

**IN THE LABOUR COURT OF SOUTH AFRICA
CASE NO J1070/98**

In the matter between:

NUMSA ON BEHALF OF ITS MEMBERS

Applicant

and

LUMEX CLIPSAL (PTY) LIMITED

Respondent

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JUDGMENT

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JAMMY AJ

1. The Respondent company manufactures and assembles electrical fittings and accessories. The manufacturing process takes place in a division of its operations known as The Plastic Shop, where it is done by way of injection moulding machines, the type of fitting or accessory concerned being defined by the particular mould installed in the particular machine at any given time.
2. The 31 employees involved in this matter, all of whom were at all material times members of the Applicant, were dismissed by the Respondent with effect from 12 January 1998. They had been found guilty in a collective disciplinary enquiry held a month earlier, of misconduct described in their notices of dismissal as -

" - continued and unreasonable refusal to work in accordance with the company's newly implemented rationalisation measures, despite exhaustive shopfloor consultations in this regard, your aborted retrenchment on 01 December 1997 and a collective undertaking dated 05 December 1997 where NUMSA, on your behalf, agreed that you would work in accordance with the company's rationalisation measures, pending the outcome of a NUMSA labour dispute regarding the very same rationalisation measures." (sic).
3. It is common cause that following industrial action by the Applicant and its

members in August 1997, a settlement agreement was entered into between NUMSA on the one hand and the Respondent and an associated company, Lumex//Clipsal Manufacturing (Pty) Limited on the other, of which the following express provisions have relevance to the issues to be determined in this matter.

- "1. The parties herewith undertake to in future strictly adhere to and comply with the letter and the spirit of the collective bargaining protocols, practices, procedures and principles as provided and prescribed for in the new Labour Relations Act as amended, with specific reference to the statutory dispute resolution procedure.**
- 2. The parties herewith undertake not to embark on any unprocedural, unprotected and illegal industrial action in future and to make use of the statutory dispute resolution procedure to settle all collective bargaining related disputes between the parties.**
- 3. NUMSA and their members herewith collectively agree and consent to the fact that the companies shall have the right to terminate the services of any NUMSA member who in future participates in any unprocedural, unprotected and illegal industrial action, subject to a formal collective disciplinary enquiry in respect thereto, with the NUMSA shop stewards collectively representing the NUMSA members at such an enquiry.**
- 4. The parties herewith undertake to hold themselves legally bound by this agreement and undertake to make use of their best endeavours to observe the provisions contained therein, both in letter and in the spirit thereof and to promote shop floor stability and sound shop floor relations."**
4. The remaining provisions of the agreement recorded, in the main, a mutual commitment to good faith collective bargaining with the object of concluding "mutually acceptable collective agreements, which will properly and competently govern the parties' collective bargaining relationship."
5. On 17 September 1997 the Respondent addressed a notice to its employees of its "Intention to Rationalise." There was no viable alternative, the notice stated, "but to initiate an urgent and extensive internal rationalisation programme." Two specific aspects of the proposed rationalisation were dealt with as follows:

"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 logical grouping together and combining of

operational duties and functions to a larger degree than what is currently the practice within the Companies."

The company, it was stated in conclusion, looked forward "to meaningful and constructive consultations in this regard."

6. On 15 October 1997 the Respondent sent a memorandum to the Applicant recording its concern that no response to the invitation to consult on the proposed rationalisation measures had been received, reiterating that invitation and proposing a meeting which in fact then followed on 21 October 1997. Following that meeting the Respondent forwarded to the Applicant "details of the company's proposed first phase of rationalisation measures for employee perusal, comment and discussion." It is common cause that in that communication, termed "Labour Reduction:Motivation", the following was stated in relation to the Plastic Shop.

"Currently one operator attends one machine even though: the moulding operation is automatic, machine setting, adjustment and maintenance is done by specially appointed setter/supervisors and the 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 four staff members successfully operated nine machines.

In future, fifteen machines will be run by eight operators, staggering breaks."

7. The operating functions of other machines were then reviewed and the following was stated:

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

The abovementioned task allocation applies to all three shifts and shift changeover may not affect the continuity of the operations."

8. Further meetings and communications followed and it is significant in that regard that the exchanges involved, whilst dealing comprehensively with the Respondent's retrenchment programme and the introduction and ramifications

of the new three-shift system, made no further reference to the proposal that one operator should attend more than one machine at the same time.

