at Nampak was initially provided through a company medical aid scheme, the Nampak SA Medical Scheme ("the Nampak scheme") which was established in 1971. Membership by employees was compulsory until 1988.

[7] From about 2009, the financial position of the Nampak scheme deteriorated due to a combination of factors including the ageing profile of the members of the scheme, the drop in the number of principal members, the increasing costs of claims in excess of budget and a steep decline in the number of members. Over the years, and as a result of selling businesses, Nampak had reduced in size and by 2012 there were only 5000 members in the Nampak scheme, most of whom were managerial employees.

[8] The trustees of the Nampak scheme accordingly proposed that the Nampak scheme amalgamate with the Discovery Health Medical Scheme ("the Discovery scheme). In a communication addressed to the membership dated 12 July 2012, the trustees of the Nampak scheme explained the position and proposed amalgamation with the Discovery scheme subject to a vote of approval by the membership. The letter in relevant part read:

> 'The Nampak SA Medical Scheme was established in 1971. Nampak SA Medical Scheme's financial position has deteriorated in the last three years largely due to increasing claims cost in excess of budget.
>
> This trend of very high claims has continued, resulting in a year end loss ratio i.e. claims + expenses/net contributions of 102% before expenses and a net deficit before investment income of R13,34 million for 2011 year. As a consequence of successive net deficits Nampak SA Medical Scheme's solvency level reduced from 98,3% at the end of 2008 to 50,5% (84,3% including unrealised gains) at the end of 2011.
>
> Therefore, as a result of Nampak SA Medical Scheme's deteriorating financial profile, ageing profile, and drop in principal members, the Board of Trustees has considered various options….
>
> The outcome is that the Board of Trustees of both Nampak SA Medical Scheme and Discovery Health Medical Scheme approved the amalgamation.
>
> The proposed date for the amalgamation is 1 January 2013. The date is subject to approval through a voting process of the Nampak SA Medical Scheme membership and the Competition Commission……
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> If the majority of members (at least 50% of the votes) vote **FOR** the change, the amalgamation will continue subject to the approval of the Council for Medical Schemes and the Competition Authority…
>
> If the majority of members (at least 50% of the votes) vote **AGAINST** the change, the amalgamation with Discovery Health Medical Scheme will not continue. This means the Board will have to re-visit other options to ensure the financial sustainability of the Scheme.'

[9] An opinion in respect of the amalgamation was obtained from a consulting

actuary, who gave an assessment of the proposed amalgamation which was made available to the relevant employees. A presentation was given to the employees concerning the implications of the amalgamation which had the advantage that there would be no waiting periods (normally 3 months) for members who transferred and also no prejudice to them in respect of pre-existing conditions.

[10] The majority of members voted for the amalgamation which was then effected in 2013.

[11] Not long after the amalgamation the PRMA liability increased significantly and posed a foreseeable problem for profitability. Medical aid inflation was considerably in excess of the consumer price index ("CPI"). Nampak then decided to exercise the discretion in clause 4.1 of the policy to limit the PRMA liability in respect of future pensioners by setting a maximum level at which it was prepared to contribute to PRMA. Instead of paying the full amount of the increase in premiums levied by the Discovery scheme from year to year, as it had up to that point, Nampak opted to limit its contribution to the amount of the premiums plus the annual percentage increase in the CPI as determined by Statistics South Africa. The limitation was in accordance with the general increase in costs within Nampak, the increase in premiums in the previous medical aid scheme, and the increases in the salaries of the relevant employees.

[12] On 25 September 2014, Nampak addressed a letter to relevant employees which stated:

> 'In an attempt to ensure the long term future of Nampak and its employees, Nampak will, with effect from 30 September 2014, determine the value of the monthly subsidy that each qualifying employee will receive after his or her retirement. This amount will be equal to 50% or 100% (as applicable) of the cost of the monthly medical scheme contribution for the applicants and their spouses (if applicable) as at 30 September 2014, and the annual amount increase will 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.'

