

**THE LABOUR COURT OF SOUTH AFRICA,
(HELD AT JOHANNESBURG)**

NOT REPORTABLE

Case No: J1716/19

In the matter between:

**SWEETBOY XOLANI KHUMALO &
65 OTHERS**

**First and further
Applicants**

and

**MEDIKREDIT INTEGRATED
HEALTHCARE SOLUTIONS (PTY)
LTD**

First Respondent

**UNIVERSAL HEALTHCARE (PTY)
LTD**

Second Respondent

**CHARTERED ACCOUNTANTS (SA)
MEDICAL AID FUND**

Third Respondent

COMPCARE MEDICAL SCHEME

Fourth Respondent

Heard: 27 August 2019

Delivered: 29 August 2019

Summary: (Urgent application – requiring employer and group company to remain affiliated to medical scheme – alternatively interdicting the employer

parties from terminating the applicants' membership of a medical scheme, pending either the outcome of a substantive application to be launched in the labour court or the determination of an unfair labour practice dispute to be referred to arbitration)

JUDGMENT

LAGRANGE J

Introduction

- [1] Judgment in this matter was handed down on 29 August 2019, without reasons being provided. The reasons to the order set out at the end of this judgment are detailed below.
- [2] This is an application launched on an urgent basis on 13 August 2019 for the following relief:
- 2.1 a final order compelling the first and second respondents ['Medikredit' and 'Universal'] to remain affiliated to the third respondent ['CAMAF'], a medical scheme, so that the applicants may retain their membership of CAMAF, or
 - 2.2 alternatively, an interdict preventing Medikredit and Universal from terminating the applicants' membership of CAMAF pending either the outcome of a substantive application in this court for final relief, or the outcome of an unfair labour practice dispute, referred under case number GAJB15876-19 to the CCMA.
- [3] At the time the matter was heard, the applicants had not launched a substantive application for final relief in this court, nor had they referred the dispute before the CCMA to arbitration to determine the unfair labour practice dispute. Nonetheless, in the event interim relief pending finalization of either of those proceedings is granted, the applicants have committed themselves to launching the proceedings within fixed time limits.

- [4] In their answering affidavit, the respondents took issue with the absence of confirmation that the application had been duly authorized by all the applicants. However, confirmatory affidavits were filed by the time the application was heard and the respondents did not persist with this preliminary objection.

Background

- [5] The individual applicants are employed by Medikredit and are all members of CAMAF. In 2015 Universal acquired Medikredit. Universal administers the medical scheme provided by the fourth respondent, 'CMS'.
- [6] On 10 October 2018, Medikredit advised the applicants that a decision had been taken by the Universal group of companies to standardize medical aid offerings and to place all employees in the group in the CMS. On 22 October 2018 the applicants objected to this and referred an unfair labour practice dispute to the CCMA, whereupon Medikredit and Universal indicated that they had abandoned the decision to disaffiliate from CAMAF. In consequence, the unfair labour practice dispute was withdrawn.
- [7] However, on 11 January 2019, Universal 'confirmed' its 'provisional' view to consolidate and standardize all employee benefits in the group including transferring members from capital CAMAF to CMS. A renewed effort to transfer medical aid benefits from CAMAF to CMS was announced on 11 January 2019. The letter noted, *inter alia*, that in terms of the employees' contracts of employment Medikredit was at liberty to affiliate to a medical scheme of its choice. It further proposed that consultations would commence on 11 January on its proposals.
- [8] Employees created a workplace forum to represent them in the consultations, a step which Medikredit encouraged.
- [9] Consultations ensued between February and July 2019 with the forum and on a one-to-one basis with applicants. The applicants maintain they continued to object to the proposed changes and the rationale for making them. A petition to this effect was submitted on 7 May 2019 rejecting the

proposed change in medical benefit schemes owing to the negative financial and health risk coverage, which they claimed it would entail.