9. Eventually, on 24 November 1997, the Applicant wrote to the Respondent recording the dissatisfaction of the workers with the company's new shift proposal. A moratorium was requested which, if not agreed to, would have the result, it was stated, that "workers will work under protest and this will result in both parties not having agreed and therefore there is a deadlock."
10. On 27 November 1997, the Applicant referred that dispute to the Bargaining Council, defining it as "disagreement on restructuring and the three-shift system affecting workers at Plastic Shop."
11. The communications between the parties at that stage related unequivocally to wage rates which would be applicable in the restructured shift system. On 2 December 1997 and following further exchanges, an alleged refusal by workers to commence work on 1 December and an alleged consequential lock-out by the Respondent, the Respondent informed the Applicant that, in the face of what it termed provocative, inappropriate and improper wage demands, it was left with "no alternative from an operational, market and financial point of view, but to formally retrench those former Plastic Shop employees who refused to work in accordance with the proposed shifts". At that point Attorneys respectively acting for the parties intervened and an apparent interim resolution of the prevailing problem was reached. This was confirmed in a letter from the Respondent's Attorneys to the Applicant's Attorneys on 4 December 1997 in which it was recorded 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. We furthermore confirm that your client's members will be remunerated, notwithstanding that they have not worked these last few days."
12. The Respondent's records indicate that on Saturday 6 December 1997 the day and night shift, as well as the morning shift on Monday 8 December 1997

timeously reported for work and executed their normal duties in accordance with the new rationalisation programme, which encompassed the operation at the same time of two machines by one operator. When the afternoon and night shift workers reported however, and were instructed to continue that process, they collectively refused to do so until, the company was informed, the dispute which had been declared and referred concerning the rationalisation measures was resolved, the viability and safety of the new one operator/two machine ratio had been investigated and validated and finally, that a collective agreement dealing with the wage increase demands for Plastic Shop operators, purportedly for the increased work load involved in that one operator/two machine process, had been concluded.

13. It is common cause that as a consequence of those events the employees concerned, who were suspended from their normal duties in the interim, were subjected to a collective disciplinary enquiry on 11 December 1997, consequent upon which they were, on 12 December 1997 informed that their services were to be terminated with effect from 12 January 1998 on one week's contractual notice. In accordance with company procedure, an appeal was noted, was duly heard and was rejected, the decision to terminate the services of each of the 31 Plastic Shop employees involved being upheld.

14. The issues for determination by this Court are defined in an unopposed amendment of the Applicant's Statement of Case and, as submitted by Adv T Bruinders who represented them, may be summarised as follows:

Did the company fail to comply with Clause 33(3) of the main agreement when requiring employees to operate two machines per operator?

Alternatively, did the two machines/one operator requirement amount to a unilateral variation of the employment contract of the employees?

Further alternatively, if it is found that there was no unilateral variation then was the instruction to operate two machines simultaneously unreasonable?

15. The agreement in question - The Main Agreement of the National Bargaining

Council for the Steel, Engineering and Metallurgical Industries, was indisputably applicable to both parties. Clause 33 thereof deals with "Technological Changes and Work Reorganisation" and sub-clause 3, under the sub-heading "Work Reorganisation", provides, inter alia, the following:

Consultation

Where an employer intends introducing major work reorganisation which will substantially and materially affect the work of employees, the employer shall consult, in an endeavour to reach agreement with the representative party trade union(s) and/or any employee representative body, on the implications of the work reorganisation including:

- (i) the need to re-train employees affected by such work reorganisation; and**
- (ii) any possible impact on the health, safety and work environment of the affected employees."**

16. The requirement that one operator attend two machines, the Applicant contends, constituted a major work reorganisation as contemplated by the section. No consultation with the Applicant was held in that context and the implementation of the new system was accordingly prohibited. What was involved, it contends, was a major work reorganisation materially affecting the work of the employees.

17. This contention, the Respondent replies, is opportunistic. No specific reference to it, as an element of the dispute between the parties, is made in the reference of that dispute to the Bargaining Council. Consultation is required by the section where what is proposed is the introduction of **major** (emphasis added) changes in the work done by the employees. An indication of what is there contemplated is provided by the section itself which illustrates the implications of such introduction as, for example, the need to re-train employees affected by it and considerations of health, safety and work environment which may flow therefrom. No re-training of the employees involved was required. The change from a two-shift to a three-shift system was patently one with no impact on the health and work environment of the employees. The dual function of operators under the new system had

intermittently been performed in the past and the only material ramification of what was now proposed, would be the increased volume of work to be performed by each of the employees concerned. That was an issue to be independently addressed in the context of wage negotiations. In any event, the Respondent concludes, even if it could properly be held that what was proposed fell within the ambit of s33, the necessary consultations had been held. Significant again in that context is that throughout the exchanges which followed the initial rationalisation proposals submitted to the Applicants, no issue had been made of the one operator-two machine question until it was physically challenged on 8 December 1997.

18. Addressing the question of whether or not the implementation of the one operator/two machine requirement constituted a unilateral variation of the employment contracts of the operators, the Applicant points to the prohibition of such conduct in the Labour Relations Act 66 of 1995. Dismissal of employees who refuse to comply with employment terms and conditions unilaterally so altered, is unlawful under s64(4) and (5) of that Act.
19. A change in the way in which the work is done by employees, it contended, where this is required in circumstances such as those existing in the present instance, will amount to a change in the nature of the work required to be performed by the employees concerned under their contracts of employment. Operators contracted to operate one machine are entitled to refuse to operate two machines where that requirement constitutes a change in the nature of their jobs.
20. The Respondent however, contends that what the individual employees were required to do did not constitute a variation of the terms and conditions or the nature of their employment. The change to the shift system was negotiated and, albeit under protest on the part of operators, had been implemented by agreement. The fact, as exhaustively canvassed and ultimately demonstrated in the course of the evidence, that the dual function in question was practicably and physically possible, negated any suggestion that what the

employees were being required to do was anything other than a more labour intensive performance of jobs for which they were already fully trained and qualified. It was, in short, recognisably the same work.

