IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: J1330/97

n the matter between:

DENEL INFORMATICS STAFF ASSOCIATION ***First Applicant***
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA ***Second Applicant***

and

DENEL INFORMATICS (PTY) LTD ***Respondent***

JUDGMENT

BASSON J

[1] This is an application brought by two trade unions, Denel Informatics Staff Association and National Union of Metal Workers of South Africa, against the respondent, Denel Informatics (Pty) Limited, for an order (an interdict) to compel the respondent to comply with the procedures prescribed by section 189 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicants also seek an order to restrain the respondent from victimising the applicants' members as well as an order declaring that the applicants are representative of the employees employed at the workplace of the respondent for the purposes of sections 12, 13 and 15 of the Act.

[2] In essence, the applicant-unions seek to give effect to their

organisational rights as well as the rights of their members (employees of the respondent) not to be unfairly dismissed for operational purposes (retrenched). These employees have, however, not been joined as parties and this fact in itself may pose problems for the relief which the applicants seek. However, as the application stands to be dismissed on other grounds (as will appear more fully below) I will not deal with this aspect any further.

[3] The primary objects of the Act are, *inter alia,* to "give effect to and to regulate the fundamental rights conferred by section 27 of the Constitution" (in terms of section 1 (a)). This is a reference to the interim Constitution as these so-called labour relations rights are now entrenched as fundamental rights in terms of section 23 of the Constitution of the Republic of South Africa, Act no.108 of 1996 ("the Constitution"). In essence, for the purposes of this matter, the Constitution stipulates that everyone has "the right to fair labour practices" and that every trade union has "the right to organise".

[4] These are the two fundamental rights contained in section 23 of the Constitution which the applicants wish the Court to protect and give effect to. These fundamental rights are rights which are given effect to and regulated by the (Labour Relations) Act, in keeping with the primary objects of the Act outlined in section 1 (a) (discussed above at paragraph [3])

[5] As point of departure, it can be noted that section 157(1) of the Act stipulates that "(s)ubject to the Constitution, except where this Act provides otherwise, the Labour Court has **exclusive** jurisdiction in respect of all matters that elsewhere in

terms of this Act or in terms of any other law are to be determined by the Labour Court" (Court's underlining).

[6] The Act seeks to protect and give effect to the fundamental rights which the applicants seek to enforce by way of an interdict and a declaratory order in the following manner.

[7] Organisational rights are given effect to and regulated in terms of Part A of Chapter III of the Act ("Organisational Rights"). In terms of these provisions, a so-called representative trade union has, for instance, the following rights: trade union access to the workplace; deduction of trade union subscriptions or levies; trade union representatives; leave for trade union activities; and disclosure of information (in terms of sections 12 to 16 of the Act).

[8] Section 21 of the Act regulates the exercise of these fundamental rights conferred by Part A of Chapter III. Section 21(1) reads as follows:

> "Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace."

[9] If there is a dispute in regard to the exercise of these rights, such dispute must be referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation (in terms of section 21(4) of the Act). If such dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration (in terms of section 21(7) of the Act).

[10] Section 21(8) of the Act clearly sets out the position where the unresolved dispute concerns the question whether or not the

trade union which wishes to exercise these rights is a "representative" trade union and stipulates the manner in which the commissioner of the CCMA must deal with such dispute.

[11] It is therefore clear that the Labour Court has no jurisdiction in regard to the organisational rights which are given effect to in terms of these provisions of the Act as fundamental rights contained in the Constitution. The applicants should therefore primarily seek to enforce and protect their organisational rights in terms of these provisions of the Act which give effect to these fundamental rights.

[12] In the event, the prayer by the applicants for this Court to make an order as to the representivity of the trade unions at the workplace of the respondent is not an order which can competently be made by the Labour Court. The applicants must utilise the procedures contained in Part A of Chapter III of the Act to obtain such relief. The application for such order must therefore fail due to the lack of jurisdiction of the Labour Court.

[13] Further, if the dispute is about a collective agreement (as was argued on behalf of the applicants), section 24 of the Act applies. Section 24(2) stipulates that where there is a dispute about the interpretation or the application of a collective agreement, any party of the dispute may refer such dispute, in writing, to the CCMA or otherwise deal with the dispute in terms of the procedures provided for in an operative collective agreement which must include conciliation and arbitration procedures (in terms of section 24(1) of the Act). In the case where such dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration (in terms of section

24(5) of the Act).

