

**FAULTLESS DISMISSAL: ASSESSING THE SUBSTANTIVE  
FAIRNESS IN DISMISSAL FOR OPERATIONAL REQUIREMENTS**

**BY**

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## Plagiarism Declaration

I declare that *Assessing the Substantive Fairness in Dismissal for Operational Requirements* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Paul SakweMasumbe



30 May 2013

Signed

A handwritten signature in black ink, consisting of a large, stylized loop and a vertical stroke.

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## DEDICATION

To my beloved Chimonay, Elektra, Uhuru and Grace Masumbe, you guys did all you could to comfort, believe and motivate me to where I am today.



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**KEYWORDS**

Operational Requirements

Retrenchment

Substantive Fairness

Managerial Prerogative

Commercial Rationale

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Business Restructuring

Viable Alternative

Intervention

Abstention



v

**LIST OF ACRONYMS**

BLLR      Butterworth Law Reports

CCMA      Commission for Conciliation, Mediation and Arbitration

CLP      Current Legal Problems

COSATU	Congress of South African Trade Unions
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LC	Labour Court
LAC	Labour Appeal Court
LCD	Labour Court Digest
LRA	Labour Relations Act
NUMSA	National Union of Metalworkers of South Africa
OCGAWU	Oil Chemical General and Allied Workers Union
SABC	South African Broadcasting Corporation
SACWU	South African Catering and Allied Workers Union
SACTWU	South African Clothing and Textile Workers Union
TGWU	Transport and General Workers Union
UPUSA	United People's Union of South Africa

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# FAULTLESS DISMISSAL: ASSESSING THE SUBSTANTIVE FAIRNESS IN DISMISSAL FOR OPERATIONAL REQUIREMENTS

## Chapter 1: Introduction

### 1.1 Background

The recognition of operational requirements as a ground for dismissal originates from ILO Convention 158.<sup>1</sup> In its general survey of Recommendation 119 of 1963,<sup>2</sup> the Convention's predecessor, the International Labour Organisation's Committee of Experts noted that reasons for dismissal relating to the operational requirements of the undertaking were generally defined by reference to redundancy or reduction in the number of posts for economic or technical reasons, or due to *force majeure* or accident.

The above instrument<sup>3</sup> recognises the right of employers to terminate the service of employees when operational requirements so require subject to certain provisos.<sup>4</sup> Under the present Constitution,<sup>5</sup> South Africa is obliged to give effect to this and other ILO Conventions.<sup>6</sup> It is stated in the current Labour Relations Act (LRA) that 'any person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic.'<sup>7</sup> Such interpretation and compliance is necessary

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<sup>1</sup> Termination of Employment Convention 158 of 1982.

<sup>2</sup> ILO Termination of Employment Recommendation 119 of 1963.

<sup>3</sup> Convention 158 of 1982.

<sup>4</sup> Article 4 of Convention 158.

<sup>5</sup> Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 39.

<sup>7</sup> Section 3 (c) of the Labour Relations Act 66 of 1995.

because 'it serve as important benchmarks for evaluating whether South Africa is in conformity with international standards.'<sup>8</sup>

Section 188 of the current LRA distinguishes three broad categories of reasons for which an employer may dismiss namely, misconduct, incapacity and the operational requirements of the employer.

The LRA defines the notion of 'operational requirements' to mean 'requirements based on the economic, technological, structural or similar needs of an employer.'<sup>9</sup> The Code of Good Practice: Dismissal based on Operational Requirements,<sup>10</sup> elaborates as follows:

As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.<sup>11</sup>

'Similar needs' is an extremely broad concept which must be determined with regards to the circumstances of each case. Since the existence of such a reason is a factual question, it is impossible to provide an exhaustive list of what constitute 'similar reasons' for dismissal.<sup>12</sup> The similar needs of an employer 'would seem to be restricted to grounds akin to economic, technological and structural reorganisation of the

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<sup>8</sup> Jansen van Rensburg and Olivier "International Standards" in Olivier et al (eds) (2004) *Introduction to Social Security* 179.

<sup>9</sup> Section 213.

<sup>10</sup> GN 1517 *Government Gazette* 20254 of 16 July 1999, item (1).

<sup>11</sup> For examples of dismissals under such circumstances, see *TAGWU v SA Stevedores* (1993) 14 ILJ 1068 (IC); *FAWU v Kellogg SA* (1993) 14 ILJ 406 (IC); *Associated Biscuits (a division of National Brands Ltd) v Mumsamy* (1997) 9 BLLR 1121 (LAC); Du Toit D, Bosch C, Woolfrey D et al *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 423.

<sup>12</sup> Basson A, Christianson M, Garbers C et al *Essential Labour Law* 2ed (2000) 194.

enterprise'.<sup>13</sup> Common to the circumstances in which the law permits employers to dismiss for operational requirements, is that they all justify, in economic terms, a reduction in the workforce.<sup>14</sup>

For a wide variety of reasons an employer may find itself in a situation where it faces financial ruin. Management may have resorted to an unsound strategy, large clients or contracts may have been lost or there may even be factors in the economy at large that places pressure on employers. A shift in exchange rates or in international oil prices may have a pronounced impact on certain types of operations.<sup>15</sup>

The definition of operational requirements under section 213 of the LRA is itself very broad, but 'its remit certainly includes a dismissal accessioned by a drop in productions, the introduction of a new technology or work programs, and the reorganisation of work and the restructuring of a business.'<sup>16</sup> The background to this, Du Toit explains, is 'the fiercely competitive climate in which many businesses, exposed to the full force of global economic pressures, find themselves, giving rise to the need for constant adaptation and conversely, the specter of dismissal for many employees.'<sup>17</sup>

Consequent to this tough, but uncertain, commercial climate is the quest for survival, continuity and profit. Basson suggested therefore that:

Under pressure, the employer may be forced into considering reducing its wage bill- the total remuneration to all employees. Alternatively, an employer may consider restructuring its organisation - some organisations restructure fluidly and rapidly to meet changing

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<sup>13</sup> *CIWU v Algorax (Pty) Ltd* (2003) 11 BLLR 1080 (LAC) at para 57. See, Du Toit D, Bosch C, Woolfrey D et al *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 423.

<sup>14</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 426.

<sup>15</sup> Basson AC *Essential Labour Law* 4ed (2005) 146.

<sup>16</sup> Van Niekerk A '*Unfair Dismissal*' 2ed (2004) 74.

<sup>17</sup> Du Toit D 'Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond' (2005) 26 *ILJ* 595.

circumstances (such as new competitors entering the market); in other organisations a restructuring may mean that some employees lose their place in the organisational structure. Taking a longer term view, an employer may opt to invest heavily in advanced technology requiring fewer and fewer employees to control and operate this technology.<sup>18</sup>

The definition of operational requirements in the LRA is quite clear at least in one respect – the reason for the dismissal is clearly not by virtue of any act or omission on the part of the employee, it is as a result of the needs of the employer.<sup>19</sup> Some of these needs in operational requirements are mostly beyond the control of the employer.

The employer's needs under operational requirements must at least be distinguished from the other two forms of dismissal: misconduct and incapacity. In the case of misconduct and incapacity, the dismissal is as a consequence of some deed or misdeed of the employee. The employee fails to comply with workplace rules or the employee is incapable of doing the work for which he or she is employed. In the case of operational requirements, the reason has its origin in the employer's needs and requirements.<sup>20</sup> Dismissal on this ground occurs despite the fact that employees who may have given all they have and all they can into a business and are still willing to render more services within their capabilities are retrenched without any fault of their own. This is a 'no-fault dismissal' and the termination of employment in this situation is commonly called retrenchment.<sup>21</sup>

In dismissal for operational requirement therefore, 'it is the employer's exigencies rather than any act or omission on the part of the employee that causes the termination of

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<sup>18</sup> Basson AC *Essential Labour Law* 4ed (2005) 146.

<sup>19</sup> Grogan J *Workplace Law* 7ed (2003) 196.

<sup>20</sup> Grogan J *Workplace Law* 10ed (2009) 270.

<sup>21</sup> Grogan J *Workplace Law* 10ed (2009) 270.

employment',<sup>22</sup> but regrettably the multiplier effect of the termination of employment of this kind goes beyond affected employees as the hardship extends to their dependants. The Code of Good Practice: Dismissal based on Operational Requirement 'reiterates the categorisation of such dismissals as a species of "no fault" dismissals and states that, for this reason the LRA places particular obligations on an employer, 'most of which are directed towards ensuring that all possible alternatives to dismissal are explored and that these employees are treated fairly'.<sup>23</sup> In the other two categories of dismissal namely incapacity and misconduct, the employer has in most cases a sound legal standing to justify the dismissal of a guilty employee because the employee has maybe failed to comply with workplace rules or the employee is incapable of doing the work for which he or she was employed.<sup>24</sup> But the burden of establishing the fairness of an operational requirement dismissal becomes a daunting task for an employer.

According to Grogan,

The tension between the drive for profit and the obligation to honour contractual commitments to employees may create conflict because changes that are viewed by management as necessary for business efficiency or even for the survival of the enterprise may be unacceptable to affected employees and their representatives who may view proposed changes as attempts to increase the company's profitability at their expense.<sup>25</sup>

Since the consequences of operational requirements dismissal are quite grave on affected employees, and labour in general, due to the hardship that comes with unemployment, many countries require that retrenchment 'should not be resorted to

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<sup>22</sup> Van Niekerk A *Unfair Dismissal* 2ed (2004) 72.

<sup>23</sup> Du Toit D, Bosch C, Woolfrey D et al *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 423.

<sup>24</sup> Basson AC *Essential Labour Law* 4ed (2005) 146.

<sup>25</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 426.

until the employer has complied with certain procedural requirements intended to minimise the impact on employees and their dependants.<sup>26</sup> For this reason therefore,

The law is more prescriptive, in terms of both substance and procedure, than in the case of dismissal for misconduct or incapacity. If there is any discernible purpose to this prescription, it is to effect a balance between the promotion of the social good of preserving employment and the preservation of the efficiency of the employer's enterprise.<sup>27</sup>

In South Africa, the LRA promotes this purpose 'by creating the structures that permit affected employees and their representatives to participate in decisions that are taken about proposed dismissal and its consequences.'<sup>28</sup>

In allowing employers to dismiss in operational requirement circumstances, on the one hand, and in the same vein allowing employees or their representatives to participate in a joint consensus seeking process, Thompson and Benjamin wrote that:

The statute set out to promote two immediate objects and one indirect one: Firstly, to avoid if possible the need to retrench at all (on the expectation that constructive dialogue may produce other solutions); secondly, to minimise the extent and impact of any dismissals that do occur; and thirdly, to help maintain reasonable relations between the employer, its employees and their representatives through what is inevitably a testing time.<sup>29</sup>

In fact, sections 189 and 189A of the LRA<sup>30</sup> 'prescribe the procedures to be followed by an employer intending to dismiss on the basis of its operational requirement and determine the extent of interference by the Labour Court and collective bargaining with the employer's substantive decisions to dismiss.'<sup>31</sup>

Operational requirements dismissal is assessed on the fairness of substance and procedure.<sup>32</sup> The substantive component of operational requirements dismissal concerns the real reason for the dismissal and the procedural aspect of the dismissal

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<sup>26</sup> Grogan J *Workplace Law* 10ed (2009) 270.

<sup>27</sup> Van Niekerk A *Unfair Dismissal* 2ed (2004) 72.

<sup>28</sup> Ibid.

<sup>29</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 464.

<sup>30</sup> See below at 3.5.5.

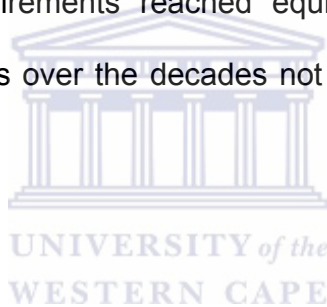
<sup>31</sup> Van Niekerk A *Unfair Dismissal* 2ed (2004) 72.

<sup>32</sup> Section 188 of the LRA.

deals with the consultation of employees by the employer in making or effecting the dismissal decision. For the purpose of this mini-thesis, only the substantive fairness criteria in operational requirement dismissal will be assessed. To understand the position in this area of the law, this mini-thesis will assess the historical developments in this aspect of the law leading to the current Labour Relations Act of 1995 and its application by the courts.

## **1.2 Research Question**

The research question to be answered is: Has the law on substantive fairness in dismissal for operational requirements reached equilibrium? Why has the various legislation and judicial decisions over the decades not created certainty in this area of the law?



## **1.3 Aims and Objectives**

The aims and objectives of this research are to:

- Assess substantive fairness in dismissal for operational requirements in South African labour law.
- Examine why the common law and the various statutory interventions have not succeeded to bring this area of the law into certainty.
- Examine the relevant case law and specific legislative provisions relevant to this form of dismissal and determine whether they fell short of achieving a consistent approach to the question of the substantive fairness in dismissal for operational requirements.



## **1.4 Rationale**

This study hopes to contribute in proposing ways to bring the law on substantive fairness in operational requirement dismissal to certainty and joins the effort in seeking a consistent approach to the question of substantive fairness in dismissal for operational requirements. This research is restricted to the law on substantive fairness in the dismissal for operational requirements in South Africa.

## **1.5 Methodology**

In attempting to assess the substantive fairness in dismissal for operational requirements, this research will make use of the relevant legislation, judicial decisions, international law, books and academic articles in this area of the law.

## **1.6 Chapter Outlines**

The outline of this research will be as follows:

### Chapter one

Chapter 1 is the introductory chapter that introduces operational requirements as a ground permissible under South African law on dismissal. It limits the scope of the research to South African law. It sets out the research question, the aims and objectives of this research, the methodology that will be used in completing the research, the rationale of the research and the chapters outline of the mini-thesis.

### Chapter Two

This chapter focuses on the historical development of the law on substantive fairness in operational requirement dismissal. It looks back to how the common law treated this form of dismissal and the limitations of the common law in this area. It examines the



statutory development of operational requirement dismissals and the jurisprudential progress in unfair dismissal in general and dismissal for operational requirements in particular. It assesses how the courts have applied the various statutory provisions relevant to operational requirement dismissals, but with emphasis on the substantive fairness in dismissal for operational requirements under the LRA. The focus on the history of substantive fairness dismissal is important because it illustrates the ebb and flow of the two main approaches regarding the role of the courts in adjudicating disputes regarding the substantive fairness of dismissals for operational requirements.

### Chapter Three

This chapter focuses on operational requirements under the current LRA. It examines in detail the meaning of operational requirements, the concept of fairness and the specifics of what may constitute the 'similar needs' of an employer<sup>33</sup>. It assesses the 2002 amendment to the LRA in more detail, especially the changes brought in by section 189 A and how the courts position has been shaped by this new provision and the impact of this amendment on the law on substantive fairness in the dismissal for operational requirements.

### Chapter Four

Based on the findings in the previous chapters, this chapter will provide the conclusions and recommendations on how more certainty can be achieved regarding substantive fairness in dismissal for operational requirements.

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<sup>33</sup> The definition of operational requirements refers to economic, technological or structural or '**similar needs**' of an employer-section 213.