- [10] A grievance was also filed on 25 June 2018. This resulted in the chairperson of the grievance hearing recommending that Medikredit and Universal should commence consultations with each individual to discuss the proposed changes.
- [11] In July 2019 a PowerPoint presentation was made by Medikredit in which it was stated that the successful migration from CAMAF to CMS would be done through a consultation process together with financial assistance to provide for potential or exceptional healthcare shortfalls that members might experience in moving from CAMAF to CMS. On 10 July 2019, the applicants' attorneys wrote to Medikredit and Universal claiming the applicants were still unhappy with the proposed membership of CMS, which offered substantially less benefits than they were presently enjoying, and that they considered the respondents were engaging in an unfair labour practice which would be referred to the CCMA. In particular, they complained that attempts were being made to get individuals to agree to the changes in the one-on-one consultation meetings.
- [12] The letter of 10 July called on the respondents to provide a written undertaking by 12 July that they would not make any changes in respect of staff who currently were members of the CAMAF scheme. The letter further warned of an urgent application being brought in the event that this was not done. This was followed by a similar letter on 11 July.
- [13] In the respondents' reply of 12 July it maintained it was entitled to change the medical schemes of employees and that, despite the consultations, it intended to make a decision by 15 July regarding the change. It further disputed that the benefits under CMS were less substantial than under CAMAF. Further, a fund and cover had been provided for in the event some employees might be adversely affected.
- [14] The conciliation of the dispute at the CCMA was scheduled for 7 August. On 25 July the applicants asked for the outcome of the decision which was supposed to be taken on 15 July, but on 30 July the respondents said they had not yet made a final decision. Nevertheless, the following day the

company announced that it had decided to implement the migration from CAMAF to MCS with effect from 1 September 2019. This was followed up by a somewhat inelegantly worded notice issued on 1 August 2019 to the effect that the applicants' CAMAF membership "has been resigned with effect from 31/08/2019".

- [15] The conciliation process at the CCMA on 7 August was unsuccessful. Following the unsuccessful conciliation, the applicants complained that the workplace forum was prevented from convening and representing them.

Existence of a legal right:

- [16] Applicants claim that at the commencement of their employment they were entitled to join CAMAF and that the Medikredit and Universal are attempting to unilaterally change their conditions of employment. Insofar as the applicants can point to any contractual entitlement allowing them to remain members of CAMAF, it is clause 1.2.2 of the standard contract of employment for Medikredit employees, which states:

"1.2.2 Medical Scheme

The company requires that you select at least the minimum cover with one of the schemes that the company affiliates with...."

As I understand the applicants' contention they maintain that this clause is a once-off election exercised by them and the reference to "schemes that the company affiliates with" only refers to schemes the company is affiliated to at the time they exercised their election. On their interpretation, the fact that the company subsequently affiliates to different schemes cannot disturb their original choice of medical scheme membership.

- [17] They also claim they will be substantially prejudiced, which claim is illustrated by a comparison of the benefits of the two schemes and as they say is evidenced by the fact that the respondents recognised that it was necessary to set up an assistance fund to provide for exceptional relief.
- [18] Further, the applicants contend that the transition will entail that their private medical records would become known to their employer because Universal, the holding company of Medikredit, is the scheme administrator

of CMS, and that Medikredit would effectively have the discretion whether or not to reject proof claims within the discretion of the so-called Clinical Committee.

- [19] The respondents maintain that the applicants are bound by the terms of the standard contract of employment applicable to all members of the Universal group, which provides *inter alia*, that:

“The employee agrees to accept membership of the medical aid, GAP cover, pension funds, and loyalty wellness programmes as approved by the employer.”

(emphasis added)

Accordingly, they contend that, irrespective of whether the applicants initially elected to join CAMAF, they are bound to accept membership of a medical scheme currently approved by the employer. Consequently, if the employer approves membership of a different medical scheme to the one which employees currently belong to, they are required to accept membership of the new scheme. The respondents also argue that the same interpretation is applicable to clause 1.2.2 of the standard Medikredit conditions of employment. It does appear that both clauses suggest that membership of a medical scheme is confined to membership of schemes, which Medikredit *currently* affiliates to or approves of. If it is within the choice of Medikredit to disaffiliate from a scheme, it is difficult to see how the applicants can claim as a matter of contractual right that they retain their membership of a scheme despite that.