[13] A few months later in November 2014, Nampak's employees were advised that Nampak was selling its tissue, corrugated and sacks businesses to the other respondents. In terms of the sale agreements, the PRMA liability of Nampak was retained by Nampak and did not transfer to the purchasers of the relevant businesses. The employees became concerned that the sales of the businesses, coupled with the retention of the PRMA liability, had a negative effect on Nampak's capacity to pay the PRMA.

[14] In response to employee concerns Nampak made presentations to the employees explaining the rationale of the capping and considered their representations. During the consultation, a suggestion was made by employees that Nampak should offer to buy out its PRMA liability. The consultation process culminated in Nampak making an offer to the relevant employees on 24 April 2015. The relevant part of the offer letter reads:

> 'Comments from a range of employees during Nampak's consultative process have indicated that the nature of the subsidy itself is not ideal for all employees as, for example, some employees are unlikely to reach retirement with Nampak and others believe they will be able to achieve better benefits themselves at retirement with the current value of the benefit…
>
> Nampak has therefore decided to make eligible employees a settlement offer in respect of this post-retirement subsidy benefit, based on the value of the benefit that has accrued with service to date, being the value that is currently carried by Nampak in its books. However, where an employee's current value is less than R100 000, Nampak has agreed to increase the amount offered to R100 000…..
>
> In return for you waving all future medical scheme subsidy benefits for you and your dependants, Nampak is offering to pay the settlement value for employees who qualify on one of two options: i) payment to the member in cash (which is taxable); ii) payment into the employee's pension/provident fund account (which is a non-taxable transfer)….
>
> Acceptance of the settlement offer is voluntary and eligible employees can choose to continue with the current subsidy policy in place….
>
> This is a once-off offer and completely voluntary – you do not have to accept

> it. However, it must be emphasised that the offer will not be repeated. Eligible employees who do not accept the offer will receive a subsidy on retirement form Nampak, subject to the CPI cap as communicated to employees in October 2014.'

[15] The letter of 24 April 2015 gave a clear indication of the manner in which the settlement value was calculated individually for each eligible employee. The value of the offer was calculated in the same way that Nampak valued its obligation for the purposes of its annual financial statements. The letter pointed out that the exact value of the future subsidy could not be precisely known, but constituted an estimate based on rational assumptions regarding: i) future investment returns; ii) future levels of CPI; iii) the probability of each member reaching retirement age with Nampak; and iv) the number of years that the subsidy will be paid after retirement.

[16] In excess of 70% of the relevant employees accepted the offer – at a cost of R236 million to Nampak. An offer in respect of the PRMA liability was also made to the retired employees, pensioners, who remained members of the scheme. About 75% of the pensioners accepted the offer at a cost of about R500 million to Nampak. The appellants did not accept the offer. They instead opted for the default option and sought to challenge the decision to cap the PRMA benefit.

[17] On 26 June 2015, the attorneys of the appellants addressed a letter to Nampak requesting it to reverse the capping decision alleging that it had unilaterally changed the appellants' terms and conditions of employment or alternatively had committed an unfair labour practice as contemplated in section 186(2)*(a)* of the Labour Relations Act[1] ("the LRA"). The dispute was eventually referred to the Labour Court in July 2016. It appears that the Labour Court accepted jurisdiction in respect of the contractual claim in terms of section 77(3) of the Basic Conditions of Employment Act[2] ("the BCEA"). Objection was taken at the hearing to its jurisdiction in respect of the alleged unfair labour practice. The Labour Court rejected the jurisdictional point for

[1] Act 66 of 1995.
[2] Act 75 of 1997.

reasons that are opaque and badly formulated in the judgment. However, there is no cross-appeal against the finding. Consequently, we will assume that the Labour Court had jurisdiction in relation to the unfair labour practice dispute.

[18] The appellants sought orders declaring the capping of the PRMA benefit and the decision of Nampak to retain the liability to be breaches of contract and unfair labour practices. They requested specific performance, contractual damages and/or compensation in terms of section 194 of the LRA. In pre-trial proceedings, it was agreed that only the issue of substantive fairness would be determined in relation to the unfair labour practice claim. The Labour Court dismissed the application in its entirety holding in effect that the exercise of the discretion in clause 4.1 of the policy and the retention of the PRMA liability by Nampak were reasonable (thus not in breach of contract) and fair.

