

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JA 51/2000

In the matter between:

NUMSA o.b.o its members

Appellant

and

LUMEX CLIPSAL (PTY) LTD

Respondent

JUDGMENT

MOGOENG JA

[1] The Respondent is a company that manufactures electrical fittings and accessories. The Appellant is a trade union and it represents 31 employees (“the employees”) whose task was to operate machines in a division of the Respondent’s manufacturing operations known as the plastic shop. The employees were dismissed for having refused to comply with an instruction requiring each of them to operate two machines. What follows are the events which culminated in their dismissal.

[2] On 17 September 1997, the Respondent initiated a rationalisation programme. Two aspects of that programme which affect the plastic shop are set out below:

“THREE SHIFT SYSTEM

the introduction of an alternating three eight hour shift system in the plastic shop, together with the option to work an additional twelve hour shift every third Saturday at normal overtime rates.

.....

INTERNATIONAL OPERATIONAL STANDARDS

the introduction and phasing in of the international operational, quality, safety and efficiency standards, which, amongst other things, allows for machine operators to attend to more than one machine at a time and dictate the logical grouping together and combining of operational duties and functions to a larger degree than what is currently the practice within the Companies.”

[3] On 20 October 1997 employees refused to operate more than one machine. According to the Respondent, this was contrary to normal practice at the time, whenever there was absenteeism. This resulted in Mashamaite, one of the plastic shop supervisors, compiling a report for management. On 21 October 1997, the representatives of the employer and of the employees met to discuss the abovementioned proposed rationalisation. After that meeting Mr Phakwe, a union representative, conducted an inspection at the plastic shop to familiarise himself with the workings of the plastic shop.

[4] The Respondent circularised another communique dated 23 October 1997. It stated the following about the plastic shop:

“2.1) Plastic shop (410)

2.1.1)Currently one operator attends one machine even though:

- The moulding operation is automatic,
machine setting, adjustment and maintenance department.

It is commonly acceptable for one operator to attend more than one machine at the same time:

- Various companies i.e. CLIPSAL in Australia use this system,
- In a recent labour crisis 4 staff members successfully operated 9 machines.

In future, 15 machines will be run by 8 operators, staggering breaks.

2.1.2) Series 2000 moulds do not operate automatically and require a full time

operator. The cycle time of 0.37 minutes however allows the operator to perform a secondary operation like assembly of screws to grid plates while the machine completes it's cycle.

The sixteenth machine will in theory be allocated to S2000 and run by one operator who will also put screws in grid plates.

2.1.3) An additional operator will be allocated to pack S2000 components in bags and containers as well as attend the automatic rocker printing machine. When S2000 is not being produced, this operator will assist the jumper in relieving moulding machine operators.

2.1.4) A jumper will be appointed to ensure the continuous operation of all moulding machines should operators leave to take a break. The jumper may be required to replace an absent operator.

2.1.5) A three shift system will be implemented resulting in seven additional positions being created.

The above mentioned task allocation applies to all three shifts and shift change over may not affect the continuity of the operations.

2.1.6) The seven operators required to fill three shifts will be :

2 Permanent whose existing positions have been allocated to female operators who can not be allocated to any other positions.
5 Fixed term operators taken from the LIFO list.
These positions require male operators because of heavy lifting."
(My emphasis)

This was followed by a meeting of 27 October 1997 between the parties. At that meeting, the Appellant never challenged the above position particularly in so far as it made the one-operator two-machines task allocation an integral part of the three-shift system.

[5] After the above meeting, the parties continued to exchange ideas about the proposed changes but could not reach agreement. On

26 November 1997 the Respondent invited any employee who was willing to work according to the Respondent's three-shift proposal, to give a written commitment to that effect by 28 November 1997 or else face retrenchment which would be effective from 12 December 1997. Those who would give the undertaking would begin to work in terms of the new system with effect from 01 December 1997. None of the employees committed himself. Accordingly, they were all retrenched.

[6] This decision to retrench was subsequently withdrawn by agreement between the parties' attorneys. The crucial part of the agreement, which was concluded on 05 December 1997, states that:

“Your client's members agree and undertake to work (under protest) in accordance with the 6-day/3-shift system proposed by Lumex Clipsal (Pty) Limited, pending the outcome of any dispute which your client may wish to refer to the Bargaining Council in regard to that 6-day/3-shift system.”

[7] On 08 December 1997 the employees were instructed to, but refused to comply with the one-operator two-machines requirement (hereinafter also referred to as “doubling-up”). As a result, the Respondent held a ‘collective disciplinary enquiry into the plastic shop employees collective, unprotected and unprocedural industrial action and their collective refusal to adhere to the company's new operational operator moulding machine ratio of two plastic moulding machines per operator.’ The employees were all found guilty and dismissed.

[8] The substantive fairness of the dismissal was challenged in the Labour Court. Jammy AJ found the dismissal to have been substantively fair and dismissed the Appellant's claim with costs. The Appellant has now appealed to this Court against the whole of that judgment.

[9] Mr Bruinders, for the Appellant, based the Appellant's case on two main grounds. Firstly, that the undertaking to work the six-day/three-shift system under protest was never intended to incorporate the one-operator two-machines requirement. The question of one-operator two-machines was completely abandoned earlier in the negotiations since no agreement could be reached on it. That is why it is not mentioned at all in any of the correspondence which was exchanged after the communique of 23 October 1997. Secondly, it had never been part of the employees' job description to operate two machines at any given time. Therefore, so submitted Mr Bruinders, the employees' refusal to operate two machines did not amount to refusing to work. They tendered their services to operate one machine, which was how they had always worked, and should not, therefore, have been regarded as

having been involved in an unprotected industrial action.