- [20] Further, the applicants claimed that the respondents’ attempt to remove them from membership of CAMAF is a breach of their right to freedom of association, but this contention was not pursued when the application was argued. Another claim, which was also not pressed in court, was that the mere payment of contributions by them meant they have a right to choose their medical aid.

- [21] The applicants’ alternative claim to a contractual entitlement to remain members of CAMAF, is that the Medikredit’s attempt to disaffiliate from CAMAF and to require them to be members of CMS, save in those cases where the applicant is a beneficiary of a spouse’s medical scheme,

amounts to an unfair labour practice. Having regard to the established principle that such a determination can be made in respect of benefits within the discretion of an employer, there is reason to believe they might succeed in unfair labour practice proceedings. See ***Apollo Tyres SA [Pty] Ltd v CCMA & Others***.¹

Balance of convenience:

- [22] The applicants claim that having been members of CAMAF for many years there is no prejudice to the respondents should they remain members, whereas if they ultimately establish their right to be members of CAMAF, but interim relief is refused, the establishment of that right in due course would be of no assistance to them if their membership of CAMAF is terminated in the interim, because CAMAF is a closed scheme and can only admit new members who are part of the accounting profession. Accordingly, if their membership of the scheme is terminated it will not be possible simply to resume their membership. The respondents refused to cancel the termination notice pending the outcome of the unfair labour practice claim.
- [23] The respondents claim that their efforts to standardize conditions of employment across the Universal group will be hampered by any delay occasioned by arbitration proceedings and any court proceedings subsequent thereto. The mere fact that the applicants were allowed to remain members of CAMAF for a period of five years after Universal acquired Medikredit has no bearing on the balance of convenience.
- [24] In my view, while it is understandable that the respondents do not want to have a multiplicity of medical schemes, contribution rates and benefits to deal with, they have been able to tolerate the anomalous position of the applicants for a period of five years. The additional time that might be lost in awaiting a determination of an unfair labour practice claim is unlikely to be inordinately long. From the applicants' perspective, it does appear that the respondents recognize that the benefits available to the applicants

¹ (2013) 34 *ILJ* 1120 (LAC) at 1136, para [50].

under CMS are such that additional funds might have to be provided to deal with possible shortfalls in benefits that the applicants could experience once they moved to CMS.

- [25] More importantly, the applicants will irrevocably lose their right to retain membership of CAMAF if the termination of their membership proceeds before the unfair labour practice dispute is determined, as it is inconceivable that in the event they are successful, the arbitrator could require the renewal of their membership of CAMAF, contrary to the rules of that fund restricting further admission of members to members of the accounting profession only.

Existence of alternative remedies

- [26] The respondents argue that, in so far as the applicants claim the change in medical scheme membership amounts to a unilateral change to conditions of employment they have not invoked the protected strike mechanism available to them under section 64 [4] [a] of the Labour Relations Act, 66 of 1995 ('the LRA') to require Medikredit not to implement any change. In fact, the applicants intend pursuing the alternative remedy of obtaining an unfair labour practice determination. That remedy might be an alternative, but direct enforcement of contractual rights would ordinarily be the most appropriate way of enforcing those rights by way of an order of specific performance.
- [27] In any event, the alternative interim relief sought will allow the applicants to pursue another alternative remedy.

Order

- [1] The application is dealt with as a matter of urgency in terms of Rule 8 of the Labour Court Rules and noncompliance with time periods and provisions relating to service therein is condoned.
- [2] The first and second respondents are interdicted from terminating the applicants' membership of the third respondent pending the finalization of the unfair labour practice dispute under case number GA JB 15876-19 currently pending in the Commission for Conciliation Mediation and

Arbitration, provided that applicants request that the dispute be referred to arbitration no later than 4 September 2019.

- [3] The first and second respondents are jointly and severally liable for the applicants' costs, the one paying the other to be absolved.

R G Lagrange
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

C Malan instructed by Bagraim Sachs Attorneys

RESPONDENT:

A Redding instructed by Cliffe Dekker Hofmeyr Inc