IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: J369/04

In the matter between:

SOLIDARITY	**FIRST APPLICANT**
C W COOKE	**SECOND APPLICANT**

and

TEST & DRIVE HOLDINGS (PTY) LTD t/a AA TEST AND DRIVE **RESPONDENT**

JUDGMENT

CELE AJ

INTRODUCTION

[1] This is an application in terms of action 158 (1) (iii) of the Labour Relations Act 66 of 1995 ("the Act") to direct the respondent to pay the second applicant's post retirement healthcare benefits. The application is based on the contract of employment and reliance is therefore on section 77 (3) of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"). Application is opposed by the respondent.

Background facts

[2] The second applicant commenced employment with the Automotile Association of South Africa ("the AA") on 11 November 1972. However, on 5 August 2001, the second applicant entered into a written contract of employment with the AA. Clause 16 of such contract dealt with medical aid and read-

> "16. Medical Aid
>
> 16.1 It is compulsory for all staff to belong to a healthcare scheme. Should a staff member belong to his / her spouse's health care scheme, proof of this must be provided. Should you not be covered you may join a healthcare scheme of your own choice. However this must be arranged through the AA's consultants, Alexander Forbes.
>
> 16.2 Once you have been enrolled as a member of a medical aid scheme by our consultants, that option may only be changed in January of the following year.
>
> 16.3 Employees engaged after 1 January 1998 are responsible for their own post- retirement medical aid provisioning."

[3] It was thus compulsory of the second applicant to belong to a

healthcare scheme and at that time AA was responsible for providing his post- retirement healthcare benefits.

[4] There came a time when AA felt it could no longer afford the post-retirement healthcare benefits. Through a letter dated 27 November 2001, addressed to its employees, AA suggested that the post-retirement benefit be ceased and posed an invitation to its personnel to enter into consultation with those who might be affected by the change. Those who acknowledged the changes and had no further need for clarification or consultation on the issue were to sign an acknowledgement to that effect in the relevant provided space. They were to return the acknowledgement to a Human Resources Manager Mr Sally Ebert, by no later than 3 December 2001. Those who wished to continue with the consultation process were to consult with the Human Resources Manager.

[5] On 3 December 2001 the second applicant had neither signed and submitted the acknowledgement nor had he arranged for consultations with one Mr Sally Ebert. On 6 December 2001 AA notified the second applicant of his non – compliance with the directive. He was told that if he was not willing to sign the acknowledgement and to respond to AA's invitation to arrange a consultation within 2 days of receipt of the letter, AA would regard him as having accepted the post- retirement alterations. On 11 December 2001 the second applicant made a written note on the letter of 6 December 2001 which reads-

"I do not accept the changes. I first want to see my contract

from Test & Drive and only then can a decision be made."

[6] He then forwarded that letter to Mr Ebert. By then the 2 days within which he was asked to respond had elapsed.

[7] In the meantime AA and the present respondent had on 22 November 2001, entered into an agreement, clause 16 of which transferred employment contracts of the technical division staff from AA to the respondent, with effect from 1 January 2002. The respondent issued a letter dated 25 January 2002 to the affected staff to inform them of the change. It was endorsed in that letter that provident fund would be transferred by the end of February 2002 and the medical aid would be transferred at the end of March 2002.

[8] Clause 16.1 of the transfer agreement between AA and the respondent reads –

> "16.1 with effect from the effective date, the seller hereby assigns and transfers, as contemplated in section 197 of the Labour Relations Act no. 66 of 1995, to the purchaser, all the contracts of employment of those of the seller's employees who are, on the effective date, employed specifically in respect of the business on the same terms and conditions as those pertaining to the employees as at the effective date, which terms and conditions are set out opposite each of the employees in annexure "B" ("the employees").

[9] On or about 1 January 2002 the AA's Technical division was consequently taken over by the respondent as a going concern in

terms of section 197 of the Act.