## CHAPTER 2

### HISTORICAL DEVELOPMENT OF THE LAW ON SUBSTANTIVE FAIRNESS IN OPERATIONAL REQUIREMENT DISMISSAL

#### 2.1 Introduction

Operational requirement is one of the grounds of dismissal permissible in South African law in terms of section 188 of the LRA.<sup>34</sup> Permissible as it is, this area of the law has attracted more controversy than the other categories of dismissal such as misconduct and poor work performance. The operational requirement of a business has been defined in terms of section 213 of the LRA as those based on the economic, technological, structural or similar needs of an employer. From the definition of operational requirements under section 213, it is clear that the reason for the dismissal must relate to the economic, technological or structural needs of the employer, or reasons similar to these. There must be an 'economic rationale for the dismissal.'<sup>35</sup>

The decision to dismiss employees for operational requirements is purely an economic one. How each employer reacts to salvage their business, reduce losses or increase profits, is a personal decision and varies from enterprise to enterprise. Todd & Damant are of the opinion that:

One employer faced with a particular economic or operational circumstance might take one approach, while another might take a different approach. An employer will be presented at any one time with a whole range of different options and alternatives as to how best it may pursue the commercial or other interests of the business or enterprise. It may choose to

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<sup>34</sup> Act 66 of 1995.

<sup>35</sup> See Brand J, Lotter C, Mischke C et al *Labour Dispute Resolution* 3ed (2002) 229.

buy assets or sell assets, increase volume of production or reduce volumes of production, buy a factory or sell a factory, increase or decrease its prices, choose a new supplier.<sup>36</sup>

The shifting nature of commerce and the need for businesses to adapt and adjust to the changing nature of the market place are summed up by Thompson & Benjamin when they emphasise that:

...in a market driven economy, businesses thrive or wither on their capacity to adapt and compete overtime. Businesses that react well, survive; business that anticipate, prosper. The organisation that treads water, while perhaps profitable today, will be stretched and then outmaneuvered by more nimble competitors tomorrow. A legal bar on downsizing for those otherwise leveraging still greater efficiencies is simple not compatible with the dynamics of domestic and especially international markets, the more so given the mobility of capital.<sup>37</sup>

It is suggested by Grogan that 'the number of employees required by an employer to maintain production at the desired rate is an issue falling within the peculiar knowledge of management',<sup>38</sup> and this decision from the LAC seem to agree that:

[T]here can be no doubt that as a general rule an employer has the right to choose the way in which he will run his business provided that, in so far as workers are concerned, he.....consults with them or their representatives as contemplated by s189 of the Act....<sup>39</sup>

Hence in making retrenchment decisions, it is generally accepted that managers running the day-to-day affairs of a business are ideally best placed to make its decisions and surely, the judges are not members of any business executive. Le Roux & Van Niekerk noted that 'allowing the courts to enquire into the merits of management decisions would constitute an intrusion into managerial prerogative by an institution ill-qualified to do so.'<sup>40</sup> While Le Roux & Van Niekerk's position here may be open to some questions, navigating the murky waters of managerial prerogative by the courts has seen some of the most inconsistent decisions in judgment history in this area of the law as judicial scrutiny

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<sup>36</sup> Todd C & Damant G 'Unfair Dismissal-Operational Requirement' (2004) 25 *ILJ* 905 at para 2.

<sup>37</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 477.

<sup>38</sup> Grogan J *Dismissal* (2010) 341.

<sup>39</sup> *Forecourt Express (Pty) Ltd v SATAWU and Others* (2006) 27 *ILJ* 2537 (LAC) 2538E.

<sup>40</sup> Le Roux PAK & Van Niekerk A *The SA Law of Unfair Dismissal* (1994) 244.

embrace the 'brutal realities'<sup>41</sup> of the commercial world. Perhaps it is with this uncertainty in mind that Grogan took the view that 'the courts enter this debate at their peril'<sup>42</sup> and in the same vein, Du Toit stated that 'it is improbable that courts will frequently be prepared to address questions of this nature, involving complex commercial calculations, purely on the basis of common sense or logic.'<sup>43</sup>

These views notwithstanding, others have submitted to the contrary and suggested that even if management should run its business as it sees fit, the courts should intrude in those decisions given the gravity of such decisions on the lives of workers. Rycroft & Jordaan stated that:

The complex, but purely economic nature, of retrenchment decisions and its consequences to affected employees to an extent necessitated some judicial intrusion in the battle between labour and capital and that perhaps 'challenging the traditional employer perception that the size and character of the workforce is a matter entirely of managerial prerogative, is a growing refusal by workers to accept that retrenchment is the inevitable consequence of economic forces or technological change over which they have no control.'<sup>44</sup>

This chapter of the mini-thesis will consider the jurisprudential development before the introduction of the current LRA. It will focus on the common law, the development of statutory enactments and the role the courts have been playing in scrutinising the employer's decision to dismiss for operational requirements from the previous Labour Relations Act of 1956 to the present Act in force today.

One cannot understand this area of the law by just looking at its statutory history in isolation. The law of unfair dismissal has been in existence even before the introduction of statutory law governing specific aspects of labour law such as dismissal. Labour law, and

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<sup>41</sup> Thompson C '*Bargaining, Business Restructuring and the Operational Requirements Dismissal*' (1999) 20 *ILJ* 755 at 756.

<sup>42</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 426.

<sup>43</sup> Du Toit D, Bosch C, Woolfrey D et al *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 430.

<sup>44</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 230.

the law of unfair dismissal, in particular, was regulated and governed by the general principles of common law.<sup>45</sup> It was perhaps the inadequacy of the common law to provide full and satisfactory answers in specific labour matters and in this case on the substantive aspects of operational requirement dismissal that necessitated the introduction and development of statutory provisions in this area of the law. The focus will now be shifted to the common law position in this area of the law, its shortcomings and statutory developments under South African labour law for which the English common law has been very influential.<sup>46</sup>

## 2.2 The Common Law Position on Dismissal: An Overview

Before the introduction of statutes in this area of the law, the law of dismissal was governed by the common law. The contract of employment generating the obligations and duties of both employee and employer like any other contract was governed to some extent by the general tenets or principles of general contract law. At common law the parties are in principle free to determine the terms of their relationship.<sup>47</sup> The classical view of contract was that the parties freely enter into an agreement or bargain as equals and therefore there should be as little state regulation or intervention as possible.<sup>48</sup> Hence, the rendering of personal services came to be regarded as a 'free exchange between individuals who are exerting their own free will over the letting and hiring of the worker's services.'<sup>49</sup> Pure contract doctrine came to be applied to the

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<sup>45</sup> Van Jaarsveld SR & Van ECK BPS *Principles of Labour Law* (1998) 2.

<sup>46</sup> Schreiner OD *The Contribution of English Law to South African Law; And the Rule of Law in South Africa* (1967) 10.

<sup>47</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 36.

<sup>48</sup> Koffman L & Macdonald E *The Law of Contract* 3ed (1998) 3.

<sup>49</sup> Veneziani B 'The Evolution of the Contract of Employment' in Hepple (ed) *The Making of Labour Law in Europe* (1986) 32.

employment relationship with the development of the new social orders of the 17th and 18th centuries and it became as Alan Fox has argued, 'the essence of economic exchange' and was regarded 'as the mechanism which articulates atomistic, self-regarding individuals into collaborative aggregates and linked processes necessary for civil society.'<sup>50</sup> According to Veneziani,

The ideology embodied in this description was that of freedom of contract i.e. the freedom of the employer and worker from the interference of the state in the labour market, the freedom of choice of the contracting parties and the freedom of private will to determine the content of the contract.<sup>51</sup>

It was a concept of general application that if parties having the capacity to act enter into an agreement, that agreement in the absence of some factors such as fraud, misrepresentation, duress, undue influence, mistakes, becomes law between the contracting parties which courts of law must enforce. As Kessler has pointed out, 'rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law.'<sup>52</sup> The proper functioning of a contract once entered under the common law rests very firmly on the ability of the parties to bargain freely, and reach an understanding or meeting of the minds.<sup>53</sup> A typical contract is ideally where there is free bargaining between parties who are brought together by the interplay of market forces and who meet each other in a footing of an equality of some sort.<sup>54</sup> It was perhaps with this in mind that Sir George Jessel, MR made his famous dictum...

If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their

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<sup>50</sup> Fox A A *Sociology of Work in Industry* (1971) 181.

<sup>51</sup> Veneziani B (1986) 37.

<sup>52</sup> Kessler F 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43(5) *Columbia Law Review* 629.

<sup>53</sup> *Ibid.*

<sup>54</sup> Koffman L & Macdonald E *The Law of Contract* 3ed (1998) 3.

contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.<sup>55</sup>

Sir George Jessel MR was here enunciating the doctrine of the sanctity or freedom of contract which applied squarely in contracts of employment. This dictum is important because freedom to contract and the respect of contractual obligation is very much present in the South African law of contract including employment contracts. According to Didcott J in *Roffey v Catterall, Edward & Goudre*,<sup>56</sup> there is both a commercial and moral justification for the emphasis on the sanctity of contract:

Commerce needs freedom to bargain and loyalty to contracts already concluded....But its mercantile justification is not all there is to be said for sanctity of contracts. The principle has a moral foundation too, which gives its durability and universality beyond the norms of the market place. This consists of the simple requirement that people should keep their promises. That appeal to honour surely transcends all else of present relevance.<sup>57</sup>

The role of the court it can be said, during the dominant application of the common law, was mostly limited to interpreting the instrument which embodied the agreement of the parties. Koffman & Macdonald wrote that:

It was not the task of the law to ensure that a fair bargain had been struck or to enquire whether the parties had in fact met as equals. This attitude was consistent with the *laissez-faire* philosophy which was so influential in the thinking of the time; it was consistent with the idea that contracts should be made by the parties (with freedom of choice) and not imposed on them by the state. It was thought to be consonant with a free market economy and the spirit of competition.<sup>58</sup>

The court is not expected to make a contract for the parties. In other words, parties to a contract of employment have to agree on their condition or terms of employment and this agreement if freely entered, may not be varied in principle by the courts of law.<sup>59</sup> As a species of contract, the contract of employment depends for its validity on compliance

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<sup>55</sup> *Printing & Numeric Registering Co. v Sampson* (1875) LR 19 EQ 462 at 465.

<sup>56</sup> *Roffey v Catterall, Edward & Goudre* (1977) 4 SA 494 (N).

<sup>57</sup> At 505F-H. See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* (1984) (4) SA 874 at 892.

<sup>58</sup> Koffman L & Macdonald E *The Law of Contract* 3ed (1998) 3.

<sup>59</sup> Nassar N *Sanctity of Contract Revisited* (1995) 5.



with the normal contractual requirements of agreement, capacity to contract, possibility of performance, lawfulness and certainty, and nothing more.<sup>60</sup>

Proponents of the common law doctrine of laissez-faire who argue against any interventionist approach by the courts and legislation in contractual matters contend that such intrusion will distort the interplay of market forces.<sup>61</sup> The concerns of the proponents of minimal or no intervention by the courts and legislation in contractual matters, is summed up by Brassey in this lengthy but relevant quote:

They say that litigation will have a bad effect on collective bargaining: instead of trying to sort out their differences for themselves, people will rush off to the courts, and the result will be acrimony and suspicion where there should be conciliation and compromise. Anyway, they say, the law is not equal to the task: it is too static, too unresponsive, ponderous and slow moving. It will be asked to regulate relationships, on the factory floor and at the bargaining table, that are continuous, mercurial and shot through with imponderables. It will also be asked to recreate the relationships when they break down. Can it really be expected to do these things by issuing pieces of official paper from its lofty perch? Can it order an employer to take back an employee it does not want or oblige to bargain in good faith? Can it really stop workers from going to strike, or order the community not to boycott an employer's goods? And, for that matter, can it cope with the procedural difficulties that labour cases are prey to because of the number of people they involve and the complexity of their issues? The law, they say, must be kept out of this area; if it intervenes, it will fail, and then there will be harm done not merely to it but also to the parties who have come before it and to industrial relations generally.<sup>62</sup>

Exponents of the sanctity of contract therefore, jealous of the liberty of the individual, believe that each individual knows best what is good for them, that the sum total of everyone pursuing their best interest uninhibited by courts or legislations, was the greatest good for the greatest number.

Martin Brassey, writing back in 1987, believed that the common law served quite an important purpose. In commenting on the accomplishment of the common law in the field of employment law, Brassey took the view that:

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<sup>60</sup> *Lende v Goldberg* (1983) 2 SA 284 (C) 289.

<sup>61</sup> Brassey M, Cameron E, Cheadle H et al *The New Labour Law: Strikes, dismissal and the unfair labour practice in South African Law* (1987) 1.

<sup>62</sup> *Ibid.*

The answer is that it undoubtedly does to an extent. For instance, if the parties are silent on the matter, it implies into the contract an undertaking by the employees to work competently, faithfully and honestly, because this makes commercial sense. It likewise gives the average employee a right to payment for his services even though the parties may have come to no agreement on the matter; once again this makes commercial sense. In much the same spirit, it permits a party to bring the relationship to an end before the appointed time if its continuance has become impossible; and imports terms into the contract if this is necessary to give it-mark the language-business efficacy.<sup>63</sup>

The perceived fairness of the common law that contracting parties are free to negotiate their own terms notwithstanding, it was beset by its own shortcomings which to a large extent resulted in statutory developments and intervention.

## **2.3 The Limitations of the Common Law**

As discussed above, the common law position was that of freedom of contract with a limited role of the court mainly, to enforce the agreement in the event of a breach.

### **2.3.1 Inequality of bargaining power**

The directives of the market place also postulate free and equal contracting parties negotiating at arm's length. Haysom & Thompson observe that,

contract doctrine embodies a particular conception of society-atomized and juridically equal individuals who enter relationships by striking a bargain on the terms of a contractual exchange. The important assumption is reciprocal exchange between equals.<sup>64</sup>

This, Brassey writes, 'conceals the fact of the employee's dependence on the employer- a dependence fortified by the employer's power to terminate the relationship virtually at will.'<sup>65</sup>

The employee is, as a rule, 'not in a position to hold his or her own in determining the content of the relationship neither does he or she enjoy the same measure of freedom, as the employer

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<sup>63</sup> Ibid.

<sup>64</sup> Haysom N & Thompson C 'Labouring Under the Law: South Africa's Farm workers' (1986) 7 *ILJ* 218 at 221.

<sup>65</sup> Brassey M (1987) 3.

does, to exit from the relationship at will.<sup>66</sup> In fact, Beatty is of the opinion that employment is the only medium that employees can meaningfully cling for survival and that it might be close to impossible for them to exercise the will of exit. He wrote:

For them there is no meaningful alternative institution other than employment through which their labour can be made productive. For them access to this social institution represents nothing more than the means of survival. The possibility of exit, the traditional check on the abuse of market authority...is not realistically available.<sup>67</sup>

Therefore, the inequality of the bargaining power between the contracting parties and perhaps the difficulty of the employee to exit the employment relationship was to an extent largely ignored by the classical theory of contract under the common law with its insistence on freedom or even sanctity of contract.

