IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J343/97

In the matter between :

LANCELOT NAWA & ANOTHER Applicant

and

THE DEPARTMENT OF TRADE & INDUSTRY Respondent

CONSTITUTION OF THE COURT :

THE HONOURABLE JUDGE A A LANDMAN

On behalf of Applicant :

ADV A VAN DER WALT

instructed by Peet Grobbelaar Attorneys

On behalf of Respondent :

ADV C P RABIE SC assisted by ADV J G VAN DER RIET

instructed by The State Attorney, Pretoria

PLACE AND DATE OF PROCEEDINGS: Arbour Square Braamfontein - on 27 June 1997

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This is an urgent application brought by Lancelot Nawa as the first

applicant and Msamo Teche as second applicant against the Department of Trade and Industry as the first respondent, the Directorate Communications and Mr I Lahadin as the second respondent, Dr Rustomichi as the third respondent and Mr A Irwin as the fourth respondent.

The relief which the applicants seek has been set out in a draft order which has been handed up and I find it only necessary to refer to the following paragraphs. An order is sought that :

2.the first, second, third and fourth respondents are interdicted from proceeding with the proposed decentralisation;

3.the first, second, third and fourth respondents are ordered to stop their victimisation of the two applicants;

3.that orders 2 and 3 operate as an interim order pending the outcome of mediation on an urgent basis between the applicants and the respondent;

And then follow further prayers which are consequent upon those and I need not set them out.

As is apparent from the notice of motion and the draft order to which I have referred, the applicants claim that their right to fair labour practices as envisaged in the

Labour Relations/..

Labour Relations Act have been infringed or will be infringed. In the first place, it is alleged that the

scheme which has been proposed by the respondents, the details of which have been set out in a memorandum attached to the papers regarding the re-organisation and restructuring of the communications functions of the Department of Trade and Industry and the location of those communication offices within various chief directorates within the Department, and

which I shall refer to as "the decentralisation programme, is one which infringes their basic rights.

It was contended by Miss van der Walt, who appears on behalf of the applicants, that the respondents have engaged in an unfair labour practice and that this unfair labour practice is to the detriment of the two applicants. Miss van der Walt was asked to pinpoint the section in the Labour Relations Act which constitutes the rights which are allegedly being infringed and she referred me to the definition of a residual unfair labour practice which is to be found in part B of schedule 7 to the Labour Relations Act, 66 of 1995. Item 2(1)(b) reads :

"For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and employee involving :

(b) the unfair conduct of the employer relating to

the promotion/..

the promotion, demotion or training of an employee or relating to the provision of benefits to an

employee."

I have had an opportunity to read the papers carefully and to read the decentralisation programme and the documents in support of that and it is clear to me that what the respondents propose doing is to alter the way in which they run the operations within the Department of Trade and Industry. There is no intention to disturb the existing terms and conditions of employment; there is an intention to alter the way in which the activities are performed; there is an intention to restructure, to a degree, the reporting functions or the chain of

command to a slight degree, but all this falls within the managerial prerogative of an employer, including the State in its capacity as an employer.

The applicants would have possibly made out a case under the old dispensation where the definition of an unfair labour practice was extremely wide and the Industrial Court was empowered to strike down any labour practice which was unfair. The new Act, the Labour Relations Act of 1995, has done away with the concept of an unfair labour practice, save for a remnant of that concept which is to be found in item 2 of Schedule 7 to which I have referred.

The conduct/..

The conduct of the respondents arising from their intention to implement the decentralisation agreement will not infringe item 2(1)(b) of Schedule 7 of the Labour Relations Act.

It is also true that various other allegations are made on the papers, such as the fact that the job security of the applicants may be jeopardised insofar as they will suffer harm and that by being reallocated to the positions which are intended for them, that they will suffer an unfair dismissal. That, and the references to section 189 of the Act, which provide for dismissal as the result of economic and technological changes, seems to be entirely misplaced. If there is any intention in implementing the decentralisation programme then it does not seem to encompass any dismissals or retrenchments, certainly not insofar as the two applicants are concerned.

My conclusion therefore is that, although the applicants may be unhappy with the way in which the Department has gone about exercising its managerial prerogative, that the law does, unfortunately, not provide them with a remedy and that the prayer which would require this court to interdict the implementation of the decentralisation agreement cannot be entertained.

As regards/..

As regards the second leg of the case, it relates to an allegation of victimisation. Mr Rabie, who appeared on behalf of the respondent, and with him Mr van der Riet, argued that victimisation was an insubstantial concept and that there was no indication on the papers as to what this victimisation was and that, if it cannot be concretised, it cannot be interdicted. Miss van der Walt, who appeared on behalf of the applicants, pointed to the authority of this court to interdict victimisation to the Act as a whole and she referred to various sections in the Act.

In my opinion, this court probably has the discretion and the power to interdict the harassment of employees on various grounds. Part of that authority is set out in section 5, in regard to victimisation for trade union activities. In general, I think that the concept of an unfair labour practice as it appears in section 22 of the Constitution and which would be advanced by the provisions of the Labour Relations Act, read together with section 157(2)(a) of the Labour Relations Act of 1995, would permit this court, in suitable circumstances, to interdict the victimisation of an employee. It is, however, not necessary to decide that for, on the facts, it seems to me that the applicants have not made out a case that they will be victimised by the respondents.

There are various paragraphs in the applicants' application which are/..

which are relevant in this regard. I will not, at this stage, repeat them but simply refer to them as being paragraphs 26, 27, 28, 29, 30 and 32. I have considered those paragraphs singly and cumulatively and, although there is a hint of impatience, some aggression, certainly annoyance with the applicants and which is stated in the most blatant terms by the third respondent as follows :

"We have not seen a reign of terror yet as we claimed we experienced under Mr Le Hardin until the forthcoming two weeks during which he will use whatever power he has in dealing with us, particularly bearing in mind that some of us were still under probation, such as myself..."

See paragraph 27 of the papers. There are no follow-up allegations which indicate that that ever took place or that that is intended to take place in the near future and that it should be interdicted.

To sum up, I find therefore that there is no prima facie case, even though it may be open to some doubt in regard to victimisation. The result is that the application as a whole must fail and is dismissed. However, having regard to the injunction and the guidelines set out in the matter of Num v Ergo, I am of the opinion that I should make no order as to costs.

THE HONOURABLE JUDGE A LANDMAN