<u>The validity and scope of clause 4.1 of the policy</u>

[19] The appellants raise various grounds of appeal. They contend firstly that clause 4.1 of the policy, conferring the discretion to cap the PRMA benefit, is void for vagueness. Although not pleaded, the legal point is deserving of consideration.

[20] The intention of the relevant clauses of the policy is clear. Clause 3.3.3 conferred on employees who commenced employment before 1 June 1996 and who reached retirement age with at least 25 years continuous years' service and 10 years membership of an acknowledged medical aid scheme the right to receive 100% of their medical aid contributions post-retirement; while clause 3.3.5 conferred on employees who had been continuous members of a medical aid society for more than five years with at least five years but less than 25 years continuous service the right to receive 50% of the medical aid contributions. These entitlements were expressly made "subject to" clause 4 of the policy. Clause 4.1 of the policy bestows on Nampak a "sole discretion" in respect of *future pensioners*, being all its employees who had not reached retirement age, to set a maximum level at which it is prepared to contribute towards medical aid society benefits post-

retirement. In other words, Nampak reserved to itself the right to alter the PRMA benefit in respect of employees in whom the benefits under clauses 3.3.3 and 3.3.5 of the policy had not vested.

[21] The appellants argued that a term purporting to afford Nampak a sole discretion to determine its own performance is void. They relied in this regard on *NBS Boland Bank Ltd v One Berg River Drive CC and Others*[3] to submit that "no promise can be valid if it lies wholly within the choice of the promissor." A careful reading of the judgment discloses that it is not authority for the proposition advanced by the appellants.

[22] The question before the Supreme Court of Appeal ("the SCA") in *NBS Boland Bank Ltd v One Berg River Drive CC and Others* was whether a clause in a mortgage bond conferring upon the mortgagee the right to unilaterally increase the original rate of interest payable by the mortgagor is valid. Lower courts had concluded that such a clause was invalid because a term of a contract leaving it to the will of one of the parties to determine the extent of his or the other party's presentation is void for vagueness. The SCA conceded that such was undoubtedly the view of Roman Dutch Law writers, but only in regard to the determination of the price in a sale and the rental in a lease. However, it felt that the principle, even narrowly applied to sales and leases, did not accord with modern legal systems. It is thus doubtful that courts should continue to follow the principle. The SCA considered it unnecessary to decide the point because the rule does not apply to a contractual power to fix a prestation other than a price or rental. It held there was no reason to extend the common law rule to other types of contractual discretions.

[23] Hence, generally, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable. There is accordingly no basis to hold clause 4.1 of the policy invalid and the Labour Court did not err in making that finding. This does not mean, as the Labour Court correctly understood, that an exercise of such a contractual discretion is necessarily unassailable. In terms of our common law, unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of a contractual

[3] 1999 (4) SA 928 (SCA).

discretion to alter a prestation must be made *arbitrio bono viri* (reasonably).[4] The essential question in this case, therefore, is whether Nampak exercised its discretion under clause 4.1 of the policy reasonably.

[24] Before turning to that question, we need first to consider another preliminary argument advanced on behalf of the appellants. The appellants maintain that Nampak had already exercised its discretion to set a maximum level of benefit long before it decided to implement the cap in 2014. They claim that when Nampak exercised its discretion in 2006 to confer the benefits in clauses 3.3.3 and 3.3.5 of the policy it did so for all its employees for all time. Once the discretion was exercised (by adopting clauses 3.3.3 and 3.3.5), neither clause 4.1, nor any other clause in the policy, expressly or impliedly entitled Nampak to indefinitely retain a right to unilaterally amend the employment contract from time to time.

[25] The argument is untenable. If the predicate were correct, clause 4.1 of the policy would be without purpose. The object of clause 4.1 of the policy is self-evident and unambiguous. Nampak reserved to itself the discretion to cap its PRMA liability in respect of future pensioners, being those employees in whom the right to PRMA had not vested. The benefits in clauses 3.3.3 and 3.3.5 of the policy vested in employees only on their retirement. Clause 4.1 of the policy reflects a clear intention to permit adjustment (on legitimate or reasonable grounds) of the PRMA benefit of employees still in employment prior to their retirement.