[14] Once again, it is clear that the Labour Court does not acquire jurisdiction in terms of the Act to adjudicate a dispute concerning the interpretation or the application of a collective agreement as such dispute must be resolved by way of arbitration. It is thus not a matter to be determined by the Labour Court.

[15] The applicants *in casu* alleged that the recognition agreement between the applicant and the respondent (which for all intents and purposes is a collective agreement in terms of the Act) was cancelled by the respondent. The applicants dispute the right of the respondent to cancel this collective agreement and accordingly the **application** of the collective agreement is in dispute. Such dispute is to be determined by way of arbitration as is pointed out above (at paragraph [13]). Further, the arbitrator has wide powers in terms of section 138(9) of the Act to make "any appropriate award" when determining such dispute.

[16] In the event, the Labour Court has no jurisdiction to entertain the alleged dispute about the application or the interpretation of the recognition agreement and such dispute must be dealt with in terms of the provisions contained in section 24 of the Act (see paragraph [13] above).

[17] The applicants have further argued that this Court is being approached in terms of section 157 (2) of the Act which reads as follows:

" The Labour Court has concurrent jurisdiction with the Supreme Court -

(a) in respect of any violation or threatened

violation, by the State in its capacity as employer of any fundamental right entrenched in Chapter 3 of the Constitution."

[18] In my view, it is clear that such concurrent jurisdiction of the Labour Court and the (former) Supreme Court (now the High Court) pertains to those fundamental rights which are **not** entrenched in terms of section 27 of the interim Constitution, that is, in terms of section 23 of the present Constitution. This would, for instance, be fundamental rights such as the right to privacy which is entreched in section 14 of the Constitution but which is not given effect to by the (Labour Relations) Act. Had that been the position, the High Court would have had concurrent jurisdiction with the Labour Court also in regard to the fundamental "right to fair labour practices" (entrenched in terms of section 23 of the Constitution) and as such the High Court would, for instance, have been able to exercise unfair dismissal jurisdiction. However, the Labour Court, in terms of section 157(1) of the Act, has **exclusive** jurisdiction to deal with such matters (this section is quoted above at paragraph [5]). It is therefore clear that the Labour Court has exclusive jurisdiction in respect of such unfair labour practices (including unfair dismissal disputes) in terms of the Act (which also includes jurisdiction in regard to all residual unfair labour practices contained in Part B of Schedule 7 of the Act which stand to be adjudicated by the Labour Court). Other violations of fundamental rights entrenched in the labour relations clause of the Constitution (including some of the residual unfair labour practices) have to be dealt within terms of the Act by the CCMA by way of arbitration (see, for instance, the discussion on organisational rights at paragraphs [7] to [10] above).

[19] The (Labour Relations) Act thus creates legal procedures by way of which employees and employers can enforce and give effect to their fundamental rights which are entrenched in the labour relations clause (section 23) of the Constitution including, of course, rights such as the "right to strike" which is also protected (by the Labour Court under its exclusive jurisdiction) in terms of the provisions contained in Chapter IV of the (Labour Relations) Act.

[20] Further, the Labour Court is not approached for relief in terms of section 157 (2) of the Act when giving effect to these fundamental rights but in terms of its (exclusive) jurisdiction in terms of section 157(1) of the Act (quoted above at paragraph [5]).

[21] As an aside, it may be noted that the respondent, Denel Informatics (Pty) Limited, does not appear on the evidence presented to Court to be an "organ of state" as defined in the Constitution. See in this regard also the judgment in the matter of **South African Agricultural Plantation and Allied Workers Union & Others v Premier of the Eastern Cape & Others** (case number J591/97 - an unreported judgment of the Labour Court). The definition contained in section 239 of the Constitution of an "organ of state", especially the requirement that it must exercise a public power or perform a public function in terms of legislation, namely does not apply to the respondent in the present matter as it would appear that the respondent is not an organ of state which falls within this definition. This is an *obiter* reflection on the argument of the applicants to the effect that acts undertaken by the respondent are acts by "the State in

its capacity as employer" in order to bring these acts within the parameters of section 157(2) of the Act (quoted above at paragraph [17]). In the event, the applicants appear to fail on this basis also to bring the present matter within the ambit of the provisions of section 157(2) of the Act.

[22] Turning now to the interdict which was prayed for to force the respondent to comply with the provisions of section 189 of the Act. First, it must be noted that the Labour Court, in terms of its unfair dismissal jurisdiction (also referred to above at paragraph [18]), gives effect to the constitutionally entrenched right to fair labour practices (see paragraphs [3] to [5] above) by determining unfair dismissal disputes where the alleged reason for dismissal is based on the employer's operational requirements (section 191(5)(b)(iii) of the Act). Section 189 of the Act prescribes largely procedural steps for such dismissals (which includes so-called retrenchment dismissals) to be fair.

