THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1086/12

THE NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA — **First Applicant**

M CELE & 3 OTHERS — **Second to Further Applicants**

and

ESKOM HOLDINGS SOC LIMITED — **Respondent**

Stated Case: **24 November 2015**

Delivered: **19 August 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants brought this claim before the court in terms of section 77 (3) of the Basic Conditions of Employment Act[1] (The BCEA). The dispute pertains to an alleged unilateral change to their terms and conditions of employment. In

[1] Act 75 of 1997

the alternative, it is alleged that the respondent's conduct amounted to a breach of contract. The dispute followed upon the withdrawal of monthly fixed payments which the applicants alleged they were entitled to. No oral evidence was led as the parties had agreed that the matter should be dealt with as a stated case.

Background:

[2] The individual applicants are Messrs MT Cele; MH Cele; RJ Matona and OS Oliphant. They are currently employed by the respondents as Principal Clerk Billing Support in its Billing Department, except for Oliphant, who has since retired. In 1999, the respondent introduced a two cycle shift system in its Processing Centre. The first shift started 06h00 to 14h00 and the second at 14h00 to 22h00. The individual applicants were paid a shift allowance for working on those shifts.

[3] In 2002 the respondent discontinued the shift system. Payment of the shift allowance was however not stopped, and was at some point changed in the employees' salary advice to reflect it as 'fixed monthly payment'. The respondent had continued to pay the fixed monthly payments from 2002 until August 2012.

[4] An audit done during 2011 by the respondent's Hennie Doman indicated that employees were receiving a shift allowance which they were not entitled to as they were no longer doing any shift work. On 6 February 2012, the respondent advised the individual applicants at a shift allowance meeting that the shift allowance that was being paid to them was to be phased out.

[5] On 1 March 2012, the individual applicants were issued with letters by the respondent advising them that the 'shift allowance' would be discontinued in the next six months. On 29 March 2012 NUMSA referred a dispute to the CCMA for conciliation. The dispute was however withdrawn. On 25 July 2012, NUMSA wrote a letter to the respondent requesting it to cancel the withdrawal of the employees' fixed monthly payments as the employees had tailored their lifestyles around the payments and further since some had long term financial commitments. The respondent failed to respond to the request. A similar letter

sent by NUMSA's attorneys of record was not responded to. By the end of August 2012, the payment of the shift allowance was phased out.

[6] On 2 October 2012, NUMSA referred a dispute pertaining to unilateral changes to terms and conditions of employment. The dispute could not be resolved by the CCMA on 29 October 2012. A certificate of outcome entitling NUMSA to embark on strike action was issued. NUMSA nevertheless referred the dispute to the Court in terms of the provisions of the BCEA.

The dispute and submissions:

[7] The issues which the parties placed before the court to determine were whether the withdrawal of the monthly fixed payments by the respondent which was paid to the individual applicants was justifiable; whether those payments were part of the individual applicants' terms and conditions of employment; and whether or not the erroneous payments created a legal duty to continue paying even though the employees were no longer performing shift duties. The applicants' main contentions in regard to these issues are as follows:

7.1 The respondent failed to consult meaningfully with them prior to the decision to discontinue the payment of fixed monthly payments, and the meeting held with them on 6 February 2012 was just a formality to inform them of the withdrawal;

7.2 Since the respondent had conducted audits on salary payments annually it should have picked up the error as early as 2002 when the shift system was stopped, and there was no excuse as to the reason it had failed to detect the alleged errors;

7.3 The payments could not have been an error because of the lengthy period it took, and they were in fact part of their salary package. The respondent had no excuse for having failed to detect the payments which it now alleged to have been made in error;

7.4 The respondent did not have a unilateral right to tamper with the individual applicants' terms and conditions of employment without a proper and meaningful consultation to show good reason why the payments which had been made for ten years were discontinued;

7.5 The fixed monthly payment formed part of their terms and conditions of the t service by virtue of the long period they had been receiving it, and such payments were legitimate as they were part of their salary.

7.6 The payments were continued subsequent to the shift system having been terminated, as a *quid pro quo* for their being prepared to work shifts when their position did not as a rule require it.

[8] The respondent's contentions were as follows:

8.1 Although it was not obliged to consult with the applicants, it had done so individually and collectively, and the termination of the payments was not unilateral.