In questioning the equality of the contracting parties in matters of employment and concluding that the parties to this contract are truly not as equal as the common law doctrine of freedom of contract perceived them to be, Davies & Freedland put it this way:

His or her [the employee's] lack of material resources, general immobility in the labour market, and the economic, personal and psychological value of work, makes the employee vulnerable to the employer's power. In short, the power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to work. Far from being the voluntary relationship it is claimed to be, the relationship is endowed with an involuntary, even coercive, character.<sup>68</sup>

It is suggested that, by assuming the freedom of the parties to enter into the relationship and their equality in the making of the bargain, the market approach ensures that the content of the bargain is shielded from judicial supervision and interference.<sup>69</sup> The law of contract, states Selznick, shows little interest in employer benevolence:

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<sup>66</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 23.

<sup>67</sup> Beatty D 'Labour is not a Commodity' in Reiter B & Swan R *Studies in Contract Law* (1980) 333.

<sup>68</sup> Davies P & M R Freedland *Kahn-Freud's Labour and the Law* 3ed (1983) 18.

<sup>69</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 23.

It presumes that each party would take care of his own interest and provide for them in a freely bargained agreement. The limited moral commitment of the employer [justifies] any agreement he [may] impose. The terms of the arrangement would have to be relied on for substantive justice in the plant.<sup>70</sup>

With the employer's power of command and the employee's concomitant subordination firmly in place 'the court's interpretation of the parties' "intention" in such an "agreement"...frequently results in the consolidation of the superior...powers of the employer.'<sup>71</sup>

The concept of unfair dismissal was, one may say, probably absent in the vocabulary of the common law since parties to the employment contract could bring it to an end without communicating the reasons for termination. Bringing an employment contract to an end without disclosing the reasons for such termination could not be fairness to either of the contracting parties especially the employee. The perceived equality of rights of the contractual parties ignored the gravity of the hardship to the employee in the sense that the right to terminate employment without reason is scarcely exercised by the employee. What was to be the equal rights of both contracting parties to bring the employment to an end without any notice, tends to be the right of the employer to dismiss at will while greatly diminishing the employee's security of employment. The position of inequality of termination of employment is elaborated by Bennet when he wrote that:

While both parties were believed to have had an equality of rights, it was only when one looked at the effect of that exercise of rights that one realized how unequal they really were. When the employee exercises his rights to end the contract, which seldom occurred, the detrimental effect on the employer would generally have been slight. In most cases, the employee would easily and quickly have been replaced. When the employer, on the other hand, exercised his rights to end the contract, the effect on the employee would generally have been disastrous. This is especially true in times of widespread unemployment, when

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<sup>70</sup> Selznick P *Law, Society and Industrial Justice* (1967) 137.

<sup>71</sup> Lord Wedderburn 'Trust, Corporations and the Worker' (1985) *Osgoode Hall LJ* 203 cited in Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 23.

the employee's "equal" right to choose for whom he wished to work would be diminished, and in most cases non-existent.<sup>72</sup>

The common law freedom of contract and perception of equality of the bargaining powers between the contracting parties in the field of employment actually led to inequality, particularly for the employee, and this shortcoming necessitated intervention. The situation was further complicated in South Africa before the advent of democracy in that losing their jobs had an adverse impact on where many employees were allowed to reside. Bennet summarised this position as follows:

In South Africa, this inequality was increased by the fact that many workers, once they were dismissed, lost their rights to reside in the areas where they were most likely to find other jobs in terms of s10 (1) (d) of the now repealed Black (Urban Areas Consolidation) Act 25 of 1945. Once dismissals had to be justified, many employers took advantage of this loss of rights, knowing that it would have been extremely difficult for a dismissed worker to make a claim for reinstatement once he had been bussed back to his "homeland".<sup>73</sup>

The purported equality of rights in employment under the common law regime was therefore a fallacy and as a consequence, the contracting parties were never equal and hence the need for statutory intervention.

### **2.3.2 Employment relationship viewed in economic terms**

The second line of attack or shortcoming of the common law focuses on the judicial perception of the relationship in purely economic terms.<sup>74</sup> The employees do not enjoy the freedom of withdrawal of labour because of the need for sustainability, dignity coupled with the difficulties in obtaining alternative employment whereas the employer can fairly terminate the employment contract with very little hassle of replacement.<sup>75</sup>

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<sup>72</sup> Bennet C *A Guide to the Law of Unfair Dismissal in South Africa* (1992) 2.

<sup>73</sup> Ibid.

<sup>74</sup> *UAMAWU v S Thompson (Pty) Ltd t/a Thompson Sheet Metal Works* (1988) 9 ILJ (IC) 266 at 272D.

<sup>75</sup> Rycroft A & Jordaan B *A Guide to South Africa Labour Law* 2ed (1992) 23.

### 2.3.3 Sanctity of Contract

The third shortcoming of the common law within the realm of dismissal law was the sanctity of contract doctrine or the strict adherence to contract. Hence, the courts operating under the common law adopted the view that it was not their place to make contracts for parties thereby limiting their roles solely to interpreting agreement between the contracting parties. In *Paiges v Van Ryn Gold Mines Estates*<sup>76</sup> it was argued that a provision in an employment contract should not be enforced because it bore oppressively on the employee. In finding that this argument must fail, De Villiers JA held inter alia:

Even if it could be established that the stipulation is not in the interest of the workman,...[that] would not, apart from legislative enactment, be sufficient to justify the court in declaring the agreement freely entered into by the parties contra bonos mores. That would rather be a matter for the legislature.<sup>77</sup>

The court found that it was not its place to make or negotiate contracts for the parties and that a contract freely entered into cannot be varied by the court however onerous and imbalanced that may be to either of the contracting party.<sup>78</sup> In rejecting the aforementioned argument of the employee and stating that the irregularity of the contract cannot be rectified by the court and that it is a matter for the legislature, De Villiers JA was adhering to the sanctity of contract in total neglect of the inequality of the perceived equal parties to a contract. One may say therefore that as indispensable as the doctrine of the sanctity of contract was made to be during this era, its application was oppressive to employees and hence the need for legislation.

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<sup>76</sup> *Paiges v Van Ryn Gold Mines Estates* (1920) AD 600.

<sup>77</sup> At 616.

<sup>78</sup> *Ibid.*

### 2.3.4 No reasons for termination required

The fourth short-coming under the common law was that neither party is enjoined to give reasons to the other why the employment contract is terminated. According to Brassey 'non-disclosure the reason for terminating a contract of employment has been seen as a common law right to be arbitrary about the procedure of dismissal.'<sup>79</sup> Brassey continued:

The common law... offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to the change. It allows him to flout the bargain whenever he likes, provided that he does not mind paying a paltry sum, which is invariably all the damages amount to. And all this he is allowed to do without consulting the other party first, or paying him the slightest heed.<sup>80</sup>

The terminating party, therefore, was under no obligation to consult with the other party or his representatives on the reason for termination. Without the obligation to state reasons or consult an affected party before terminating an employment contract, the question of substantive and procedural fairness of a dismissal was foreign under the common law and the concept of unfair dismissal one can say to an extent was non-existent. In rejecting the notion to consult an employee or its union representative before termination of employment, Ogilvie Thompson AJA stated that he was not aware of any authority which has applied the *audi alteram partem* principle to the field of contract and that 'there certainly appear to be none that has applied it to the field of employment.'<sup>81</sup>

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<sup>79</sup> Brassey M, Cameron E, Cheadle H et al *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 5.

<sup>80</sup> Ibid.

<sup>81</sup> *Mustapha v Receiver of Revenue* (1958) 3 SA 343 (A) 357 H.



Thus, the courts have held that an employer has no obligation to afford an employee a hearing before deciding to dismiss him.<sup>82</sup> Similarly, the employee is under no obligation to provide reasons to the employer as to why he is terminating his employment contract. The same will be true it seems, even if the obligation to hear, consult or negotiate is expressly imposed by the contract.<sup>83</sup> The common law regards a term of this sort as 'so vague as to its import, significance or consequence as to be unenforceable'.<sup>84</sup> The vagueness, so it is said, lies in the fact that it confers on the party to whom it relates an absolute discretion to perform or not, as he chooses; by which is meant, presumably, an absolute discretion not merely on whether he will agree but also on how he will negotiate.<sup>85</sup>

Summed up together, therefore, during the era of the sole prevalence of the common law, contracting parties were considered equal in the negotiation, conclusion and termination of the contract of employment. This contract, once entered, cannot be varied by a court of law, however onerous or oppressive any of the provision thereto can be to either of the contracting parties. In the event of a dispute before the court, the court was in no position to vary or alter any provision thereto and this was in pursuance of the doctrine of the sanctity of contract. Finally, either party to the contract was at liberty to bring the contract to an end without explanation as to why he elected termination. Hence, it is abundantly clear that if the parties to the contract are not in any obligation to consult an affected party, then the issue of procedural fairness or otherwise cannot be considered. The fact that any of the contracting parties can terminate the

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<sup>82</sup> *Monckten v British South African co* (1920) AD 324 at 329.

<sup>83</sup> *Brassey M et al The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* (1987) 5.

<sup>84</sup> *SA Reserve Bank v Photocraft* (1969) 1 SA 610 (C) 613G.

<sup>85</sup> *Brassey M et al* (1987) 5.



employment contract without advancing any reason thereto, left the issue of substantive and procedural fairness out of the dismissal equation. On these premises, one cannot speak of unfair dismissal during the exclusive prevalence of the common law. It is perhaps the shortcomings and inadequacies of the common law discussed above and their harsh consequences to employees that paved the way for the statutory development in this area of the law of unfair dismissal. Statutory intervention was clearly a necessity to address the inadequacy of the common law. Veneziani writes:

The history of the contract of employment can be seen as the history of false aspiration. The promise of the freedom of contract in the employment relationship was never fully achieved. The freedom of the worker in the labour market was impeded by his social condition, that is, by his status. This statement holds true for both civil and common law countries. The transition from status to contract has been more apparent than real. It would be more accurate to say that in the various phases of the economic, social and political evolution of the employment relationship the worker's status has changed.<sup>86</sup>

The author was here certainly referring to the evolution of the status of the employee from the false equality under the freedom of contract era to a more positive state with the intervention of legislation.<sup>87</sup>

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## **2.4 Statutory Development of the Law of Unfair Dismissal with Specific Emphasis on Substantive Fairness**

The current LRA<sup>88</sup> has a lengthy history of industrial legislation stretching back even to colonial times. In chronological order of statutory development, they are the Cape Servants Registry Act of 1906, the Transvaal Industrial Disputes Act of 1909, the Mines

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<sup>86</sup> Veneziani B 'The Evolution of the Contract of Employment' in Hepple B (ed) *The Making of Labour Law in Europe* (1986) 70.

<sup>87</sup> Writing back in the late 1990s, Koffman & Macdonald observed that '[t]he law is a living and developing thing and cannot be reduced to a set of axioms or precepts as if it were an exact science. This means that the inevitable inequality of bargaining strength (in relation to wealth, resources and experience) must be acknowledged by the law.' Koffman L & Macdonald E *The Law of Contract* 3ed (1998) 5.

<sup>88</sup> Act 66 of 1995.

and Works Act of 1911, the Factories Act of 1918, the Industrial Conciliation Act of 1924 and the Native Labour (Settlement of Disputes) Act of 1953.

A century ago, the South African economy was exclusively agrarian and most people were employed at the farms or the country-side.<sup>89</sup> The principles of the common law discussed above were adequate to regulate the relationship between the employer and the individual employees. However, the discovery of minerals resulted in great economic growth and industrial development.<sup>90</sup> With the increase in population,

[l]abour activities also expanded, resulting in the fact that relationships which regulated the rendering of services in the performance of work became more complicated. This made it imperative for the state to intervene towards the beginning of the last century, and to regulate labour relations by means of statutory enactments. The situation today is such that the collective labour relations between the employer and employee are regulated by a sophisticated system of statutory labour measures.<sup>91</sup>

While it is true that the relationship between the employee and the employer has been described by the common law as one of confidence in the execution of contractual obligations, the common law approach in South Africa had begun changing by 1979.<sup>92</sup> According to Le Roux & Van Niekerk, 'the rapid transformation from the common-law regulation of termination of employment to a jurisprudence of unfair dismissal at least equal to that in most market economies is perhaps the most remarkable feature of South African labour law reform.'<sup>93</sup> What is even more remarkable is the fact that the jurisprudence was largely developed from an 'amorphous statutory provision which nowhere referred to the words "termination of employment" or "dismissal" let alone the grounds on which a dismissal might be considered to be fair as opposed to lawful.'<sup>94</sup>

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<sup>89</sup> Van Jaarsveld SR & Van Eck BPS *Principles of Labour Law* (1998) 1.

<sup>90</sup> Van Jaarsveld SR & Van Eck BPS (1998) 2.

<sup>91</sup> Van Jaarsveld SR & Van Eck BPS (1998) 6.

<sup>92</sup> Bennett C *A Guide to the Law of Unfair Dismissal in South Africa* (1992) 5.

<sup>93</sup> Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 1.

<sup>94</sup> *Ibid.*

However, it was not until 1979, when the government accepted the recommendation of the Commission of Enquiry into Labour Legislation (better known as the Wiehahn Commission),<sup>95</sup> that the way for the statutory introduction of the concept of unfair dismissal was paved.<sup>96</sup>

While South Africa had withdrawn from the ILO in 1964, the Wiehahn Commission suggested that the country should attempt to use international recommendations, such as Recommendation 119 of 1963,<sup>97</sup> as yardstick for its own labour legislation.<sup>98</sup>

The unfair labour practice concept was introduced into the Labour Relations Act<sup>99</sup> by the Industrial Conciliation Act<sup>100</sup> following upon the recommendations of the Wiehahn Commission. The Industrial Conciliation Act established the Industrial Court and with it, the unfair practice jurisdiction emerged.<sup>101</sup> The Act simply declared that an unfair labour practice was 'any labour practice which in the opinion of the Industrial Court is an unfair practice.'<sup>102</sup>

Although there was no express provision in the Act of the concept of unfair dismissal, it 'was soon accepted that the definition of unfair labour practice was broad enough to encompass it.'<sup>103</sup> The task of defining the concept of unfair dismissal was thus left to the

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<sup>95</sup> *Report of the Commission of Enquiry into Labour Legislation* part 5 RP47/1979.

<sup>96</sup> Bennet C (1992) 5. According to Van Jaarsveld & Van Eck, '[m]any circumstances and problems, amongst others the position of South Africa in the international and political sphere, the economic progress of South Africa, the role of multinational companies in South Africa, a dualistic labour bargaining system for employees, the shortage of skilled employees and dubious practices made it imperative for the government in June 1977 to appoint a commission of inquiry (Wiehahn Commission) to investigate prevailing labour laws.' Van Jaarsveld SR & Van Eck BPS *Principles of Labour Law* (1998) 2.

<sup>97</sup> Termination of Employment Recommendation-119 of 1963.

<sup>98</sup> Bennet C *A Guide to the Law of Unfair Dismissal in South Africa* (1992) 5.