Mr Sutherland, for the Respondent, submitted essentially that it was very clear to the employees that a one-operator two-machines task allocation was central to the implementation of the three-shift system in a manner that would be economically sound. Furthermore, he submitted that the pre-existing practice was for operators to run two machines whenever there was absenteeism. Because of the view I take of this matter, the ensuing analysis will be confined to the issue identified below as being the real issue.

[10] The real issue, which is dispositive of this matter, is whether the one-operator two-machines requirement is, and was known by both parties to be, an integral part of the six-day/three-shift system which the employees undertook to comply with in the agreement of 05 December 1997. This question is addressed below.

[11] The proposals were scheduled to be discussed at the meeting of 21 September 1997. The Appellant's contention that the one-operator two-machines issue was not discussed is improbable. It is common cause that on 20 October 1997 the employees refused to operate two machines when they were requested to do so. (Whether they were supposed to do so or not is of course controversial). This incident was so fresh in the minds of the parties and so relevant to the proposals in so far as they affected the plastic shop that it must have factored in the discussions. It could not have been sheer coincidence that, after the abovementioned meeting, Phakwe went to inspect the plastic shop with particular interest in the feasibility or practicality of one employee operating two machines. I am satisfied that the three-shift system as well as doubling-up were discussed on 21 September 1997.

[12] Viewed in isolation, the documentation dated 17 September 1997, which initiated the rationalisation programme, seems to suggest that the three-shift system and the doubling-up are two separate issues altogether. They are dealt with separately and there is, *ex facie* the document, nothing really to suggest that the latter is necessarily part of the former. However, the motivation of 23 October 1997 clarifies the connection between the six-day/three-shift system and the job or task allocation in terms of which one operator would be required to operate two machines during one shift. Firstly, it is explained that 16 machines would be running during a shift and 10 operators, including a jumper, would see to it that all those 16 machines are operative. These are the

same 16 machines that have almost always been running during the two-shift system. For everybody who is involved in the plastic shop that explanation coupled with constant reference to the 'three-shift continuous operations system' must have sent a clear message that the continuity of the same volume of production that was achieved during the two-shift/12 hour system, or much more, would have to be maintained during the three-shift/8 hour system. It also appears from the motivation contained in the communique of 23 October 1997 that the system in a broader sense is the three-shift system. The doubling-up is nothing more than a task allocation which is subsumed under the system. From the beginning of the motivation up to subparagraph 2.1.4 the allocation of tasks and of machines to operators is discussed. Subparagraph 2.1.5 then clarifies the position thus:

“2.1.5 A three shift system will be implemented resulting in seven additional positions being created.

The above mentioned task allocation applies to all three shifts and shift change over may not affect the continuity of the operations.”
(My underlining)

[13] Having inspected the plastic shop and seen how people worked there, and having received the communique of 23 October 1997, Phakwe never complained about the feasibility of the plastic shop restructuring proposals at the meeting of 27 October 1997 or even in subsequent correspondence. He did not question the intended continuity of the operations throughout the shifts and the fact that the doubling-up was intended to be an integral part of the three-shift system. His counter proposal, in a letter dated 05 November 1997, was that the Respondent's proposal of the introduction of the three-shift system be changed to allow employees to reduce their hours of work during weekdays from forty four to forty per week, without loss of pay and to pay these employees overtime rates for work carried out over weekends. At some stage there was also a concern expressed about transportation and the security of the employees especially those who would be doing night shift. His attitude about the one-operator two-machines task allocation as stated in his letter of 10 December 1997 was that employees were not opposed to it but that some job

evaluation would have to be done. These were the only issues.

[14] The dispute which the employees referred for conciliation also shows that the practicality of the implementation of the three-shift continuous operations system, which evidently incorporates the one-operator two-machines requirement, was never an issue. The employees asked for improved wages as a reciprocal for the implementation of the system precisely because they knew that they would each have to operate two machines, which would mean slightly more work for them on a regular basis. Mr Nkele, one of the employees, conceded in evidence that the reason why they refused to operate two machines was that they wanted to be paid more.

[15] The omission to mention the task allocation or the doubling-up in subsequent correspondence is inconsequential. The system and how it was intended to work had already been thoroughly explained. There was no need to keep on repeating the one-operator two-machines task allocation in the communiques that followed that of 23 October 1997. There can, therefore, be no doubt that when the Appellant's legal representatives gave an undertaking that the employees would work the six-day/three-shift system under protest, they and their clients knew exactly what that system entailed. To suggest, as the employees do, that the system as referred to in the undertaking of 05 December 1997 did not entail the foregoing task allocation, is to be rather too opportunistic as the Court *a quo* found. Each employee was certainly under an obligation to operate two machines. Their refusal to operate two machines constituted a repudiation of the undertaking of 05 December 1997.

[16] It is not necessary for me to deal with the fairness or otherwise of the employees' dismissal. Their counsel conceded, correctly in my view, that, if this Court found that the employees were under an obligation to comply with the instruction that they operate two machines each, the employer was entitled to dismiss them.

[17] Finally, I did not understand any of the parties to be really pressing for costs. I am also of the view that this is not an appropriate

matter where an order for costs should be made against any party including the individual employees. Accordingly no order for costs will be made.

[18] In the circumstances, the following order is made:

- “(a) The appeal is dismissed;
- (b) There will be no order as to costs.”

MOGOENG
JUDGE OF APPEAL

M.T.R.

I agree

R.M.M. ZONDO
JUDGE PRESIDENT

I agree

D. VAN REENEN
ACTING JUDGE OF APPEAL

Appearances

Appearing for the Appellant : Mr T.J. Bruinders
Appearing for the Respondent : Mr R. Sutherland S.C.
Date of hearing : 22 November 2001
Date of judgment : 19 April 2002