



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

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

**JUDGMENT**

Case no: J515/2011

In the matter between:

**JOHSON MATTHEY (PTY) LTD**

**Applicant**

and

**NATIONAL UNION OF MINE WORKERS**

**OF SOUTH AFRICA (“NUMSA”)**

**First Respondent**

**MADLANGU P**

**Second Respondent**

**MOTLUONG L**

**Third Respondent**

**MOHAPE E**

**Fourth Respondent**

**Heard: 13 April 2012**

**Delivered: 24 April 2012**

**Summary: Application to declare 2<sup>nd</sup> to 4<sup>th</sup> respondents bound by the applicant's terms and conditions of employment; ordering them to sign all necessary documents to join medical aid. Granted**

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## **JUDGMENT**

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GUSH J

- 1] In this matter, the applicant applies for an order declaring that the second to fourth respondents are bound by the applicant terms and conditions of employment and accordingly obliged to take all necessary steps and to sign all necessary documentation facilitates then joining the Discovery Health Medical Aid Scheme; ordering the second to fourth respondents to take all necessary steps to sign all necessary documentation to join the Discovery Health Medical Aid Scheme in accordance with the contracts of employment or alternatively in the event of the second to fourth respondents refusing to comply authorising the sheriff of the court Germiston South to take all necessary steps and sign all necessary documentation to facilitate second to fourth respondents joining the Discovery Health Medical Aid Scheme.
- 2] The second, third and fourth respondents, who are members of the first respondent, had been employed by the applicant on 1 November 2001, 15 February 2020 and 29 November 1972 respectively. On 27 February 2009, the applicant dismissed, for operational requirements, a number of its employees including the second, third and fourth respondents.
- 3] The second, third and fourth respondents contracts of employment prior to their dismissal provided:

The employee shall continue to be required to belong to one of the medical aid schemes currently subscribed to. Exemption from joining one of the above medical schemes would only be granted in the event of an employee being a member of the medical aid scheme of which his spouse is the principal member or he has private membership to a medical scheme...'

- 4] The second, third and fourth respondents had all initially been members of the Discovery Health Medical Aid Scheme. However in accordance with their contracts of employment at the time of their dismissal, the second and third respondents had terminated their membership of the Discovery Health Medical Aid Scheme and become members of the Sizwe Medical Fund, which at the time was a medical aid scheme to which the applicant subscribed.
- 5] During 2008, the applicant 'decided to consolidate its offerings in respect of medical aids' and elected to subscribe only to the Discovery Health Medical Aid Scheme. Those employees who had elected to become members of Sizwe Medical Fund were permitted to remain members of that fund.
- 6] At the culmination of the consultation process regarding the dismissals for operational requirements, the applicant and the first respondent entered into a 'Section 189A Agreement' which provided *inter alia* that it would '... give preference to retrenched employees for a period of 36 months should a vacancy occur...'
- 7] From the papers, it is clear that vacancies did occur, that the second, third and fourth respondent together with a number of other retrenched employees were not given preference and that as a result a dispute was declared and referred to the bargaining Council for arbitration.
- 8] The arbitrator in addition to awarding 12 of the retrenched employees (including the second third and fourth respondents) compensation ordered the applicant to re-employee all 12 of the retrenched employees (again including the second third and fourth respondents).

The order reads:

'[The applicant] is ordered to re-employee ... Madlangu [2<sup>nd</sup> respondent], Motluong [3<sup>rd</sup> respondent] and Mohapi [4<sup>th</sup> respondent] ... In the operator positions formerly occupied by them at the **prevailing** rates of pay and other **conditions of employment attached to these posts on date of re-employment** as the herein specified. The re-employment is ordered ... to take effect on 10 January 2011 when the applicant shall report for duty in terms hereof.' (my emphasis)

9] The second, third and fourth respondents appear to have accepted the award of reemployment and duly reported for duty. The applicant likewise appears to have accepted the award, and in compliance offered second, third and fourth respondents employment and presented them with a new contract of employment for signature.

10] The new contract of employment which contains the "prevailing conditions of employment" as at 10 January 2011 under the heading Medical Aid provides:

'The employee shall be required to join Discovery Health medical aid scheme. Exemption from joining the medical scheme would only be granted in the event of an employee being a member of a medical scheme of which is spouse/partner is the principal member or if he/she has private membership to a medical scheme ...'

11] The second, third and fourth respondents, despite having accepted their re-employment by the applicant, refused to sign the contract of employment and those documents and/or take such steps as are required in order to be registered as members of the Discovery Health Medical Aid Scheme.