<sup>99</sup> Act 28 of 1956.

<sup>100</sup> Act 94 of 1979.

<sup>101</sup> Rycroft A & Jordaan B *A Guide to South Africa Labour Law* 2ed (1992) 156.

<sup>102</sup> *Section 46(9)*.

<sup>103</sup> Bennet C (1992) 5.

Industrial Court.<sup>104</sup> Little wonder therefore, that this has sometimes been referred to as the court's legislative nature. In terms of section 46(9)(c) of the principal Act,<sup>105</sup> the Industrial Court was also entrusted with the task of determining disputes concerning alleged unfair labour practices.

A fresher and more expanded definition of the concept of unfair labour practice was introduced following the passing of the Industrial Conciliation Act 95 of 1980. A more significant consequence of this 1980 amendment was that it removed the court's 'legislative' function of defining the concept of unfair labour practice and leaving it with the function of determining the dispute.<sup>106</sup> The definition of the unfair labour practice was now left for the legislature to determine.

Before the passage of the 1988 amendment to the Labour Relations Act, South African law had no express statutory basis for the doctrine of unfair dismissal.<sup>107</sup> The concept of an unfair labour practice was new to South African law and unfair dismissals were not strictly regulated by statutes as they were, for instance, in Britain.<sup>108</sup> The Industrial Court has often been guided by the developments of the concept in Britain and in the United States, as well as being guided by international labour standards.<sup>109</sup>

Until September 1988 therefore, the concept of 'unfair dismissal' had no express statutory foundation, but was developed from the broad definition of 'unfair labour practice' over which the Industrial Court had exclusive jurisdiction. Yet the broad

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<sup>104</sup> Rycroft A & Jordaan B (1992) 156.

<sup>105</sup> Labour Relations Act 28 of 1956.

<sup>106</sup> Mureinik E 'Unfair Labour Practices: Update' (1980) 1 *ILJ* 113 at 116.

<sup>107</sup> Cameron E, Cheadle H & Thompson C *The New Labour Relations Act* (1989) 107.

<sup>108</sup> Bennett C (1992) 5.

<sup>109</sup> *Ibid.*

definition harbored the foundations for the development of a distinct jurisprudence of unfair dismissal. The Industrial Court fleshed out this bare framework by importing the principles enshrined in the Termination of Employment Recommendation 119 of 1963 of the ILO.<sup>110</sup> The court enquired whether there had been a 'valid and fair' reason for the termination, and whether the employer had given the employee a fair and reasonable opportunity of speaking in rebuttal or in mitigation of the complaints in accordance with the *audi alteram partem* rule.<sup>111</sup>

Substantive changes were introduced to the principal act by the Labour Relations Amendment Act 83 of 1988 and for the first time provided statutory recognition for the concept of 'unfair dismissal'.<sup>112</sup>

The amending 1988 Act, in addition to introducing the concept of unfair dismissal, brought in the element of substantive fairness, however vague.

Even the Labour Relations Amendment Act 9 of 1991 which came into effect on 1 May 1991 did very little to clarify the concept of unfair dismissal statutorily. Wider powers to determine this concept was left exclusively with the Industrial Court.<sup>113</sup>

Statutory history in dismissal law has proven, therefore, that before the advent of the current LRA, the concept of unfair dismissal under which operational requirements dismissal is listed as one of the components or categories received very little statutory attention. The absence of clear statutory development in the area of unfair dismissal obviously affected the rapid growth of consistent jurisprudence in this area of the law. Its

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<sup>110</sup> At 194.

<sup>111</sup> *NUM v Durban Roodepoort Deep Ltd* (1987) 8 ILJ 156 (IC) at 165.

<sup>112</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 94.

<sup>113</sup> Section 10 of Act 9 of 1991.

definition and development was left at the mercy of the Industrial Court which only came into existence after the Wiehahn Commission recommendations of 1979.

Amid this late attention that the concept of unfair dismissal received from statutes, the focus of this chapter will now shift to how the Industrial Court grappled with unfair dismissal cases in its jurisprudence developed especially under the 1956 LRA with emphasis on substantive fairness in the dismissal for operational requirements.

## **2.5 Development of the Law on Substantive Fairness under the Labour Relations Act of 1956: The Role of the Court**

With the repeal of the 1988 codification,<sup>114</sup> the law on retrenchment was based on the guidelines laid down by the Industrial Court from time to time<sup>115</sup> such as: the employer must consider ways to avoid or minimise retrenchment,<sup>116</sup> give sufficient prior warning to a representative trade union of the pending retrenchment and to the employees selected for retrenchment,<sup>117</sup> and that the retrenchment must be reasonable, made in good faith and there must be a commercial rationale for the retrenchment.<sup>118</sup> In addition to the aforementioned guidelines, section 1(4) of the 1956 LRA permitted the unfair labour practice definition to be interpreted in the light of the requirements laid down in the 1988 definition.

While the amendment in 1988 of the 1956 LRA established the Labour Appeal Court in 1988, the Industrial Court operating under the unfair labour practice jurisdiction

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<sup>114</sup> The Labour Relations Amendment Act 83 of 1988 was amended by the Labour Relations Amendment Act 9 of 1991 which came into effect on 1 May 1991.

<sup>115</sup> Rycroft A & Jordaan B (1992) 233.

<sup>116</sup> *Morester Bande (Pty) Ltd v NUMSA & another* (1990) 11 ILJ 687 (LAC) 689G.

<sup>117</sup> *Shezi v Consolidated Frame Cotton Corporation Ltd* (1984) 5 ILJ 3 (IC) 12.

<sup>118</sup> *Combined Small Factory Workers Union & Others v Aircondi Refrigeration* (1990) 11 ILJ 532 (IC) 546G-I.

established the above guidelines which they saw as constituting fair employment practices. Paramount of the guidelines is that the decision to retrench must be reasonable and made in good faith and there must be a commercial rationale for the retrenchment. This was the dispensation under the 1956 LRA but what was the role of the Industrial Court under this regime?

The relationship between employer and employee has been described as one which is 'mercantile to the core'.<sup>119</sup> The employer's right to promote its own interest in a competitive market is a value both accepted and encouraged by the free enterprise system. The law regulating dismissal 'extends recognition to that value by regarding a dismissal on account of the operational requirements of the business as legitimate.'<sup>120</sup> There is often not even in principle 'a clear right or wrong answer to the question whether a business change is necessary to the point of justifying a dismissal.'<sup>121</sup> The procedural side of dismissal for operational requirements 'holds no terror for judges, though, and it is this more familiar territory that has attracted their compensating attention.'<sup>122</sup>

Todd & Damant agree with Thompson and state that,

[t]here is seldom if ever, a right or wrong answer to the question whether a particular dismissal is necessary or justified by the business imperatives on which it is grounded. The enquiry is not a fact-finding one but rather one that assumes the form of a review of the norms that the employer sought to establish- norms that determine the distribution of cost and benefits.<sup>123</sup>

Consequent to this, Thompson writes that 'the courts therefore instinctively look for ways of avoiding being drawn into the economic merits of a decision, and the natural

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<sup>119</sup> Brassey M et al (1987) 65.

<sup>120</sup> Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 235.

<sup>121</sup> Thompson C 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' (1999) 20 *ILJ* 755 at 769.

<sup>122</sup> Thompson C (1999) 769.

<sup>123</sup> Todd C & Damant G 'Unfair Dismissal-Operational Requirements' (2004) 25 *ILJ* 896 at para 1.



response has been to give employers a hefty margin of grace in this quarter.<sup>124</sup> The court showed a marked reluctance to 'second guess' an employer's decision to dismiss employees for operational grounds.<sup>125</sup> The hefty margin accorded to employers by the court therefore, has been the axis of legal challenge over the years and the result of which has been the court's adjustment of its decisions of abstaining to scrutinise the employer's reasons for retrenchment toward scrutinising such decisions.

Despite the formal requirement of adjudication, it has been stated that the underlying issue in dispute was 'essentially economic.'<sup>126</sup> It was perhaps the economic nature of this form of dismissal that created the uncertainty in this area of the law. Hence, there was a need for statutory intervention to lessen the legal controversy in this category of dismissal, which led to the current LRA and its subsequent amendment in August 2002.<sup>127</sup> However, to understand the uncertain journey in the adjudication history in this area of the law, it is perhaps helpful to assess the court's position during this era when the courts were abstaining from scrutinising the employer's reasons for retrenchment when one can almost say that the managerial prerogative was all but impenetrable. The departure point in this assessment will be to retrace pertinent decisions in operational requirement dismissal with emphasis on the substantive aspects from the Industrial Courts to the current Labour and Labour Appeal Courts.

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<sup>124</sup> Thompson C (1999)769.

<sup>125</sup> Du Toit D, Bosch D, Godfrey S *et al Labour Relations Law-A Comprehensive Guide* 5ed (2006) 425.

<sup>126</sup> Thompson C (1999) 769.

<sup>127</sup> Labour Relations Amendment Act 12 of 2002.



## 2.6 The Abstention Approach of the Courts in Substantive Fairness Dismissal for Operational Requirements

Commercial rationale has been the focal point in the context of adjudicating the substantive fairness in dismissals for operational requirement. On one enduring strand, 'the courts have held that all that is required of the employer's termination decision (assuming due process) is that it be *bona fide* and imbued with commercial rationale.'<sup>128</sup>

This is reflected in the following extract from *Morester Bande (Pty) Ltd v NUMSA & another*:<sup>129</sup>

The industrial court has in the past stressed time and again that, as a general rule, redundancy will be regarded as a fair and valid reason to dismiss an employee and accordingly the court will not regard a *bona fide* decision to retrench such an employee as unfair...<sup>130</sup>

It was initially clearly established that, as a general rule, the court will not interfere in an employer's decision to retrench provided that the court was satisfied that an acceptable reason for the retrenchment existed and that the decision was *bona fide*.<sup>131</sup> The court has generally demonstrated a reluctance to interfere with the employer's decision to retrench unless the motive amounts to victimisation or some other form of anti-union activity.<sup>132</sup> Where the decision to retrench is based on economic considerations the court will not impose its view of the most appropriate commercial decision in the circumstances on the employer.<sup>133</sup>

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<sup>128</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 472.

<sup>129</sup> (1990) 11 *ILJ* 687 (LAC).

<sup>130</sup> At 688J.

<sup>131</sup> Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 242.

<sup>132</sup> *SACWU & Others v Toilet Pak Manufacturers (Pty) Ltd & Others* (1988) 9 *ILJ* 295 (IC) 305G.

<sup>133</sup> Le Roux PAK & Van Niekerk A (1994) 242.

The Labour Appeal Court (LAC) has held that neither it nor the Industrial Court is equipped to decide economic, business, and commercial issues.<sup>134</sup> That remark notwithstanding, an increase in profitability and business efficiency has been held to constitute an acceptable reason for retrenchment-it is not necessary that the employer demonstrates that the effect of the retrenchment will be the cutting of cost.<sup>135</sup>

It seemed to be settled at this stage that a commercial rationale for retrenchment equated the fairness of such retrenchment. If an employer could prove that the dismissal of a certain employee or group of employees was predicated or bordered on commercial rationale, it meant that the dismissal was fair. There would be no judicial reversal of the employer's decision to dismiss for operational requirement however ill-conceived that decision may be proven to be. And so, dismissals resulting from poor management decisions were to an extent unimpeachable and would not be unfair for that purpose alone.<sup>136</sup> The court did not want to enter the fray as to assess management economic decisions to retrench for operational requirement and to migrate in their opinion a purely commercial decision into a legal debate. To avoid this, it seemed best to let management have their way.<sup>137</sup>

The most important question that arose from a consideration of the cases dealing with the substantive fairness of retrenchments before the advent of the current LRA 'concerns the degree of deference to be shown by the courts in their assessment of the employer's business decisions, and the impact of that assessment on the requirement

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<sup>134</sup> *Mobius Group (Pty) Ltd v Corry* (1993) 2 LCD 193 (LAC).

<sup>135</sup> *Morester Bande (Pty) Ltd v NUMSA & another* (1990) 11 ILJ 687 (LAC) 689.

<sup>136</sup> *Benjamin & Others v Plessey Tellumat SA Ltd* (1998) 19 ILJ 595 (LC) 596G-H.

<sup>137</sup> Todd C & Damant G 'Unfair Dismissal: Operational Requirements' (2004) 25 ILJ 896.

of fairness.<sup>138</sup> The real question is the extent to which the court was willing to respect or accept the commercial rationale advanced by the employer to retrench as the cardinal reason for such termination. Or, put another way, to what level was the court willing to allow the commercial reason by the employer in a retrenchment exercise for operational requirements to go unchallenged? Within this level of how the court can humbly respect the employer's decision to retrench, lies the degree of deference to be shown by the court. But as seen above, earlier decisions from both the Industrial and Labour Courts held that as a general rule, once the court was satisfied that the employer's decision to retrench was based upon sound economic consideration, it will not interfere with such decision.<sup>139</sup> In other words, it was the courts position that in matters regarding unfair dismissal for operational requirements, the employer's burden was just to establish that a bona fide case for retrenchment existed and that it was commercial in nature.<sup>140</sup> With great respect, it was perhaps irrelevant during this time if the decision to retrench was defensible or otherwise, the burden of proof expected from the employer was merely a commercial rationale.

The burden to establish a commercial rationale was quite simple for employers. Actually the employer was allowed only to submit its financial statements and intimate that there is a commercial rationale to retrench employees, and this, in the opinion of the court was tantamount to good faith and fairness.<sup>141</sup> In *Combined Small Factory Workers*

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<sup>138</sup> Todd C & Damant G (2004) 900. 'Deference' as used in retrenchment cases literally means 'to accept or give in humbly to something.' Oxford Dictionary 3ed (1987) 227.

<sup>139</sup> Todd C & Damant G 'Unfair Dismissal: Operational Requirements' (2004) 25 *ILJ* 896 at 901.

<sup>140</sup> *Morester Bande (Pty) Ltd v National Union of Metal Workers of SA & Another* (1990) 11 *ILJ* 686 at 689.

<sup>141</sup> *Combined Small Factory Workers Union & Others v Aircondi Refrigeration (Pty) Ltd* (1990) 11 *ILJ* 532 at 533F.