8.2 The consultations held with the applicants were meaningful and they were afforded an opportunity to adjust their lifestyle.

8.3 Despite audits being conducted annually, the error was not detected. This however did not in law create a legal obligation to continue paying where none existed. The individual applicants were unjustly enriched as a consequence of the error.

8.4 The obligation to pay ceased when the shift system was terminated. The fact that the respondent continued to make payments did not and does not in law give rise to an obligation to continue paying.

8.5 An error in law cannot give rise to a legal obligation, and an erroneous payment did not give rise to a legal obligation.

Evaluation:

[9] The issue in this case is whether an erroneous payment over a period of ten years made to the individual applicants can lead to such payments being

considered as part of the terms and conditions of their service. Central to the applicants' case is that once the payments were labelled differently, they were legitimately due to them.

[10] The respondent contends that its case and the error pleaded should not be confused with *Justus error* in the context of a *condictio indebeti*[2]. Amongst the requirements of a successful plea of *condictio indebeti* is that the payment must have been *indebite* in the widest sense, that is, there must have been no legal or natural obligation to pay or perform. Furthermore, the payment must have been made in the mistaken belief that the debt was due. Such a mistake must be one that is excusable[3].

[11] The respondent's contention is that it never harboured a *bona fide* and reasonable belief that it was contractually bound to pay the individual applicants after the termination of the shift system. It contends that it simply failed to terminate the payments once the shift system was terminated, and this was as a result of a mistake attributable to pure tardiness.

[12] Whether the continued payment constituted a term and condition of employment needs to be looked at in context. Most terms and conditions of employment are usually established in a written contract of employment setting out the express terms that are applicable. The written terms and conditions of employment may be supplemented by implied terms and conditions, which are understood to exist because of the conduct and behaviour of the parties or because there is an expectation or assumption by both parties. In some instances, parties may rely on the concept of custom and practice, which is essentially a practice that has developed over a period of time or by arrangement, that has never been specifically agreed between the employer and the employee, but can be argued to have formed part of the terms and conditions of employment. In other instances, the terms and conditions of employment may be governed by collective agreements.

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[2] The *condictio indebiti* is the enrichment remedy by means of which the solvens recovers from the *accipiens* money paid or property transferred in intended payment or performance of a debt that is not due. (See *Frame v Palmer* 1950 (3) SA 340 (C) at 346D-G)

[3] *Nelson Mandela Metropolitan Municipality v Ngonyama Okpanum Hewitt-Coleman* (Case No:765/2010)

[13] In *Pikitup Johannesburg (Soc) Ltd v South African Municipal Workers Union and Others*[4], Prinsloo AJ had regard to the distinction between terms and conditions of service, and mere work practices by stating the following;

> "John Grogan, writing in Collective Labour Law (Juta 2007) notes that the precise limits of s 64(1)(a) have not yet been determined, but expresses the view that it must concern the terms under which employees work, or their benefits, rather than a mere 'working practice' (at 145). He continues:
>
> > 'The difference between ''terms and conditions of employment' and working practices is generally determined by whether the employees are able to demonstrate that the changes affect their contractual rights, whether emanating from their individual contracts of employment or from a collective agreement.'
>
> Determining whether a particular aspect of an employment relationship constitutes a condition of service or a work practice requires an examination of:
>
> 1. the employees' contracts of employment;
> 2. any other document regulating the relationship such as collective agreements;
> 3. any additional terms that can be implied from the parties' conduct or from custom and practice in the workplace."[5]

[14] In *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA*[6] the court distinguished between 'terms of employment' on the one hand and 'work practices' on the other, the latter being subject to the employer's prerogative and its introduction not constituting a unilateral change. Thus a change to shift systems is not in itself a unilateral change to an employee's terms and conditions of employment but merely a change to the employer's work practice. In the absence of a contractual right to work the previously agreed

[4] (2014) 35 ILJ 188 (LC)
[5] At paras [38] to [39]
[6] [1995] 4 BLLR 11 (LAC)

shift pattern, the regulation of shift times constitutes a work practice and falls within management's prerogative to change[7].