[10] There is a letter dated 28 May 2002 which was issued under the latter heads of AA and was addressed to staff members. It purports to have been signed by one Mr Glenn Oellermann, in his capacity as Director: Support Services, Mr Oellermann was also the signatory of the letter dated 6 December 2001, addressed to the second applicant. He was acting under a similar capacity. It referred to the letter dated 27 November 2001 and it stated that a tally of acknowledgements showed that 94% of staff agreed to the change to the post- retirement healthcare benefits and that management accordingly took a decision to discontinue the provision of post – retirement healthcare benefits with effect from 31 December 2001. The letter went on to inform the staff of there being a special bonus which would accrue to all staff who were members of the Provident fund on 1 January 2001. The letter said that, in view of the discontinuation of post – retirement healthcare benefits the staff might wish to use the bonus as a contribution towards their healthcare requirements after retirement.

[11] On 30 January 2003 the second applicant applied for an early retirement which he said was to take effect from 28 February 2003. Then on 10 February Mr Greg Tourell, an Operations Director of the respondent accepted the request of the second applicant and he suggested a 30 days notice period, which if acceptable to the second applicant, he had to confirm the same in writing. On 11 February 2003 the second applicant then sent by means of a

telefax, his 30 days written notice to go on early retirement with his last working day being 31 March 2003. He concluded that letter by asking what arrangements would be made for his medical aid and he said he qualified for the post – retirement medical aid in terms of his contract with AA which he said was transferred to the respondent. On 18 February 2003 the respondent sent a letter of acceptance of an early retirement of the second applicant with a cheque for a 30 year service award and some other documentation, including the letters of 27 November 2001 and 20 May 2002. On 31 March 2003 the second applicant indeed went on early retirement. He has since brought this application.

The issue

[12] The question for a decision is whether the second applicant is entitled to post – retirement medical aid benefits consequent upon his contract of employment which was transfered from AA to the respondent.

[13] There is the ancillary question which follows if the first question is answered in the positive. It is whether it would be competent of this Court to order the respondent, to pay any medical aid benefits. No medical aid service provider was cited by the applicant. If payment is to be ordered, the next questions are who must payment be made to and how is such payment to be calculated.

Submissions by the parties and Analysis

Mr Branford for the applicants is correct in submitting it as common cause between the parties that:-

- The second applicant's entitlement to post – retirement medical aid benefit was a benefit *ex contractu* by virtue of the provisions of his employment contract with AA.
- The second applicant, as an employee engaged before 1 January 1998, was contractually entitled to post – retirement medical aid benefits.
- The AA notified its employees by way of a letter of 27 November 2001 that it proposed alterations to the post – retirement medical aid benefits and the discontinuance of those benefits to current staff members.
- The AA invited employees to acknowledge changes or to consult regarding the expected changes to the post – retirement medical aid benefits.
- The second applicant did not respond to the letter of 27 November 2001 and the AA had to write another letter of 6 December 2001 directed specifically to the second applicant. The response to the second letter reached AA on 11 December 2001. The second applicant was to have responded to that letter within 2

days from the date of receipt thereof.

[14] The second applicant, in confirming both the founding and replying affidavits of Mr Johannes Kruger, then denied that he did not send the response to the letter of 6 December 2001 within two days of receipt thereof. He said that he received the letter on 11 December 2001 and on that very day responded as directed. The respondent takes issue with this belated disclosure of the date of receipt by the second applicant of the letter dated 6 December 2001.

[15] In his founding affidavit, Mr Kruger stated that it was on or about 6 December 2001 that AA notified the second applicant that he had not answered the letter of 6 December 2001. The second applicant confirmed the contents of Mr Kruger's founding affidavit without qualifying this part of his affidavit. This resulted in the respondent, in its opposing affidavit, admitting the contents of the relevant paragraph of the founding and confirmatory affidavits of the applicants.

[16] The second applicant can not reasonably expect to raise a material issue for the first time in his replying affidavit which will have the consequence of denying the respondent a chance to respond thereto, with the hope that this Court will accept and lend credence thereto.

[17] I take the words chosen by Mr Kruger in his founding affidavit,

paragraph 4.7. "On or about 6 December 2001 the AA *notified* the second applicant…" to mean that AA wrote a letter dated 6 December 2001 *and* the contents of such letter came to the *notice* of the second applicant on or about 6 December 2001. For the second applicant, to say he received the letter of 6 December 2001 on 11 December 2001 is in my view, a contradiction which I hold against him.