21. Reference in support of that contention was made by the Respondent to -
CDM (Pty) Limited v Mine Workers Union of Namibia 1997(2) LLD 65 in which the Court held that a unilateral change to conditions of employment will be illegitimate where it is "so fundamental as to amount to a change in contract." Citing with approval the English case of -
Cresswell v Board of Inland Revenue (1984)(2) AER 713 (CHD)
the Court concluded that -
"..... an employee did not have a vested right to preserve his working conditions completely unchanged and must adapt himself to new methods and techniques."
22. In **Cresswell (supra)** it was held, as summarised in the headnote,
"..... that an employee was expected to adapt to new methods and techniques in performing his duties provided the employer arranged for him to receive the necessary training in the new skills and the nature of work did not alter so radically that it was outside the contractual obligations of the employee; that it was a question of fact whether the introduction of new methods and techniques altered the nature of the work to such a degree that it was no longer the work that the employee had agreed to perform under the terms of his contract."
23. Finally, as to the reasonableness or otherwise of the instruction in question, the technical functions of the machines have obvious relevance. I do not propose to review the exhaustive evidence adduced by both the company and the Applicant in that regard. To do so would burden this judgment unnecessarily. Suffice it to say that, in my view, on the *conspectus* of that evidence, coupled with the fact, which I am satisfied has been established, that what was required had been intermittently done in the past, thereby endorsing its feasibility, the refusal of the operators to implement that aspect of the Respondent's rationalisation programme was one sourced not in any rational contention of

unreasonableness or impossibility of performance, but directly in the remuneratory ramifications of what they considered to be an increased burden of work. That much was frankly admitted, under cross-examination, by the witness Nkele, who, asked whether one of the reasons for the workers' unhappiness was that they perceived that they should be paid more, conceded that this was the case and that if there had been agreement on the wage aspect of the matter, the "doubling-up" was physically possible.

24. On the specific issues thus canvassed, I am not persuaded that the additional tasks required of the individual operators in the context of the company's rationalisation programme, amounted to so great a variation of the work which they were contracted to perform as to constitute the "major work reorganisation" contemplated by s33(3) of the main agreement. The issue of requisite consultation in that context does not therefore arise and I would merely record, in that regard, that the Applicant's silence on that specific issue throughout the period of intense and confrontational negotiation which followed the presentation of the rationalisation plan, does not support any contention that this was an issue with which they were materially concerned.
25. I am also satisfied that, in the context of the analysis set out in the case authority to which I have referred, the "doubling-up" requirement did not constitute a unilateral change to the terms and conditions of the employment contracts of the individuals concerned. It was one, in my view, which did not alter the nature of their work to such a degree that, as defined in **Cresswell** (supra), it was no longer the work that the employees had agreed to perform under the terms of their contracts. Nor, finally, was the requirement unreasonable in the light of the reasons advanced by the Respondent in its presentation of its proposed rationalisation programme to its body of employees. As early as September 1997, what the company described as "an unfortunate combination of facts and circumstances", had been comprehensively conveyed to the Applicants and the commercial rationale dictating the necessity for the programme was at no time substantively or materially challenged.

26. The work stoppage on 8 December 1997 which manifested the individual operators' refusal to implement that aspect of the rationalisation programme was therefore, in my view, unwarranted, unreasonable and unlawful. It was in breach not only of the agreement concluded between the respective Attorneys for the parties, but of the express provisions precluding it in the procedural agreement concluded in August 1997. Those, in my assessment, were exacerbating factors which, coupled with the undisputed disruption of the productive capacity of the Respondent's entire operation in circumstances and conditions which, on the analysis to which I have referred, were already straitened, justified the sanction of dismissal imposed upon the participants in that misconduct following disciplinary procedures which were at no time challenged.

27. I have concluded, for these cumulative reasons, that the Applicant and its members are not entitled to any element of the relief sought by them in their Notice of Motion and the order that I accordingly make is the following:

The application is dismissed.

The First and further Applicants are ordered jointly and severally to pay the Respondent's costs.

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B M JAMMY

Acting Judge of the Labour Court

24 August 2000

Hearing: 5, 6, 7 June 2000

17, 18, 19 July 2000

Representation:

For the Applicants: Adv T Bruinders, instructed by Cheadle Thompson & Haysom.

For the Respondent: Adv R Sutherland SC, instructed by Hofmeyr Herbstein

Gihwala Cluver & Walker Inc.