*Union & others v Aircondi Refrigeration*, therefore, it was suggested that there exists a presumption in favour of commercial rationale and that it is:

encumbent upon the employee to present enough facts to raise a reasonable inference of an ulterior motive before the court would draw an adverse inference from the failure by the employer to disclose detailed financial information on which the decision was based.<sup>142</sup>

The judgment does not consider the difficulties which a union will invariably encounter in obtaining information which is often at the exclusive disposal of the employer.<sup>143</sup> The presentation of a financial statement indicating a decline in corporate finances or questionable stability amounted to a presumption of commercial rationale. The court's abstentionist attitude or deference is perhaps best expressed in *TGWU & Others v Putco Ltd*,<sup>144</sup> a case which concerned the closure of a business. The court stated:

[It is] submitted that the decision to close the division was one of policy and that this was a function of management which it was entitled to exercise without negotiation or consultation. In the course of argument I was not referred to, neither was I aware of, any authoritative pronouncement on that or any related topic. Ordinary business logic, however, suggests to me that [the] submission is sound. After all, it is management which has its hands on the controls and its eyes on the instrument panel, so to speak. Logically it is for management to react to what the instruments show. Particularly in the case of a public company, the directors also have a duty towards its share holders to make sound management decisions in response to events.<sup>145</sup>

In *NUMSA v Atlantis Diesel Engines*,<sup>146</sup> the Industrial Court explained why it accepted this managerial prerogative as the exclusive preserve of management or employer which it is most likely not to interfere with:

The only prerequisite for a proper exercise of such prerogative are that it must be bona fide and that a business rationale must exist. (We are somewhat doubtful about the second requirement-after all in business frequently not always the best decision is taken. Perhaps management has the right to be foolish as long as it is strictly bona fide in its deliberation).<sup>147</sup>

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<sup>142</sup> Ibid.

<sup>143</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 238.

<sup>144</sup> (1987) 8 *ILJ* 801.

<sup>145</sup> At 806D-E.

<sup>146</sup> (1992) 13 *ILJ* (IC).

<sup>147</sup> At 408A.

The rationale for this deferential approach adopted by the Industrial Court in assessing the company's decision to retrench appeared to be two-fold. Todd & Damant explain:

First, the judicial officers adopted the view that they were not necessarily the best qualified people to assess the merits of a business decision to determine whether those decisions were based on sound business or economic principles. Secondly, there was a distinct reluctance to allow the fair labour practice jurisdiction to restrict or limit the range of possible economic decisions that could be taken by managers of a business in the genuine belief that they are pursuing the best interest of the business.<sup>148</sup>

While examining the law relating to dismissal for operational requirements under the 1956 LRA, Le Roux & Van Niekerk,<sup>149</sup> endorse the Industrial Court's approach in *NUMSA v Atlantis Diesel Engines*. They argue that if an operational reason exists for the dismissal, judicial intervention has to be restricted to dismissals in bad faith or for improper motives. One may differ with the authors in that if a commercial decision cannot be scrutinised, how then will the court establish which decision is a sham and which is bona fide?

The focus of the Industrial Court, therefore, was not whether the employer's mismanagement led to retrenchment or not, but only that the reason for retrenchment was *bona fide*.<sup>150</sup> It did not matter that the decision could later be shown to have been a bad one for the business especially as there was no requirement to weigh up the benefit to the business against the hardship caused to workers in the form of job losses.<sup>151</sup> Without weighing the decision against certain consequences like the hardship of the innocent and affected employees, it could be difficult to establish which commercial decision is fair and which is unfair. The Industrial Court even went further to accept that

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<sup>148</sup> Todd C & Damant G (2004) 901.

<sup>149</sup> Le Roux PAK & Van Nierkerk A *The South African Law of Unfair Dismissal* (1994) 238.

<sup>150</sup> *Benjamin & Others v Plessey Tellumat SA Ltd* (1998) 19 ILJ 595 (LC) at para 4.

<sup>151</sup> Todd C & Damant G 'Unfair Dismissal-Operational Requirements' (2004) 25 ILJ 896 at 902.

a desire to increase profit and business efficiency constituted a fair reason to retrench<sup>152</sup> and that an employer need not prove that it faces the prospect of a financial ruin.<sup>153</sup> Even as the current LRA came into force and as recent as 2003, the LAC still held the view that the argument that an employer cannot retrench employees in order to increase profit but only to ensure survival is not supported by a proper reading of the LRA.<sup>154</sup> Hence the abstentionist approach adopted by the courts under the 1956 Act resurfaced under the current LRA.

In this era of abstention, the burden rested on the employees to present enough facts to raise a reasonable inference of ulterior motive in the employer's decision, before the court could draw an adverse inference from the failure by the employer to disclose detailed financial information on which its decision to retrench is rooted.<sup>155</sup>

This leeway given to employers by judicial officers in the form of managerial prerogative notwithstanding, the courts have in some cases denied the employers the liberty to use retrenchments to rid themselves of employees whose services have previously proven unsatisfactory and they are certainly never entitled to retrench for ulterior motives such as membership of a particular union.<sup>156</sup> Going against the grain of the then accumulating case law, the former LAC raised the bar in the 1993 decision of *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*.<sup>157</sup> The LAC hearing

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<sup>152</sup> *Food & Allied Workers Union & Others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC) 413.

<sup>153</sup> *Van Rensburg v Austin Safe Company* (1998) 19 ILJ 158(LC) at 168F.

<sup>154</sup> *Fry's Metal (Pty) Ltd v NUMSA & Others* (2003) 24 ILJ 133 (LAC) at para 33.

<sup>155</sup> *Combine Small Factory Workers Union & Others v Aircondi Refrigeration (Pty) Ltd* (1990) 11 ILJ 532 at 533G.

<sup>156</sup> *Kabeni & Others v Cementile Products (Ciskei) (Pty) Ltd & another* (1987) 8 ILJ 442 (IC) in which the court found that the true reason for the decision to relocate the business which in turn resulted in the retrenchment was to rid the workforce of a union's presence.

<sup>157</sup> (1993) 14 ILJ 642 (LAC).

this matter on appeal departed sharply from a hands-off assessment of the employers operational reasons to retrench into full intervention.

## 2.7 The Court's Departure from Abstention to Intervention

In a decision that indicated an ideological shift of practical significance, the former LAC in *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd* interpreted the Industrial Court's abstentionist approach as focusing on the correctness of a business decision, which in its opinion is quite relative. The LAC focused instead on the fairness of the employer's decision. In delivering the landmark judgment, it was held that termination of employment for operational reasons should always be a measure of last resort. The court expressed its view in the following much quoted passage:

[W]e respectfully differ from their suggestion that the decision to retrench could be fair simply because it is bona fide and made in a business-like manner. That approach suggests that the court's function is merely to determine whether or not the decision had been correct. What is at stake here is not the correctness or otherwise of the decision to retrench but the fairness thereof. Fairness in this context goes further than *bona fide* and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance related reasons should always be a measure of last resort. That in our view applies equally to termination of employment for economic or operational reasons.<sup>158</sup>

The LAC was perhaps enunciating that the era of abstention has ended and that the court's approach will now be to scrutinise the employer's decision to retrench for operational reasons. According to Grogan:

[t]he requirement that dismissal must be the only reasonable option clearly imports an objective element into the test. It will no longer be sufficient for the employer to state that it considered retrenchment in general, or the termination of the services of particular employees, to be for the good of the business. If a court finds that dismissal could have been avoided by adopting some reasonable alternative, dismissal will be deemed unfair.<sup>159</sup>

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<sup>158</sup> At 648.

<sup>159</sup> Grogan *J Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 438.



The employee's interest in a business is more than a pecuniary one and the merit of a decision by the employer affecting the operational requirements of the business is not sacrosanct.<sup>160</sup> What was the issue at this stage was whether the courts are better placed than management to make decisions regarding the operational requirements of the business. Le Roux & Van Niekerk believe that the courts lack the knowledge to make business decisions. They write that:

[t]he qualifications, experience, and knowledge of members of the court are not such that the court would inevitably be a more authoritative arbiter of what is the best or, in the words of *Atlantis Diesel* decision the most reasonable decision in any particular set of circumstances.<sup>161</sup>

## 2.8 Concluding remarks

In this chapter, it is shown that the historical development of the law of unfair dismissal with specific emphasis on the substantive fairness for dismissal for operational requirements has been necessitated to an extent by the shortcomings of the common law. In the period before 1995 there was very little statutory development in the field of unfair dismissal, especially substantive fairness in operational requirement dismissal in South Africa. On their part, the courts elected to take a deferential approach that only later on developed into the measure of last resort position in adjudicating the fairness of operational requirement dismissals.

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<sup>160</sup> Jordaan B 'Transfer, closure & insolvency of undertakings' (1991) 12 *ILJ* 935.

<sup>161</sup> Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 244.



## Chapter 3

### Substantive Fairness Dismissal in Operational Requirements and the Current Labour Relations Act

#### 3.1 Introduction

The purpose of this chapter is to examine the law on substantive fairness after the 1995 LRA. It will assess the concept of fairness and the concept of the 'similar needs' of the employer. It will focus on the law on substantive fairness and the role of the court before and after the 2002 amendment of the LRA. The chapter will end with conclusive remarks on its findings.

Regardless of the fact that the Wiehahn Commission of 1979<sup>162</sup> recommended that government should use international labour standards as a focal point of its law on dismissal, there was no statutory effort domestically to advance and realise these recommendations. One may say therefore that before the introduction of the current LRA, there was no statutory law on the dismissal for operational requirement.

After close to a century of statutory neglect, the current LRA came into effect in 1996 and brought with it operational requirement dismissal among other forms of dismissal. Apart from section 188 of the LRA which contains the element of fairness in operational requirement dismissal,<sup>163</sup> section 189 lays down the procedure to be complied with by an employer contemplating dismissal for operational requirement. The LRA did not statutorily address the issue of substantive fairness in operational requirements

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<sup>162</sup> See above at 2.4.

<sup>163</sup> See below at 3.2.

dismissal as it did with the procedural aspect under section 189. The inability of the LRA to adequately address the substantive fairness in operational requirements dismissal led to the incoherence in the decisions of the Labour and Labour Appeal Courts which will be examined in this chapter. It is this uncertainty brought by the incoherence of the various court decisions and to an extent, pressure from labour unions amongst other that led to the amendment of the LRA in August 2002.

### 3.2 The Concept of Fairness

Before the introduction of the Industrial court, the concept of fairness was not really the determining factor of dismissal under the previous LRA.<sup>164</sup> During this time, dismissals were either lawful or unlawful. However, when a specialist Industrial Court (IC) was introduced on the recommendation of the Wiehahn Commission report, 'fairness' assumed centre stage in South African labour jurisprudence.<sup>165</sup> The Commission saw 'unfairness' as something that could be 'related to the right to work, to associate, to bargain collectively, to withhold labour, to protection and to training and development.'<sup>166</sup>

The following years saw the courts giving content to the vague notion of fairness in the employment context under a statutory unfair labour practice definition. It was

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<sup>164</sup> Act 28 of 1956.

<sup>165</sup> Bosch C 'Balancing the Act: Fairness and Transfer of Business' (2004) 25 *ILJ* 923.

<sup>166</sup> *Report of the Commission of Enquiry into Labour Legislation* part 5 RP47/1979 para 4.127.20.

acknowledged that determining what is fair is a value judgment,<sup>167</sup> one which was made by the courts based on their sense of what was equitable, drawing extensively on the jurisprudence of the ILO and of other countries.<sup>168</sup>

The principles developed by the IC under the 1956 Act were essentially codified in the current LRA. The legislature did not make any fundamental changes when it devised section 189 of the LRA. However, more significant than the introduction of the LRA was the adoption in 1996 of a new Constitution for South Africa to which all law was made subordinate.<sup>169</sup> In terms of the Constitution 'every person has the right to fair labour practices'.<sup>170</sup> Thus, 'fairness' became a constitutional imperative.

Section 213 of the LRA defines operational requirements as 'requirements based on the economic, technological, structural or similar needs of the business.' The LRA provides in section 188 (1) that:

A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

- a) That the reason for dismissal is a fair reason-
  - i) Related to the employees conduct or capacity;
  - ii) Based on the employer's operational requirements;
- b) That the dismissal was effected in accordance with a fair procedure.

Section 188 (2) goes on to proclaim that in considering the fairness of a dismissal, one must take into account the fairness of the reason, the fairness of the procedure and any

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<sup>167</sup> *Cobra Watertech v National Union of Metal Workers of SA* (1995) 16 ILJ 607 (LAC) 611.

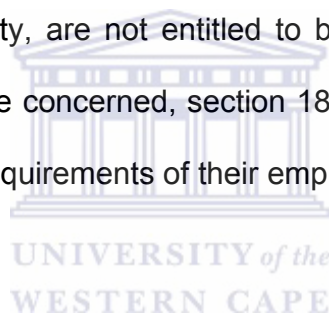
<sup>168</sup> *Bosch C* (2004) 25 ILJ 923.

<sup>169</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>170</sup> Section 23 (1) of the Constitution.

related code of good practice issued in terms of the Act. The Code of Good Practice: Dismissal based on Operational Requirements<sup>171</sup> defines the ambit of dismissal based on the operational requirements of the employer. Section 189 read with section 186<sup>172</sup> sets out the requirements to be complied with in dismissal for operational requirements and section 192 (2) proclaims that 'if the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

The procedure laid down by section 189 applies only to dismissals for reasons based on the employer's operational requirements. Employee's who are dismissed for other reasons, for example, incapacity, are not entitled to be consulted in terms of section 189.<sup>173</sup> As far as employees are concerned, section 189 renders all employees subject to dismissal if the operational requirements of their employer so dictate.<sup>174</sup>



A cursory reading of section 189 and 189A of the LRA suggests that the requirements placed on employers contemplating retrenchment are primarily procedural.<sup>175</sup> However, the LAC has suggested otherwise. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others*,<sup>176</sup> the LAC held that

the primary obligation of a retrenching employer is to initiate the consultation process when it contemplates dismissal for operational reasons. It must disclose relevant information to the other consulting party, and allow the other consulting party an opportunity during consultation to make representations about any matter on which they

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<sup>171</sup> GN 1517 Government Gazette 20254 of 16 July 1999.

<sup>172</sup> Section 186 of the LRA sets out the meaning of dismissal.

<sup>173</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 436.

<sup>174</sup> Grogan J *Dismissal* (2010) 349.

<sup>175</sup> Grogan J *Workplace Law* 7ed (2003) 197.

<sup>176</sup> (1999) 20 ILJ 89 (LAC).

are consulting. And that the employer must consider these representations and, if it does not agree with them, it must give reasons to that effect.<sup>177</sup>

The court added, however, that these formal obligations

are geared to a specific purpose, namely to attempt to reach consensus on the subjects listed in section 189 (2). The ultimate purpose of section 189 is thus to achieve a joint consensus-seeking process. In this manner the section implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed. This is also apparent from section 189 (7) which provides that the employer must select the employees to be dismissed on criteria either agreed to, or if this is not possible, on criteria that are fair and objective.<sup>178</sup>

However far the courts may be prepared to go in evaluating the objective need to retrench as will be seen in the following pages, it is apparent that the question whether an employer has complied with section 189 has both a procedural and a substantive dimension even though the section contains no express provision of substantive fairness. The question is not whether the parties have gone through the motions of consulting over the various issues listed in section 189 (2), but whether these attempts have been real. The Labour Court has described the procedural aspect of section 189 as a 'set of self-standing duties with which an employer must comply or run the risk of a retrenchment being declared invalid'. In short, the section 'gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately, the Act provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness.'<sup>179</sup>

Although the substantive and procedural obligations of the parties are intertwined, it is very clear that the LRA as it stood before the 2002 amendment did not specifically

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<sup>177</sup> At para 27.

<sup>178</sup> Ibid. See also Thembu MA 'Dismissal for Operational Requirement' (2003) 15 *SAMerLJ* 348.