<u>The exercise of the discretion in terms of clause 4.1 of the policy</u>

[26] The requirement that a contractual discretion should be exercised reasonably, *arbitrio bono viri*, means that the relevant party must not act in bad faith, arbitrarily or capriciously and should endeavour proportionally to balance the adverse and beneficial effects of the proposed decision or action. A court reviewing the justifiability of such an exercise of discretion should permit the

[4] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) 707 A-B; *Moe Bros v White* 1925 AD 71,77; *Holmes v Goodall and Williams Ltd* 1936 CPD 35,40; *Belville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C) 591 G-H; and *Remini v Basson* 1993 (3) SA 204 (N) 210 I-J.

holder of discretion a margin of appreciation in balancing the relevant interests and considerations and avoid substituting the discretion with its own merely because it might have exercised it differently.

[27] The only witness to testify on behalf of the appellants was Mr Skinner. He worked for Nampak for 42 years before retiring in 2015. Prior to his retirement, he received a cash offer of R892 996 to buy his PRMA liability. He declined the offer as he believed it was not reasonable. He valued his benefit actuarially at about R1,3 million. He essentially maintains that the capping and retention decisions were unreasonable because Nampak retained the PRMA liability while implementing the cap to make the sale of the businesses attractive so that it could sell the businesses (without the PRMA liability) to the new owners; and that the effect of the sale to reduce Nampak's profits in South Africa thus posing a risk to the funding of the PRMA liability.

[28] Mr Skinner contended that Nampak did not act in good faith (or reasonably) for the following reasons: i) it conducted insufficient consultations with employees before implementing the cap and presented it as a *fait accompli*; ii) the cash offers were not reasonable; iii) it did not disclose the sale of the businesses until after it implemented the cap or the fact that Nampak would retain the PRMA liability after the sale; and iv) it failed to protect its financial position which supports the payment of the benefit, because it intended to invest the money received from the sale in the rest of Africa. Thus, in his opinion, Nampak did not exercise its discretion in good faith, did not make a reasonable offer, and did not protect the financial position to support payment of the benefit. There was moreover no reason why Nampak could not afford to finance the uncapped PRMA benefit or pay 100% of the actuarial liability.

[29] As discussed earlier, Mr Skinner also mistakenly believed that Nampak was in breach of contract because his contract provides that after 25 years of service he would get 100% subsidy on his medical aid contribution. When it was put to Mr. Skinner that the benefit was not immutable, he responded that any change would have to be agreed upon.

[30] The respondents called two witnesses to testify as to the reasons and

justification for the decisions to cap the PRMA and retain the liability with Nampak after the transfers of business, namely Ms Kidd, the compensation and benefits manager, and Mr O'Brien, the former Group Legal Adviser and company secretary.

[31] Ms Kidd testified that the PRMA liability on Nampak's balance sheet increased significantly after the amalgamation of the Nampak scheme and the Discovery scheme. She elaborated on the gradual deterioration of the Nampak scheme and the process of consolidation with the Discovery scheme. As membership of the Nampak scheme was not compulsory there was a decline in the membership. In addition, the number of employees at Nampak decreased as a result of the sale of businesses over time. Between 2004 and 2013 the trustees of the Nampak scheme were able to manage the contributions and benefits in such a way as to keep the liability within control. When the Nampak scheme amalgamated with the Discovery scheme, Nampak had less control over the increasing PRMA liability. She confirmed the PRMA liability was projected to increase from R1.8 billion in 2014 to about R3 billion in 2019.

[32] Accordingly, various options to control the liability were looked at: i) the purchase annuities for the pensioners who were prepared to accept same; ii) capping the liability of Nampak at an increase at the rate of CPI; and iii) making cash offers to existing and future pensioners. Capping the future contributions to CPI would have speedily reduced the balance sheet liability for the active employees from R517.6 million to R397.9 million.

[33] Eventually, the cash offers to both pensioners and future pensioners amounted to R736 million being the equivalent of approximately 47% of the price of the sale of Nampak businesses in 2014-2015.