[15] In this case, it was common cause that the two shift system was established for a particular purpose, and I did not understand the applicants' case to be that as a result of the introduction of the shift system, their contracts of employment were accordingly altered. With the termination of the two shift system in 2002, and with the changes shift allowance to 'fixed monthly payments', I further did not understand the applicants' case to be that the payments were made as a result of their working shifts for the purposes of an entitlement to any payment, or whether there was a common understanding that this had now become part of conditions of employment. To this end, without any express, implied or tacit contractual rights of the applicants to work shifts, there is therefore no basis for any conclusion to be reached that they had a vested right to continued payment of the shift allowance. What was put in place with the two shift system amounted to a new work practice which was accordingly compensated and subject to the prerogative of the respondent to change. In essence therefore, there was no unilateral change to terms and conditions of employment.

[16] A further argument advanced on behalf of the applicants was that when the name of the payments changed they had assumed that the payments continued as a gratuity in consideration of assisting the respondent in working shifts in order to rid it of its backlog. As it was correctly pointed out, once it was assumed that payments were meant as gratuities, the implication is that there was no obligation on the respondent to continue making those payments. The payments in this case were made in acknowledgement and consideration for the inconvenience caused by shift work, which was specifically meant to deal with the backlog.

[7] See *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union and Others* (2011) 32 ILJ 1107 (LC); *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 1722 (LC) and *Apollo Tyres South Africa (Pty) Ltd v NUMSA & others* [2012] 6 BLLR 544 (LC)

[17] It is my view that the essence of the applicants' case is to be found in NUMSA's letter of 25 July 2012 to the respondent requesting it to cancel the withdrawal of the employees' fixed monthly payments as the employees had tailored their lifestyles around the payments and further since some had long term financial commitments. It is accepted that once employees were used to working shifts for which they were compensated, this invariably came with changes to their lifestyles as more income was generated. Decent human resources practice would have dictated that if an extra income earning practice was to be stopped, the employees would at the most be properly and timeously so advised, to enable them to adjust their lifestyles accordingly. This however cannot be a sustainable legal argument where it is alleged that a term and condition of employment was unilaterally changed. Furthermore, despite the applicant's contentions, they were consulted on the issue at the very least from 6 February 2012. In March 2012 they were given a further six months' warning that the payments were to be stopped. In my view, to the extent that the applicants at some point considered the payments to be a gratuity, and further in the light of their primary concern being the effect of the withdrawal of the payments on their lifestyles, they were not entitled to consultation in the true sense, and accordingly, it is accepted that they had at least between February 2012 and August 2012 to adjust their lifestyles accordingly.

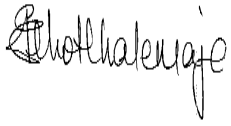
[18] In conclusion, the introduction of the two shift system in 1999 was mere a new work practice. The applicants' contracts of service were not altered by these changes to have resulted in these being part of their terms and conditions of employment. The applicants' rights were not affected by these changes, and the respondent was entitled as a matter of law to introduce what amounted to a new work practice and cancel it. There was therefore no unilateral change to terms and conditions of employment to entitle the applicants to continued payments when the shift system was stopped. Those payments were made as *quid pro qou* in consideration of the applicants having availed themselves for the shift system.

[19] The fact that it took the respondent over ten years to rectify the error did not as it was correctly pointed out on its behalf, create a legal obligation on it to continue to make those payments. The error was purely as a result of tardiness on its part and there is no basis to make any determination as to whether the error was excusable or not as this was not the respondent's case. The respondent was further entitled to stop the payments as they were not legally due to the individual applicants. Furthermore, I am satisfied that the applicants were timeously and properly consulted prior to the payments being stopped, and there is no basis for any finding to be made that the respondent's conduct amounted to a unilateral change to the applicants' terms and conditions of service, or that it had acted in breach of their contract.

[20] I have further had regard to considerations of law and fairness, and I am satisfied that there is no basis for any cost order to be made. Accordingly, the following order is made;

Order:

i. The applicants' claim of an alleged unilateral change to their terms and conditions of employment is dismissed.
ii. There is no order as to costs.



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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:	Adv K Lapham
Instructed by:	Finger Phukubje INC Attorneys
On behalf of the Respondent:	Adv. B Makola
Instructed by:	Madhlopa INC