<sup>179</sup> *Fletcher v Elna Sewing Machine Centers (Pty) Ltd* (2000) 21 *ILJ* 603 (LC).

address the substantive nature of operational requirement dismissal apart from the procedural aspect.

The concept of operational requirement dismissal itself is derived from the ILO Convention 158.<sup>180</sup> Article 4 of Convention 158 recognises a valid reason 'based on the operational requirement of the undertaking, establishment or services' as a legitimate justification for dismissal and Article 13 of the Convention imposes specific obligations on employers who contemplate termination for 'reasons of an economic, technological, structural or similar nature'.<sup>181</sup> However, ILO Recommendation 166<sup>182</sup> casts more light on the matter when it provides for the following

19. (i) All parties concerned should seek to avert or minimize as far as possible termination of employment for reasons of an economic, technological, structural or similar nature without prejudice to the efficient operation of the undertaking, establishment or services and to mitigate the adverse effects of any termination of employment for these reasons on the workers concerned.

21. The measures which should be considered with a view to averting or minimizing termination of employment for reasons of an economic, technological, structural or similar nature might include inter alia, restrictions of hiring, spreading the work force reduction over a certain period of time to permit natural reduction of the work force, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

While an ILO Recommendation does not have the force of international law, it may nevertheless be persuasive when seeking to interpret a requirement of the relevant convention or, in this case, the LRA.<sup>183</sup> The abovementioned guidelines have entered South African case law,<sup>184</sup> and it has been noted that, 'the Act and the Code follow the

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<sup>180</sup> Termination of Employment Convention 158 of 1982.

<sup>181</sup> Van Niekerk A *Unfair Dismissal* 4ed (2008) 85.

<sup>182</sup> Termination of Employment Recommendation 166 of 1982.

<sup>183</sup> Du Toit D 'Business Restructuring and Operational Requirement Dismissal: Algorax and Beyond' (2005) 25 *ILJ* 595 at 604.

<sup>184</sup> *Manyaka v Van de Wertering Engineering (Pty) Ltd* (1997) 11 BLLR 1458 (LC) 1464.

approach of the ILO concerning fair termination of employment' as manifested in Convention 158 and Recommendation 166.<sup>185</sup>

Furthermore, section 3 (a) of the LRA provides that the Act must be interpreted to give effect to its primary objects and these include giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution, and giving effect to obligations incurred by South Africa as a member state of the ILO.<sup>186</sup>

Du Toit has submitted that with respect to fairness, section 23 of the Constitution is of little assistance in the present context in that it contains no residual concept of fairness nor any more precise definition than that contained in the LRA.<sup>187</sup> The LRA does not exhaustively regulate the constitutional right to fair labour practices and in *Baloyi v M & P Manufacturing*,<sup>188</sup> it was held that, the fact that the constitutional rights to fair labour practices is not exhausted under the LRA does not affect the right not to be unfairly dismissed. Fairness in section 188 of the LRA, Du Toit has suggested, must be interpreted to mean the same as 'valid' in Article 4 of ILO Convention 158.<sup>189</sup>

Apart from the ILO having influenced the wording of section 213 of the LRA, the legislature did not make any fundamental changes to legal controls on employer's right to retrench when it devised section 189. In the 2002 amendment to the LRA, the prohibition on striking over retrenchments has been partially removed and certain

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<sup>185</sup> *Smuts v Adair & Others* (1999) 4 BLLR 392 (LC) para 24.

<sup>186</sup> Du Toit D 'Business Restructuring and Operational Requirement Dismissal: Algorax and Beyond' (2005) 25 *ILJ* 595 at 603.

<sup>187</sup> *Ibid.*

<sup>188</sup> (2001) 22 *ILJ* 391 (LAC).

<sup>189</sup> Du Toit D 'Business Restructuring and Operational Requirement Dismissal: Algorax and Beyond' (2005) 25 *ILJ* 595 at 603.

procedural requirements added.<sup>190</sup> From this brief assessment of operational requirements dismissal, it is evident that the LRA was silent on substantive fairness until the introduction of the 2002 amendment.

### **3.3 Substantive Fairness in Operational Requirement Dismissals**

The procedural aspect of dismissal for operational requirements is less controversial than substantive fairness and it will not be an overstatement to say that the law appears to have reached some kind of equilibrium in this area.<sup>191</sup> Unlike dismissal for misconduct and incapacity, one may say that the dismissal for operational requirements has attracted controversy in many quarters from academics, trade unions, lawyers and the courts. The discontent and uncertainty in this area of the law perhaps commenced with the definition of operational requirement in section 213 as a form of dismissal permissible under section 188 of the LRA.

Operational requirement is defined under section 213 of the act as 'requirements based on the economic, technological, structural or similar needs of the employer'. As will be seen later on, although economic and technological reasons have attracted some controversy of their own by the very nature of what qualifies them, such as when they are so imperative as to justify dismissal, 'similar needs' has widened the controversy in that it is hard to define or qualify all of its constituents and that the list of its content is inexhaustible. 'Similar needs' actually seem to be an ingredient without borders as far as the economic needs of a business is concerned. Perhaps to understand the controversy imported by 'similar needs', it might be helpful to assess this ingredient

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<sup>190</sup> Section 65 of the LRA.

<sup>191</sup> Todd C & Damant G 'Unfair Dismissal-Operational Requirements '(2004) 25 *ILJ* 896 at 897.



because its insertion into the definition of operational requirements has brought more troubles than solutions.<sup>192</sup> The language of 'similar needs' may have provided employers and their legal representatives with all sort of excuses to view other aspects of dismissal in the lens of operational requirements as will be seen at a later stage of this chapter.

The Code of Good Practice on Dismissal for Operational Requirements concedes that dismissal for operational requirements is a 'no fault' dismissal which means that the dismissal is by no reason of the action or omission of the employees concerned. The Code elaborates as follows on the types of reasons for dismissals for operational requirements:

As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the work place. Structural reasons relate to redundancy of posts consequent to a restructuring of the employer's enterprise.<sup>193</sup>

In amplifying the broad description in item 1 of the Code of Good Practice, Grogan<sup>194</sup> took the view that:

Technological reasons refers to the introduction of new machinery or technological innovation that affect working relationships by rendering jobs redundant or by requiring the employees to adapt working conditions to new technologies, even when this alters the existing conditions of the plant in the wide sense of the term. Structural reasons include circumstances in which an enterprise reforms into new working groups or combines with others, a process commonly known as restructuring. Economic reasons relate to the financial state of the enterprise. These are normally external factors such as the state of the market and the economy, which impacts on business profitability. A drop in demand for a company's product may require budget cuts and the reduction of working hours. This can lead to job redundancy.

In the case of operational requirements, the reasons have their origin in the employer's needs and requirements. Basson paints the following familiar scenario

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<sup>192</sup> As is done at 3.4 below.

<sup>193</sup> Item 1 of the Code of Good Practice.

<sup>194</sup> Grogan J *Dismissal* (2010) 340.

Under pressure, the employer may be forced into considering reducing its wage bill, the total remuneration to all employees. Alternatively, an employer may consider restructuring its organisation, some organisations restructure fluidly and rapidly to meet changing circumstances (such as a new competitor entering the market); in other organizations a restructuring may mean that some employees lose their place in the organisational structure. Taking a longer term view, an employer may opt to invest heavily in advanced technology requiring fewer and fewer employees to control and operate this technology.<sup>195</sup>

The above views definitely represent the same situation and meet the expectation of the language rooted in section 213 of the Act. It is worth noting that in further elaboration of this section, item 1 of the Code of Good Practice on Dismissal refers to job losses flowing from the dismissal of operational requirement as constituting job redundancy. The word commonly used in practice in describing the large-scale losses of jobs due to operational requirements is retrenchment. It is pertinent and worth noting however, that in the case of *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & Others*,<sup>196</sup> the Appellate Division of the former Supreme Court used a definition that covered both 'retrenchment' (in the narrow sense) and 'redundancy'. The court defined retrenchment as 'to cut down, to reduce, the number of employees because of redundancy, a superfluity of employees in relation to the work to be performed'.

Be the difference between retrenchment and redundancy as it may, in South Africa, retrenchment is the preferred word used in describing large-scale dismissals for operational requirements.

### **3.4 The Concept of the 'Similar Needs of an Employer'**

The expansive definition of operational requirements dismissal as defined in section 213 is broad and as Van Niekerk commented

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<sup>195</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 4ed (2005) 146.

<sup>196</sup> (1986) 7 ILJ 489 (A) at 494 A.

Its remit certainly includes a dismissal occasioned by a drop in production, the introduction of new technologies or work programs, the organisation of work and the restructuring of a business.<sup>197</sup>

The statutory definition transcends the above mentioned indicators as its scope includes 'similar needs' of the employer as an ingredient of operational requirements. Had the definition in section 213 covered only economic, technological and structural needs of the business, perhaps the law could have been approaching some kind of consistency in this area as is the case with procedural fairness of dismissal, but this has not been the case. With the constant changing nature of the corporate environment mostly masterminded by market forces, both domestic and international and often beyond the control of individual businesses, the 'similar needs' of the employer will probably remain inexhaustible.

The Code of Good Practice: Dismissal for Operational Requirement points out in item 12 that it is difficult to define all the circumstances of this form of dismissal while admitting it is a 'no fault' dismissal, that is, that the dismissal is by no reason of the action or attributes of the employees concerned.<sup>198</sup> An employer's 'similar needs' must be determined with reference to the circumstances of each case. Basson has suggested that 'there are no clear and absolute dividing line between an employer's 'economic' needs and similar needs—there maybe, and often are, considerable overlaps.'<sup>199</sup> The 'considerable overlaps' referred to by Basson perhaps imply the impossibility to craft an exhaustive list of what will constitute the similar needs of any business.

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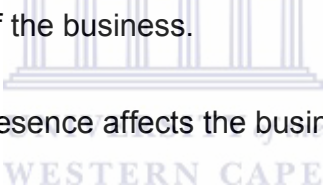
<sup>197</sup> Van Niekerk A *Unfair Dismissal* 2ed (2004) 74.

<sup>198</sup> Le Roux PAK 'Dismissal for Operational Requirement: The LRA, the Code and the Courts' (1998) 7 (11) *CLL* 101.

<sup>199</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 4ed (2005) 147.

The needs of an employer will obviously vary from business to business and perhaps from employer to employer given that employers may not employ similar strategies despite being confronted with the same problem.<sup>200</sup> Even the Labour Court acknowledged the difficulties in delimiting the scope of 'similar needs' but took the view that the 'similar needs' of an employer 'would seem to be restricted to grounds akin to economic, technological and structural reorganisation of the enterprise.'<sup>201</sup>

However, over the years the courts have succeeded in categorising some of the 'similar needs' of the employer. Even as more needs emerge and the dividing lines between the three major aspects of dismissal blurs in the wake of unexpected business situations, 'similar needs' will include, but not be limited to the following situations;

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- a) Special operational needs of the business.
  - b) The employee's action or presence affects the business negatively.
  - c) The employee's conduct or action has led to a breakdown of the trust relationship.
  - d) The enterprise business requirements are such that changes must be made to the employee's terms and conditions of employment.<sup>202</sup>

### **3.4.1 Special Operational Needs of the Business**

The nature of the business may be one that places special demands on the employee. It may, for example, that the economic well-being of the business is in jeopardy, its survival at stake and consequent on this, the employees may be required to go flexible

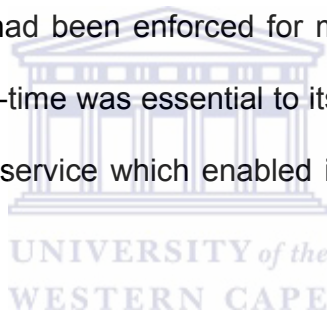
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<sup>200</sup> Todd C & Damant G (2004) 'Unfair Dismissal-Operational Requirements' (2004) 25 *ILJ* 896 at 905.

<sup>201</sup> *Masilela v Leonard Dingler (Pty) Ltd* (2004) 4 BLLR 381 (LC) at para 4.1.5.

<sup>202</sup> Basson A, Christianson M, Garbers C et al *Essential Labour Law* 2ed (2002) 226.

with their working hours which ultimately will require them to work over-time.<sup>203</sup> The employee's refusal to assent to these demands might endanger the business and the employer may rightfully contemplate dismissal or termination of employment for operational requirements as a result of this need.<sup>204</sup> In *Steel, Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd*,<sup>205</sup> decided under the former LRA of 1956, there was no express term in the employee's employment contract of service with Trident Steel to work over-time. The practice had been that employees would work over-time as and when the needs of the business required it. The employees declared an over-time ban in pursuit of the wage demands and Trident Steel dismissed them after the ban had been enforced for more than a week. Trident Steel alleged that the working of over-time was essential to its business operations and that it permitted it to offer a 24-hour service which enabled it to retain its market share in a highly competitive field.<sup>206</sup>



The Industrial Court deemed it unnecessary to consider whether an implied term to work over-time existed as there was in its words 'another more satisfactory basis upon which the issue of over-time may be decided'. The court held that the employees had been dismissed for a valid operational reason since the business requires workers who were prepared to work over-time as and when business demands necessitates it.<sup>207</sup> It should be noted here that if the employer relies on business needs to dismiss employees for operational requirement who are either refusing or are unable to work over-time, the question of whether the over-time is compulsory or voluntary is

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> (1986) 7 ILJ 418 (IC).

<sup>206</sup> At 437.

<sup>207</sup> Ibid.

irrelevant.<sup>208</sup> When the employer's business needs require employees to work over-time and the employees refuse to do so, dismissal based on the operational needs of the business will be justified and it becomes immaterial whether such a clause was included in the contract of employment.

Similarly in *SACWU & Others v Afrox (Pty) Ltd*,<sup>209</sup> decided under the current LRA, the distribution system of the respondent, a supplier of gases, had resulted in its drivers working in excess of overtime (up to 22 hours overtime per week) and the employer decided to introduce a new shift system.<sup>210</sup> The employer entered into consultation with the employee's union which opposed the introduction of the staggered shift system. Certain proposals flowed from the consultation and were implemented for a trial period in an attempt to reduce overtime and prevent the introduction of the staggered shift system proposed by the employer. When the proposal failed to achieve the desired results, the employer decided to introduce the staggered shift system (having of course reserved the right to do so). The affected employees instituted a power play by resorting to a strike in a bid to prevent the employer from implementing the new system and the employer in return staged a lock-out in an effort to compel the disgruntled employees to work the staggered shift. When the lock-out failed to compel the employees to work the staggered shifts, the employer served a notice to the employees union on its intention to dismiss for operational requirement and began using external contractors to make its deliveries.<sup>211</sup> Another consultative round was called but the consultation could not craft a solution and the striking drivers were dismissed for operational requirements. The

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<sup>208</sup> Basson AC, Christianson M, Garbers C, et al *Essential Labour Law 2ed* (2000) 193.

<sup>209</sup> (1998) 2 *BLLR* 171 (LC).