[34] Ms Kidd further testified that the uncontrollable nature of the PRMA liability would have drastically eroded Nampak's performance and profitability over time. From 2010 to 2014 Nampak's business performed well and at some point during that period its share price was approximately R45. However, due to competition, very tough economic trading conditions and low barriers to

entry for some of its products, Nampak's profitability decreased significantly, cash reduced and its ability to meet commitments changed. The share price at the time of her testimony was approximately R10.

[35] The growth of the PRMA liability had implications for the income statement because it had to be reflected as a matched expense. The resultant decline in profitability would impact on investors, banks and financial institutions willingness to provide cash and loans. It would also weaken Nampak's balance sheet, making it difficult to borrow and invest in growth assets. The capping would reduce the matched expense significantly and profitability would improve.

[36] Ms Kidd indicated during cross-examination that when the PRMA liability originally was R1 billion, the matched expense to the income statement was around R92-million. If the PRMA liability had grown to R3 billion, as Nampak feared, the matched expense would have been three times that amount. Thus, it would have reduced the profit after tax of 2019 for Nampak, being R1.3 billion, by as much as R300 million. However, as a result of the cap on the PRMA benefit and the cash offers, the PRMA expense on the income statement has been kept at R100 million. When it was put to Ms Kidd that the test is whether Nampak could afford the benefit, Ms, Kidd replied that affordability is an issue for the employer and that Nampak had engaged in extensive restructuring, the sale of businesses, and "a multitude of strategies" to protect profitability and the concomitant capacity to meet the PRMA liability.

[37] Mr O'Brien confirmed Ms Kidd's evidence concerning the rationale for the capping decision and explained the reason behind the decision for Nampak to retain the PRMA liability after the sale of the businesses in 2015. The purchasers of the businesses were simply not willing to take over an uncapped or open-ended liability when medical inflation was increasing at an extraordinary rate. He also described how Nampak had previously sold a business with the medical aid liability and had transferred an amount equal to the actuarial value of the liability to the purchaser. Shortly afterwards, the purchaser retrenched a number of employees who were potential beneficiaries of the PRMA and took some of the money transferred for the

PRMA and “put it back into profits”. The risk that other purchasers of Nampak businesses might do the same thus informed the decision to retain within Nampak the PRMA liability of those employees and pensioners who did not accept the cash offer.

[38] Mr O’Brien explained that the money generated from the sale of businesses was intended to be used to generate greater returns than what Nampak was getting from those businesses. The remaining businesses (metal and plastics) all required capital expenditure to improve their competitive position. The group also intended to expand in Africa where it hoped for higher returns. Nampak faced a challenging position with pressure to keep prices down, increased labour costs, cost pressures from suppliers, higher energy costs and increasing PRMA liability. All of these factors impacted negatively on the profitability of the company.

[39] While some of the proceeds of the sale of businesses was applied to the cash offers to rid Nampak of the PRMA liability, the agreements for the sale of the businesses had not been signed at the time the capping of the PRMA was proposed. When asked why Nampak did not disclose the potential sale of the businesses to employees when it implemented the cap to the PRMA benefit in September 2014 he explained that Nampak would only inform employees of a sale of a business when it was a done deal. He added during re-examination that the capping was a decision taken in relation to Nampak as a whole and the increase in costs, and was not directly related to the sale of businesses. If the sale had not gone through then the capping would still have occurred.

<u>Evaluation</u>

[40] The appellants’ contention that Nampak breached their contracts of employment by not affording them the benefits set out in clauses 3.3.3 and 3.3.5 of the policy is not sustainable. These clauses, as explained earlier, are expressly made subject to the provisions of clause 4.1 of the policy. The contractual entitlement of the appellants is restricted by clause 4.1 of the policy which permitted Nampak at its discretion to alter the entitlement prior to its vesting on retirement. The claim of the appellants, in the light of clause 4.1

of the policy, is essentially a claim for an entitlement they did not have as "future pensioners". Accepting that they have no entitlement under clauses 3.3.3 and 3.3.5 of the policy, their dispute amounts to a claim for new rights and is thus akin to a dispute of interest, in the final analysis a matter for collective bargaining.[5]

[41] There can only be a breach of contract or unfair labour practice if Nampak is shown to have exercised its discretion in terms of clause 4.1 of the policy unreasonably or unfairly. The appellants' case on fairness comes down to a contention that the PRMA liability was affordable and capping was accordingly not necessary. As the matched expense to Nampak in respect of that liability was only R92 -100 million, and Nampak's profit after tax in 2019 was R1.3 billion, in their view, Nampak could afford, and can still afford, to pay the uncapped PRMA benefit.