[23] The applicants allege that the respondent has failed to comply with the standards of fairness required by section 189 of the Act. However, it would appear that most, if not all, of the acts complained of refer to the past.

[24] In the event, the applicants already have protection in terms of the provisions of the Act in terms of which they may refer any dispute about the alleged unfairness of the dismissal for operational purposes to the Labour Court for adjudication in terms of trial proceedings (section 191(5)(b)(ii) of the Act - discussed above at paragraph [22]). In the event, in regard to all of those matters mentioned and which concern alleged past acts of unfairness (of alleged non-compliance with section 189 of the

Act) cannot be interdicted as there clearly is another adequate remedy available in terms of which to protect these rights.

[25] In regard to retrenchments allegedly taking place at this moment, there is no credible evidence to the effect that such retrenchments are actually being effected at this moment. Further, the facts on which the applicants rely to show that retrenchments will be effected in future are such that I cannot find on the basis of those facts that such alleged harm is reasonably apprehended at this stage.

[26] In the event, the applicants have failed to show that any harm may be reasonably apprehended. The applicants also have an alternative remedy in case of the respondent's non-compliance with section 189 of the Act (as is pointed out above at paragraph [24]). Further, in applying the test enunciated in the case of **Plascon- Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 (A) at 634E - 635C, it must be noted that the respondent denies that it will not comply with the provisions of section 189 of the Act. Accordingly, in accepting the respondent's version, there is no basis on which to find that the respondent is not at present complying or does not intend to comply with these provisions of the Act in future.

[27] Lastly, it may be noted that the applicants also seek an order to compel the respondent to provide information which may be required during possible retrenchment exercises.

[28] If any retrenchment exercise is in the offing, the applicants can enforce the right to be given relevant information in terms of section 189(4) of the Act. In terms of these provisions of the Act,

the provisions of section 16 apply. Section 16 of the Act is the section dealing with the disclosure of information and stipulates that, where there is a dispute about what information is required to be disclosed, such dispute may be referred to the CCMA for conciliation. If such dispute remains unresolved after conciliation, any party to the dispute may request that the dispute be resolved through arbitration (in terms of section 16(9) of the Act).Yet again, this it is not a matter where the Labour Court has jurisdiction as the right to relevant information is enforced by way of arbitration in terms of the Act.

[29] In regard to the alleged victimisation claim (see paragraph [1]), it must be noted that the respondent denies any allegations of victimisation. In applying the test enunciated in the **Plascon Evans** case (quoted at paragraph [26] above), I cannot find on the papers before me that there is any victimisation taking place against the members of the two applicants.

[30] Lastly, in deciding to exercise my discretion against the applicants in this matter, (and this may be the most important reason for doing so) I am of the view that, had all of these disputes been referred to conciliation, it would have greatly assisted in addressing these disputes. The discretion which the Labour Court exercises in this regard is contained in section 157(4)(a) of the Act, which reads as follows:

> "The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation."

[31] The provisions of the Act which require disputes to be

conciliated have been flaunted by the applicants to the present application for reasons unknown to the Court. In the event, the Court is not satisfied that an attempt has been made to resolve these disputes through conciliation and therefore the Court refuses to determine these disputes. The present application is thus dismissed *in toto* for this reason also.

[32] This leaves the question in regard to an order as to costs. The respondent asked for an order as to costs against the applicants on the basis of attorney and own client. The applicants argued that there should be no order as to costs.

[33] The respondent admits that the matter was brought in a *bona fide* manner and there is a continuing relationship between the parties.

[34] Taking into account all of the circumstances surrounding this matter, and taking into account the Court's wide discretion in terms of section 162(1) of the Act, the Court considers it fair that the applicants are to pay the costs of this application, but only on a party and party basis.

[35] In the event, the Court makes the following order:

1. The application is dismissed.

2. The applicants are to pay the respondent's costs on a party and party basis, jointly and severally, the one paying the other being absolved.

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BASSON J

Date of hearing: 24 June 1998

Date of Judgment: *ex tempore* (edited version)

On behalf of the applicants: Ms R Anderson of Anderson & Klopper Attorneys

On behalf of the respondent: Mr C Stockenström of FSF Attorneys Inc

This judgment is available on the internet at website: http://www.law.wits.ac.za/labourcrt