12] The pleadings reveal that the reason advanced by the respondents for refusing to sign the contracts of employment was first set out in a letter addressed to the applicant on 18 March 2011 which reads:

‘With regard to the alleged refusal to sign written contracts of employment union reiterates its position to the effect that our members will not under any circumstances sign the said contract of employment in their current form without the union input. Further be advised that our members have never refuse to join the medical aid, they have all material times indicated that they have a right to choose the medical aid of their choice. Please allow our members to join the medical aid of their choice, should the company refuse to allow the members to join the medical aid the choice the company will be held responsible of the consequences’ (sic)

13] In the answering affidavit, which is deposed to by the first respondent’s regional legal organiser the respondents expand on their reason for refusing to sign the contract as follows:

- a. the second, third and fourth respondents previous contracts of employment entitled them to choose either Sizwe Medical Fund or Discovery Health Medical Aid Scheme;
- b. the bargaining council main agreement does not require employees in the industry to belong to a medical aid particularly one of the employer's choice; and
- c. the second to fourth respondents cannot afford the monthly subscription.

14] Somewhat surprisingly the second and fourth respondents did not file substantive or confirmatory affidavits.

15] As regards the fact that the new contract did not allow the second to fourth respondents the right to choose a medical aid as opposed to their old contract, apart from the simple fact that as they had been reemployed specifically on the prevailing terms and conditions and the new contract set out those prevailing terms and conditions, the applicant recorded in its papers in some detail the rationale behind the

change to the contract which more than justified the applicant's choice of medical aid scheme.

16] Whilst it is so that the bargaining council main agreement does not require employees in the industry to belong to a medical aid it most certainly does not prevent an employer from including such a requirement in its contracts of employment.

17] Mr van der Riet who appeared for the respondents argued that in essence as the relief sought by the applicant's amounted to an order of specific performance and accordingly the court could exercise its discretion not to grant the relief, he urged the court not to grant the application. Mr van der Riet conceded that although the second to fourth respondents had not filed affidavits supporting the averment that they could not afford the contributions and detailing their individual circumstances, the applicant had set out sufficient detail regarding the second to fourth respondent's income to tip the balance of hardship in favour of the respondents.

18] Mr Tip, who appeared for the applicants, emphasised that the reasons advanced by the applicant for insisting on its employees being members of a medical aid scheme and the reasons for stipulating Discovery Health Medical Aid Scheme justified not only the applicant's choice of scheme but its decision to include such a condition in its contracts of employment.

19] There is no doubt that the arbitration award ordered the applicant to reemploy the second to fourth respondents (not reinstate them) and in particular ordered that they be reemployed on the prevailing terms and conditions of employment at the time of their reemployment. The prevailing terms and conditions at the time of their reemployment included a clause in the contract of employment that they were required to join the Discovery Health Medical Aid Scheme. The second to fourth respondents accepted reemployment. They had the option of

declining reemployment when they became aware of the prevailing terms and conditions specifically regarding the medical aid or challenging the award. This they did not do.

20] I am satisfied that having accepted reemployment, whether they have signed the contract of employment or not, the terms and conditions that are applicable to their employment require them to join the Discovery Health Medical Aid Scheme.

21] As far as the nature of the relief sought by the applicant was concerned, Mr Tip and Mr van der Riet were in agreement that should the court be inclined to grant the applicant's application, the nature of the order sought should include ordering the sheriff to sign such documents and take such steps as are necessary to facilitate the second to fourth respondents enrolment as members of the Discovery Health Medical Aid Scheme in the event of the second to fourth respondents not complying as it would obviate unnecessary further litigation.

22] The nature of the application and the circumstances which necessitated it being brought justify, despite the ongoing relationship between the applicant and the first respondent an order that the first respondent pay the costs of the application. The applicant that the costs order should include the cost of two counsel. I am however not satisfied that either the complexity of the matter or fairness justified the employment of two counsel.

23] I accordingly make the following order:

- a. The second, third and fourth respondents are declared to be bound by the applicant's terms and conditions of employment that prevailed as at the 10 January 2011 as set out in the contract of employment, specifically the requirement that they join the Discovery Health Medical

Aid Scheme.

- b. The second, third and fourth respondents are ordered to, within 21 days of this judgment, sign all necessary documentation and take all necessary steps to sign all necessary documentation, required for them to join the Discovery Health Medical Aid Scheme;
- c. In the event of the second, third and fourth respondents failing to comply, the sheriff of the court Germiston South is authorised to take sign all necessary documentation and take all necessary steps on behalf of the second, third and fourth respondents as may be required for them to join the Discovery Health Medical Aid Scheme;
- d. The first respondent is ordered to pay the costs of this application.

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Gush J

Judge of the Labour Court

## APPEARANCES

APPLICANT: K Tip SC with him A Snider

Instructed by: Webber Wentzel Attorneys;

THIRD RESPONDENT: P van der Riet SC

Instructed by: Ruth Edmunds Attorneys