[42] The issue of affordability is not decisive. When assessing whether the employer has acted reasonably or fairly in exercising its discretion to alter its prestation, its operational requirements are undoubtedly a relevant consideration. An intention to increase profitability is an entirely legitimate commercial rationale. The unfair labour practice jurisdiction is not meant to restrict the proper pursuit of profit by the employer. The point was made by Zondo JP (as he then was) in *Frys Metals (Pty) Ltd v National Union Metal Workers of SA & others*[6] when he said in relation to the commercial rationale for operational requirements dismissals:

> '[A]ll the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.'[7]



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[5] Section 1(c) of the LRA stipulates that one of the purposes of the LRA is to provide a framework within which employees and employers can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.
[6] (2003) 2 ILJ 140 (LAC) at para 33.
[7] At para 33. See also *General Food Industries v Food and Allied Workers Union* (2004) ILJ 1260 (LAC) para 52

[43] The evidence establishes convincingly that Nampak was constrained in its operations and pursuit of profitability by a number of cost-factors and adverse business conditions, including the indisputable fact that medical inflation was outstripping the CPI by a considerable margin. The earlier decision (accepted by a majority of its workforce) to amalgamate its unviable medical scheme with the Discovery scheme had unanticipated financial consequences. Those consequences impacted on shareholder value, the profitability of the company and its ability to finance its operations. As Mr O'Brien testified, Nampak faced a challenging position with pressure to keep prices down, increased labour costs, cost pressures from suppliers, higher energy costs and increasing PRMA liability. The difficulty it faced was reflected in the downward trend of its share price. Nampak consequently engaged in extensive restructuring, the sale of businesses and strategies to protect profits and the PRMA liability. These are matters falling within executive and managerial prerogative.

[44] The solution opted for by Nampak in relation to the PRMA was to exercise its contractual right to cap its liability; and after consultations with its employees and pensioners it purchased the individual PRMA liabilities of willing employees and pensioners at settlement values which although discounted were calculated fairly in accordance with appropriate actuarial assumptions. More than 70% of the active employees and the pensioners accepted the cash offers made to them, indicating that the offers had obvious advantages, not least being the transfer of the ownership of and control over the assets backing the individual PRMA liabilities from the employer to the employees and pensioners. In such circumstances, the decision to cap the benefit of the employees who preferred the respondents to retain their PRMA liability was reasonable. There is no evidence of any illegitimate or ulterior motive or caprice. The process was transparent and sought fairly to balance proportionally the competing interests at stake.

[45] Likewise, there is no merit in the contention that Nampak acted capriciously or in bad faith in the sale of businesses or by using a portion of the selling price to buy out the PRMA liabilities. There is no evidence gainsaying Mr O'Brien's testimony that the capping was a decision taken in relation to Nampak as a

whole and the increase in costs, and was not directly related to the sale of businesses. If the sale had not gone through then the capping (though perhaps not the cash buy outs) would still have occurred. Also there were sound commercial grounds for retaining the PRMA liability within Nampak in light of its negative experience with past transfers of business. The retention of the liability within Nampak was more likely to protect those employees who opted not to accept the cash offer.

[46] Hence, the Labour Court did not err in its conclusion that the respondents had not acted unreasonably or unfairly in breach of contract and had not committed a substantive unfair labour practice.

[47] As this matter is principally a contractual claim in terms of section 77(3) of the BCEA, the ordinary rule that costs should follow the result applies.

[48] In the premises, the appeal is dismissed with costs.

JR Murphy

Acting Judge of Appeal

Davis JA and Kathree- Setiloane AJA concur in the judgment.

APPEARANCES:

FOR THE APPELLANTS: PH Kirstein

Instructed by Marius Scheepers Attorneys

FOR THE RESPONDENTS: A Snider SC

Instructed by Cliffe Dekker Hofmeyr Inc