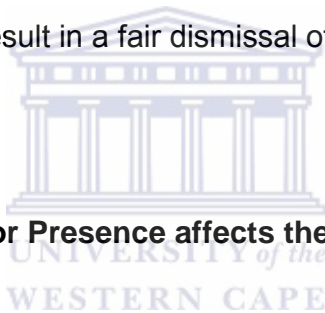
<sup>210</sup> At 172.

<sup>211</sup> At 172B.

union contended that the dismissals were automatically unfair as the individual applicants had been dismissed for striking, that the respondent had not discharged its obligation to consult before retrenching, that the dismissals could have been avoided, and that the respondent had not shown that it was 'going to the wall.'<sup>212</sup> The court in *Afrox*, under Landman J held that:

The enterprise which provides the employment must maintain its way, grow and prosper for rights to a job to have a meaning. If it fails then the right to a job fails with it. Economics dictates that if it is necessary to shed jobs so that the enterprise may survive or alter or adapt its business, then so be it.<sup>213</sup>

In *Media Workers Association of South Africa & Others v Independent Newspapers (Pty) Ltd*,<sup>214</sup> the LC, held that, even a bona fide restructuring exercise aimed at resisting negative economic trend, can result in a fair dismissal of employees.<sup>215</sup>



### 3.4.2 The Employee's Action or Presence affects the Business Negatively

The courts have accepted that an employee whose actions negatively affect the operation of the business could be dismissed for operational requirements, especially in circumstances where certain actions of an employee create disharmony among co-workers, such as, antagonising co-workers by continually making racist or sexist remarks.<sup>216</sup> In the case of *Erasmus v BB Bread Ltd*,<sup>217</sup> fellow employees called for the dismissal of Erasmus, a manager with BB Bread. The employees complained about his uncompromising and difficult attitude towards them as well as his derogatory remarks

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<sup>212</sup> Ibid.

<sup>213</sup> At 174D-E.

<sup>214</sup> (2002) 23 *ILJ* 918 (LC).

<sup>215</sup> At 922.

<sup>216</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 3ed (2002) 227.

<sup>217</sup> (1987) 8 *ILJ* 537 (IC). See also *East Rand Propriety Mines Ltd v United Peoples Union of South Africa* (1996) 17 *ILJ* 1135 (LAC) below at 3.6.

particularly aimed at black people. Erasmus's attitude toward fellow employees affected the employer's business negatively. BB Bread concluded that Erasmus was too great an industrial risk to continue with the company and so dismissed him for operational reasons as his presence and actions impacted the business negatively. The court took the view that

the employer is entitled to insist on reasonable harmonious and interpersonal relations on its factory floor. Where disharmony results from the actions or presence of a particular employee, the employer is entitled to address the problem. It may be necessary for the employer to remove the employee from the scene.<sup>218</sup>

It therefore has become possible that an employee could fairly be dismissed for operational requirements for reasons of incompatibility at the work place if such incompatibility has a negative bearing on other employees or clients to an extent that the well-being of the business as a whole is threatened. It is apparent that if the employee's conduct has only limited effect on the operational needs of the business, then the dismissal could be for incapacity rather than for operational requirements. Du Toit's<sup>219</sup> thrust is that 'incompatibility should be treated as a form of incapacity because it bears no relationship to the definition of operational requirements.' It is submitted that Du Toit's view is most compatible with the definition of operational requirements and that the judgment in *Erasmus v BB Bread* possibly blurred the lines between dismissal for incapacity and operational requirements to an extent.

The three categories of dismissal, misconduct, incapacity and operational requirements seem at first glance to be easy to apply, but in practice they are often highly

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<sup>218</sup> At 544C.

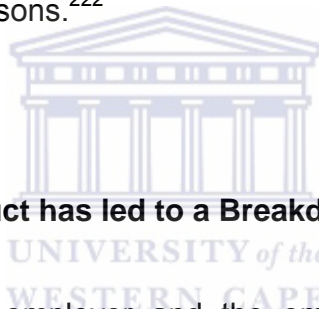
<sup>219</sup> Du Toit D et al *The Labour Relations Act of 1995* 2ed (1995) 379.



ambiguous.<sup>220</sup> This difficulty has been recognised by the courts. Thus, in *SABC v CCMA & Others*,<sup>221</sup> Pretorius AJ commented on the emerging blurring lines in the various forms of dismissal as follows:

The notional line between the various circumstances that could give rise to a fair dismissal (misconduct, poor performance, incapacity and operational requirement) is not always easy to draw. Often the same conduct may give rise to more than one appropriate categorisation. Employers may often, not unreasonably err in their attempts to categorise the circumstances giving rise to a potential dismissal. The failure to correctly categorise should not however detract from the appropriate inquiry in each case, namely to assess first, whether there was a substantively fair reason for dismissal and second, whether an appropriate and fair procedure was followed by the employer.

Nonetheless, the courts have accepted that if the presence of an employee affects the operation of the business negatively, the employer will be justified to dismiss the employee for its operational reasons.<sup>222</sup>



### **3.4.3 The Employee's Conduct has led to a Breakdown of the Trust Relationship**

The relationship between the employer and the employee is a relationship of full confidence. The employer expects the employee to always act in full confidence and adhere to the common law duty to act in good faith towards the business at all time. Although this duty is multifaceted, it essentially entails the obligation on the part of the employee to constantly strive to act in the best interest of the business.<sup>223</sup> Under the

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<sup>220</sup> Rycroft A 'Blurring the Lines Between Incapacity, Misconduct and Operational Requirements: *Zililo v Maletswai Municipality*' (2009) 21 *SAMercLJ* 426.

<sup>221</sup> (2006) 6 *BLLR* 587 (LC) para 22.

<sup>222</sup> Manikai F 'What is Operational Requirements? Variety of Circumstances that may Justify Dismissal' (2007) 16 (10) *CLL* 101, Mischke C 'Operational Requirements or Incapacity? Somewhere between two Reasons for Dismissal' (2008) 17 (6) *CLL* 51.

<sup>223</sup> Rycroft A & Jordaan B *A Guide to South African Labour Law* 2ed (1992) 59.

former LRA for example, the court in *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler*,<sup>224</sup> stated the importance of honesty in employment services in this way:

[I]n the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matter appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service.<sup>225</sup>

In *Tiger Food Brands t/a Albany Bakeries v Levy NO & Others*,<sup>226</sup> the LC accepted threats of violence against managers by unidentified employees as a form of misconduct justified in closing down the branch and retrenching all the staff.<sup>227</sup> In *Chauke & Others v Lee Services Centre CC t/a Leeson Motors*,<sup>228</sup> the employer could not identify the employees involved in certain incidents of malicious damage to property and sabotage. In passing, the LAC noted that an employer could, in a situation such as this, consider dismissing the employees not for misconduct, but for operational requirements, but only when the dismissals are necessary to save the life of the enterprise.<sup>229</sup> The LC has also accepted what is now known as 'Shrinkage Cases' where all employees are dismissed because of unacceptable losses due to theft as a fair reason for dismissal for operational requirements.<sup>230</sup> These 'shrinkage cases', has shown that the line has blurred as operational needs traverses into all other forms of dismissal due to the requirement of 'similar needs'.

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<sup>224</sup> 1971 (3) SA 866 (W).

<sup>225</sup> At 867.

<sup>226</sup> (2007) 28 ILJ 1827 (LC).

<sup>227</sup> At 1836.

<sup>228</sup> (1998) 19 ILJ 1441 (LAC).

<sup>229</sup> At 1450B.

<sup>230</sup> *SACCAWU & Others v Cashbuild Ltd* (1996) 4 BLLR 457 (IC) 476 G-I. See also *SA Commercial Catering & Allied Workers Union & Others v Pep Stores* (1998) 19 ILJ 1226 (LC) where at 1236, the LC accepted as fair, a dismissal of all the staff in the shop due to theft committed by unidentified employees. See Le Roux PAK 'Dismissal for Operational Requirements: Testing the limits of what qualifies as fair' (2010) 20 (1) CLL 4.

### 3.4.4 Business Requirements Require Changes to the Employees' Terms and Conditions

An enterprise may have to be restructured, or it may have to merge or amalgamate with another enterprise, or its mode of operation may have to be altered in order to ensure its survival or to make it more competitive, or simply to enable it to keep abreast with the latest technology in the industry. These changes may lead to an employee becoming redundant but changes of this nature may also lead to an employee being offered a new position with changes to the terms and conditions of employment.<sup>231</sup> If the employee unreasonably refuses to accept the changes to the terms and conditions of employment, the employee may be dismissed for operational reasons.<sup>232</sup>

In the case of *Ndela v SA Stevedores Ltd*,<sup>233</sup> the employee refused the new position offered to him by the employer. SA Stevedores Ltd then offered him an alternative position which he still declined and the employer ultimately dismissed him for operational reasons having no alternatives left. The IC found the dismissal fair in terms of the previous LRA.<sup>234</sup> The LAC was more cautious in the case of *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*<sup>235</sup> where the employee was a sales man for WL Ochse Webb & Pretorius (Pty) Ltd (the employer). He earned more than the other employees, as the sale of tomatoes attracted more commission than the sale of the vegetables sold by other employees, and this caused dissatisfaction among the other employees. The employer tried to address the problem by proposing a new remuneration system. The

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<sup>231</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 4ed (2005) 147.

<sup>232</sup> Ibid.

<sup>233</sup> (1992) 13 *ILJ* 663 (IC).

<sup>234</sup> At 663G-J.

<sup>235</sup> (1997) 18 *ILJ* 361 (LAC).

salesman was given three alternative solutions. He could accept the new system, present an alternative system or resign. He proposed that the old system be maintained. When his proposition was rejected by the employer, he resigned.<sup>236</sup> The LAC per Froneman J held that the employer had not acted unfairly. The court stated:

Any successful business needs contented employees. Unhappiness can lead to problems such as labour unrest, a drop in productivity, and the like. The appellant (the employer) sought to address the unhappiness of the majority of its employees with the old remuneration structure, by seeking ways to change it. That remuneration structure (viz differentiated commission) was a remnant of previous statutory determination and not only of an agreement between the employees and the employer. If the problem was not addressed the possibility of further problems arising, such as those mentioned earlier, would have increased. The evidence on record does not establish an ulterior motive on the part of the appellant for attempting to find a new remuneration package. A commercial rationale for the changes was thus established.<sup>237</sup>

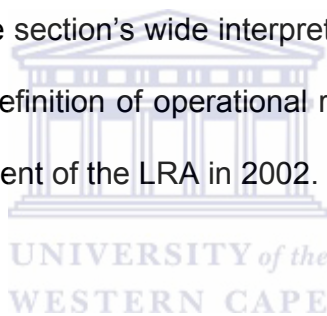
The concept of 'similar needs' included in the definition of operational requirements in section 213 of the LRA has broadened the meaning of this concept of dismissal to an extent that nearly every single action of the employer that leads to dismissal within this context may find expression in the meaning of 'similar needs'. Perhaps the impossibility of crafting an exhaustive list of what 'similar needs' are within the confine of the business sphere only heightened the legal uncertainty in this area of the law. Maybe it is with this uncertainty and difficulty in ascertaining the limit to what the 'similar needs' of a business are in mind that the Congress of South African Trade Unions (COSATU) had proposed the revision of section 213 of the LRA almost a decade ago. COSATU had blamed the increasing loss of jobs during this period partly on the broad definition of operational requirements under section 213 of the LRA which includes 'similar needs' and on its wide interpretation which had a negative effect on employees in retrenchment matters because employers could increasingly justify their dismissals on 'similar needs'

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<sup>236</sup> At 363.

<sup>237</sup> At 366D-F.

of their businesses.<sup>238</sup> Hence, COSATU's proposals to amend section 213 were in effect partly to limit the wide ambit of the concept of 'similar needs'. This, it argued, will be done by replacing 'economic needs' with 'financial necessity' and deleting 'similar needs of an employer.'<sup>239</sup> Using 'financial necessity' as a criterion may have the effect of limiting the employer's entitlement to dismiss where the object is to increase profits. It may be difficult conceptually, and even practical, to equate the need to increase profits with financial necessity.<sup>240</sup> Where the employer can, objectively speaking, retain some or all of the employees to be dismissed in order to increase profits, it may be difficult to justify the dismissal on the basis of financial necessity.<sup>241</sup> This deletion could possibly have had a limiting effect on the section's wide interpretation. The COSATU proposal of deleting 'similar needs' in the definition of operational requirements in section 213 was not incorporated in the amendment of the LRA in 2002.



### **3.5 The Application of the law on substantive fairness before the 2002 Amendment of the LRA**

As was stated before,<sup>242</sup> the LRA identifies dismissals based on the operational requirements of the employer as one of the three forms of dismissals that are permissible, provided they are for a fair reason and in accordance with a fair procedure.<sup>243</sup> Operational requirements are in turn defined as requirements based on

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<sup>238</sup> Maenetjie NH 'Consultation Versus Negotiation in Operational Requirement Dismissals: The COSATU Proposal' (2000) 21 *ILJ* 1526 at 1532.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> See above at 3.2.

<sup>243</sup> Section 188.

the economic, technological or similar needs of an employer.<sup>244</sup> However, the LRA provides no guidance on when 'operational requirements' are so pressing that they will justify dismissal of employees. This notwithstanding, retrenchment is therefore a dismissal that is based on the factors mentioned in the definition. The debate over the operational requirements of a business is essentially an economic one, not a legal one.<sup>245</sup> There must therefore be an objective link between the dismissal and some economic, technological, structural or similar needs of the employer.<sup>246</sup> The employer's mere *ipse dixit* that a dismissal was effected for these needs will not be sufficient to classify the dismissal as such.<sup>247</sup>

In dismissal for operational requirements, it is not enough that the employer has a reason to dismiss, but that reason has to be fair. The task of the courts, Grogan writes,

is to balance the interest of employers and employees in a manner that encourages employers not to resort to retrenchment lightly, and yet allows them sufficient latitude to restructure, adjust production, and determine staffing levels according to the vagaries of the market and the economic environment.<sup>248</sup>

How that balance is struck, is determined by the degree to which lawmakers are prepared to regulate the job market by protecting employees against retrenchment.<sup>249</sup>

The stakes are high for the courts, Thompson writes that:

If the Labour Court takes an intrusive approach when the consequences of business restructuring plans are challenged, it will be accused — with some justification — of straying beyond its field of competence and meddling in a critical area of economic

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<sup>244</sup> Section 213.

<sup>245</sup> Thompson C 'Bargaining, Business Restructuring and the Operational Requirement Dismissal' (1999) 20 *ILJ* 755 at 760.

<sup>246</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 430.

<sup>247</sup> *SA Mutual Life Assurance Society v Insurance & Banking Staff Association & Others* (2001) 9 BLLR 1045 (LAC) 1045 H-I.

<sup>248</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) at 426.