[18] Another consideration which tends to count against the second applicant is that upon receipt of the letter of 6 December 2001, with a two days time limit based on the date of receipt thereof, he should have endorsed the date of receipt in his response. 11/12/2001 which he put below his signature is only suggestive of the date of response and not necessarily a date of receipt thereof.

[19] The last paragraph of the latter of 6 December 2001 reads –

> "Failure to return a signed acknowledgement, or to respond to our invitation to you to arrange a consultation, will be taken as an indication of your acceptance of these changes."

[20] The respondent's submission is that the second applicant waived his rights to claim specific performance. Given the fact that he failed to respond in time, the respondent submits that AA was entitled to assume that the changes had been accepted by the second applicant and therefore that his quiescence constituted acquiescence.

[21] The applicants' reaction to the respondent's submission is that the

respondent is being disingenuous. They say that the two day time period, having regard to the proceeding negotiations and the finalisation of the takeover, was an unilateral time period decided upon by the AA, as such was arbitrary and could not stand in the light of the aforegoing events proceeding the takeover. They say that the second applicant's attitude towards the retention of his post-retirement medical aid benefits was well known and documented and that therefore the action of the respondent was arbitrary and unfair.

[22] The applicants submit that Mr Gregory Brett Tourell, who is the deponent to the respondent's answering or opposing affidavit, was well aware that the issue of the post- retirement medical aid benefits was a contentious issue to employees of the AA, before the takeover, and that he was in fact present at the meeting when such employees were informed that such benefits would not change upon the transfer of such employees to the respondent.

[23] In approaching this Court, the applicants opted for the application proceedings as opposed to trial with oral evidence. In application proceedings Courts are normally guided by the decision in **Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623(A)** when there is a dispute of facts. Corbett JA (as he was then) relied on **Stellenbosch farmers' Winery Ltd v Slellenvale Winery (Pty) Ltd 1957 (4) SA 234 (c)** at 235 E-G in stating the general rule to be:-

> "…where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order… where it is clear that facts, though not

> formally admitted, cannot be denied, they must be regarded as admitted."

[24] Further, I am guided by Olivier JA in **Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman 2001 (3) SA 952 (SCA)** at 958 when he said:

> "If, in a particular instance, it is found that the offeror has indicated that express notification of acceptance is not necessary in order to constitute a binding contract, it follows that the offeree's quiescence will amount to acquiescence, i.e. that the offeree's failure to object to and reject the offer will justify an inference that the offer has been accepted… silence is equivalent to consent when it is one's duty to speak."

[25] I, accordingly, conclude that the proposed amendment to the post – retirement medical aid scheme benefits was accepted by the second applicant when he chose not to reply to respondent's letter of 27 November 2001 and when on or about 6 December 2001, after being notified of the proposed amendment, he did not respond within 2 days as stipulated.

[26] If it has to be accepted, as applicants aver, that the issue of the post-retirement medical aid benefits was a contentious issue to employees of the AA before the takeover, there must have been a change of hart on the employees for the tally of the acknowledgements to show that 94% of the staff agreed to the change.

[27] I accept as well, therefore that management of AA took the decision to discontinue the provisions of post – retirement healthcare benefits with effect from 31 December 2001.

[28] The second respondent accepted the special bonus which was to accrue to all staff who were members of the Provident Fund on 1 January 2001. In view of the discontinuation of post- retirement healthcare benefits such staff members could use the special bonus as a contribution towards their healthcare requirements after retirement. If the second applicant did not accept the change, the reasonable thing should have done, was to return the special bonus. He did not.

[29] I hold further that when the medical scheme of the employees was transferred on 31 March 2002 to the respondent, such transfer did not include the post-retirement healthcare benefits as these had already been discontinued on 31 December 2001.

[30] The second applicant is consequently not entitled to any post-retirement medical aid or healthcare benefits. It has then become unnecessary to examine the ancillary question.

Order:

1. The application is dismissed with costs.

CELE AJ

Date of hearing : 22 November 2005

Date of Judgment: 07 March 2006

Appearances

For the Applicant:	Adv D.J. Branford
Instructed by:	Serfontein, Viljoen & Swart Attorneys
For the Respondent:	Adv Richard Brusser
Instructed by:	Delport Ward & Pienaar Attorneys