<sup>249</sup> *Ibid.*

decision making. If it takes a hands-off view, it will be accused of not fulfilling its statutory duty and of leaving labour at the mercy of rapacious market forces.<sup>250</sup>

An employer therefore, can terminate the services of his employees on grounds of rationalisation, staff restructuring, financial or business operational reasons, provided he complies with certain requirements.<sup>251</sup> The aims of these requirements which must be observed are amongst others to ensure that the employer does not act against the employee with ulterior motives.<sup>252</sup> For this reason, it is required that retrenchment should not be resorted to until the employer has complied with both substantive and procedural requirements.<sup>253</sup>

The starting point is first of all that the employer must prove that the proffered reason is one based on the operational requirement of the business.<sup>254</sup> The employer will thus have to prove that the reason for dismissal falls within the statutory definition of operational requirements. Secondly, the employer must prove that the operational reason actually existed and that it was the real reason for the dismissal.<sup>255</sup> Hence, in order to balance the employer's interest in the ongoing success of the business with the employee's interest in fairness and job security, the employer need to establish a defensible case for such termination. In the event that the professed reason advanced by the employer contemplating retrenchment under section 213 is not the true reason, the employer will be unable to show the fairness of the dismissal. While noting that it

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<sup>250</sup> Thompson C 'Bargaining, Business Restructuring and the Operational Requirement Dismissal' (1999) 20 *ILJ* 755 at 769.

<sup>251</sup> *Meyi & Others v Ovcon (Pty) Ltd* (1987) 9 *ILJ* 672 (IC) 673.

<sup>252</sup> Van Jaarsveld SR V & Van Eck BPS *Principles of Labour Law* (1998) 301-304.

<sup>253</sup> Manamela ME 'Selection Criteria: The Dismissal of Employees Based on Operational Requirements' (2007) 19 *SAMerLJ* 103-108. See also, Mthembu MA 'Dismissal for Operational Requirements' (2003) 15 *SAMerLJ* 347-349.

<sup>254</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 3ed (2002) 226.

<sup>255</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 4ed (2005) 151.

has become an expression of power play between employers and the employees, Thompson put the glaring question of conflict of interest between them in this way:

is it a choice or no choice that sees so many people working more intensively at odd hours, under arrangements both more tenuous and varied, through telecommunication and in a host of other ways? Employers are pushing for particular changes and outcomes but so too are employees. And the repercussions of these two conflict zones of interest have sparked dismissal which in turn has led to a specter of incoherent legal decisions with varied outcomes.<sup>256</sup>

The absence of precise statutory provisions relating to substantive fairness in operational requirements dismissal has rendered its establishment very complex before August 2002. The next part of this mini-thesis therefore will attempt to look into how the court fared without fixed legislative rules on the substantive fairness dismissal for operational requirements.

### **3.6. The Role of the Court Before 2002**

The substantive and procedural obligations are inevitably intertwined<sup>257</sup> even though they appear legally separate. They are interconnected because substance precedes procedure. In requiring consultations under section 189 of the current LRA, the statute sets out to promote two immediate objects and one indirect one. These objects, Thompson and Benjamin submit, are to 'avoid if possible the need to retrench, minimise the impact of any dismissal that do occur and to maintain a reasonable relationship between employees and their representatives in what is seen as a generally testing time for them.'<sup>258</sup>

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<sup>256</sup> Thompson C 'The Changing Nature of Employment' (2003) 24 *ILJ* 1793 at 1794.

<sup>257</sup> Thompson C & Benjamin P *The South African Labour Law* (2006) 464.

<sup>258</sup> *Ibid.*



In the event that consultations fail to lead to an agreement, the dismissal will be found fair if certain thresholds have been met.<sup>259</sup> An employer contemplating dismissal for operational requirements 'will seek to ensure its plan complies with the minimum requirements of the governing law — the chief objective being to place that plan beyond legal attack.'<sup>260</sup> However, 'given the complexity and essentially economic character of the subject matter, it should come as no surprise to discover that the case law on substantive fairness shows some variation.'<sup>261</sup> The LAC has expressed the view that operational requirements dismissals should be assessed against a standard of fairness that adequately gives effect to the employee's right to be dismissed for a fair reason and interest in the retention of his job.<sup>262</sup> However, this must be balanced against the employer's need to be able to take the decisions that it deems necessary for the well-being of the business.<sup>263</sup>

One of the most important functions assigned to the Labour Court after the coming into force of the LRA is to determine the fairness or otherwise of a dismissal.<sup>264</sup> While a court charged with assessing this form of dismissal must take into consideration the jurisprudence developed by the Industrial Court and the approach adopted by the former LAC, the question whether an employer's dismissal based on operational requirement is fair or otherwise is one premised on facts.<sup>265</sup>

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<sup>259</sup>Thompson C & Benjamin P (2006) 465.

<sup>260</sup>Thompson C & Benjamin P (2006) 469.

<sup>261</sup>Thompson C & Benjamin P (2006) 465.

<sup>262</sup> *BMD Knitting Mills (Pty) Ltd v SACTWU* (2000) 22 ILJ 2264 (LAC) 2269 H-I.

<sup>263</sup> *BMD Knitting Mills (Pty) Ltd v SACTWU* (2000) 22 ILJ 2264 (LAC) 2269 D-E.

<sup>264</sup> Section 158(1)(a)(iii).

<sup>265</sup> Cohen T 'The Reasonable Employer's Test-Creeping in Through the Back Door?' (2003) 15 *SAMercLJ* 193.

The most important question that arises from a consideration of cases dealing with the substantive fairness of retrenchments concerns the degree of deference to be shown by the courts in their assessment of the employer's business decisions and the impact of that assessment on the requirement of fairness.<sup>266</sup> Whether it be efficiency, financial necessity, mergers, profits etc that any employer may contemplate as its operational reasons for dismissal under section 213, the burden of proof as proclaimed in section 192(2), rests with the employer to show that the decision to dismiss passes the fairness test under section 188 of the LRA. The employer will not only be required to establish the existence of an operational reason for the contemplated retrenchment but that such a reason is the principal motive of the dismissal.<sup>267</sup> The inquiry, Grogan proclaimed in 2009

is not simply whether the employer acted in good faith—ie whether there was a bona fide reason to retrench. The inquiry now goes further, and requires proof by the employer on a balance of probabilities, that the cause of or reason for the dismissal was based on operational requirements as defined, that a procedure was followed in accordance with section 189; and that there was a substantively fair reason for the dismissals.<sup>268</sup>

Retrenchment, therefore, will be 'self-evidently unfair if the employer seeks to achieve impermissible ends.'<sup>269</sup> The test remains whether the decision to retrench was part of a *bona fide* attempt to improve the business, whether through restructuring, outsourcing, reducing production costs, or simply cutting the payroll.<sup>270</sup> The courts therefore, will not hesitate to pronounce as unfair a purported retrenchment by an employer which is actually a disguise for something else, for instance underperformance<sup>271</sup> or any other

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<sup>266</sup>Todd C & Damant G (2004) 'Unfair Dismissal-Operational Requirements' (2004) 25 *ILJ* 896 at 900.

<sup>267</sup> Basson AC, Christianson MA, Garbers G et al *Essential Labour Law* (2005) 151.

<sup>268</sup> Grogan J *Workplace Law* 10ed (2009) 272.

<sup>269</sup> *Ibid.*

<sup>270</sup> Grogan J *Dismissal, Discrimination & Unfair Labour Practice* 2ed (2007) 440.

<sup>271</sup> *Ntshanga v SA Breweries Ltd* (2003) 24 *ILJ* 1404 (LC) where the dismissal was found to be for underperformance.

form of dismissal not related to operational requirements.<sup>272</sup> Similarly in *NUMSA & Others v Genlux Lighting (Pty) Ltd*,<sup>273</sup> the respondent company, contending that it was faced with financial and other difficulties relating mainly to absenteeism and theft, decided to retrench all 70 of its hourly paid employees. It then outsourced its human resources functions to a third party service provider, which employed 63 of the 70 retrenched employees. These employees continued to do the same jobs and occupied the same positions as they had when employed by the company.<sup>274</sup> Before the LC, the 40 applicant employees contended, inter alia, that their dismissal had not been justified as their positions were still available after their retrenchment. The court noted that the company had conceded that, after the 70 employees had been dismissed, it had brought 63 of them back to do the same work they had previously been engaged in and they occupied exactly the same positions.<sup>275</sup> The court held that:

all the evidence indicated that the labour force had been indispensable to the core functioning of the company. A need to keep at least 63 employees therefore existed before and after the retrenchment, and more employees had been employed thereafter. That there had been an economic and structural need to retrench was clearly far from the truth. The decision to retrench, when seen against the behavior of the company after the retrenchment, was nothing but a sham. The overwhelming evidence showed that the retrenchment was not properly and genuinely justified by operational requirements.<sup>276</sup>

Even beyond the 2002 amendment to the LRA,<sup>277</sup> the courts have not always been prepared to lump any form of 'no-fault' dismissal into the basket of dismissal for

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<sup>272</sup> *SACWU & Others v Toiletapak Manufacturers (Pty) Ltd* (1988) 9 ILJ 295 (IC) where the dismissal was found to be for misconduct and had no bearing on operational requirement. See also *SAA v Bogopa & Others* (2007) 11 BLLR 1065 (LAC) at 1066H, where the court held that 'It is also wrong, in principle, to dismiss employees under the guise of operational requirements when the true reason for the dismissal is alleged misconduct.'

<sup>273</sup> (2009) 30 ILJ 654 (LC) 655.

<sup>274</sup> At 655B.

<sup>275</sup> Ibid.

<sup>276</sup> At 655D-E.

<sup>277</sup> See below at 3.8.

operational requirements.<sup>278</sup> Hence, in *Samancor Ltd v Metal & Engineering Industries Bargaining Council & Others*,<sup>279</sup> the employee was dismissed after been detained by the police on suspicion of robbery. When he was released from police custody some 137 days later he returned to work, he discovered that his employer had held a disciplinary enquiry in his absence and a decision was taken to dismiss him on the grounds of 'operational incapacity'. In declaring the dismissal unfair, Francis J held that:

Operational incapacity is not recognised in our law and if it did exist it must surely be related to ill health or injury. An employer, before dismissing an employee for incapacity, must follow the procedures outlined in Item 10 of schedule 8 (the Code of Good Practice: Dismissal).<sup>280</sup>

As stated previously,<sup>281</sup> when judging the substantive fairness of a dismissal for operational requirements, the IC and the former LAC have been reluctant to 'second guess' managerial decisions leading to retrenchment provided the employer can prove that its decision was made in a business-like manner and was bona fide. Similarly, in terms of the current LRA, in *Kotze v Rebel Discount Group (Pty) Ltd*,<sup>282</sup> the LAC stressed that its function is not to 'second-guess the commercial and business efficacy of the employer's ultimate decision, but to pass judgment on whether such a decision was genuine and not merely a sham.'<sup>283</sup> The only check to this managerial prerogative was that such a decision must not be accompanied by improper motives.<sup>284</sup> This position was predicated by the LAC's belief that they were not the best qualified people

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<sup>278</sup> Grogan J *Dismissal* (2010) 344.

<sup>279</sup> (2009) 30 *ILJ* 389 (LC) 389 H-J.

<sup>280</sup> At 397C.

<sup>281</sup> See above at 2.6.

<sup>282</sup> (2000) 21 *ILJ* 129 (LAC).

<sup>283</sup> At 133.

<sup>284</sup> *Mamabolo & Others v Manchu Consulting CC* (1999) 20 *ILJ* 1826 (LC) 1831.

to judge the validity or soundness of a business decision.<sup>285</sup> The former LAC even held that an employee's agreement is not required before an employer is entitled to declare a position redundant, regardless of whether the position being made redundant was created through a collective bargaining agreement or not.<sup>286</sup> In this regard, the approach of the courts over the years was that the dismissal must conform to procedural fairness with little employee's participation due to the supremacy of managerial prerogative. Perhaps this position was justified because the requirement of substantive fairness was not codified even by the LRA. Adjudicating the substantive fairness in operational requirements therefore depended on the facts of each case. Little wonder that the case law approach on substantive fairness dismissal has been quite complex and in majority of the decisions assessing the commercial rationale, the courts 'instinctively look for ways of avoiding being drawn into the economic merits of a decision, and the natural response has been to give employers a hefty margin of grace in this quarter.'<sup>287</sup>

As noted in chapter 2,<sup>288</sup> Fagan DJP hearing *NUMSA v Atlantis Diesel Engines (Pty) Ltd*<sup>289</sup> on appeal took the view that, in justifying the substantive fairness in the dismissal for operational requirement, the employer must prove that retrenching the employees

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<sup>285</sup> *SA Clothing & Textile Workers Union & Others v Discreto-A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC) para 8.

<sup>286</sup> *BCAWU & another v Murray & Roberts Building (Tvl) (Pty) Ltd* (1991) 12 ILJ 112 (LAC) 121G. This approach had been expressed most vehemently by Van Niekerk SM in these terms: 'To suggest that a general immutable and inflexible rule exists according to which the employee must be fully consulted at the first stage, when the decision to retrench is taken, in my view with utmost respect makes for economic and business nonsense...It boggles the mind even to have to begin to think about enforced participation of shop stewards in delicate negotiations of the kind where some members of the board, even, for extreme secrecy are deliberately kept in the dark. On the other extreme, why can I not just shut down my small business if I am truly sick and tired of running it. On what conceivable basis can I be forced to consult my workers as a prerequisite for doing so.' *TGWU & Others v City Council of the City of Durban & another* (1991) 12 ILJ 156 (IC) 159A-C.

<sup>287</sup> Thompson C 'Bargaining, Business Restructuring and the Operational Requirement Dismissal' (1999) 20 ILJ 755 at 769.

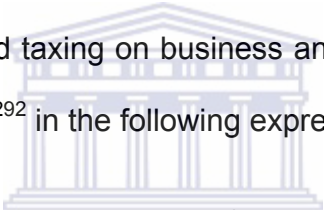
<sup>288</sup> See 2.7 above.

<sup>289</sup> (1993) 14 ILJ 642 (LAC) 648D.

was the only reasonable option in the circumstances leading to the dismissal. The decision in this case did not only attack the concept of managerial prerogative, it defied the very concept that in assessing the substantive fairness, the courts must show deference or not second-guess the business decisions of management and actually brought the abstentionist policy to a standstill before the introduction of current LRA.

The LAC in *Atlantis Diesel Engines* was in effect stating that for the dismissal to be fair, the employer must prove on a balance of probabilities or preponderance of evidence that its decision to retrench for operational requirement was its measure of last resort.<sup>290</sup>

Todd & Damant took the view that the test for fairness as formulated in *Atlantis Diesel Engines* was too exacting<sup>291</sup> and taxing on business and that the courts went too far, a sentiment shared by Thompson<sup>292</sup> in the following expression



Testing the fairness of a decision does indeed go further than a cursory look at its bona fide and commercial rationale. But it surely cannot go as far as setting up the requirement that the 'termination of employment is the only reasonable option in the circumstances'. If the decision is based on a demonstrably sensible business analysis that has been probed in the consultative process, is not unreasonable in context, nor disproportionate in the trade-off between gains and hardships, it should withstand scrutiny.

However, the test proclaimed by the former LAC in *Atlantis Diesel Engines* brought into the question the functions of the courts in scrutinising the employer's bona fides in dismissal for operational requirements. Subsequent decisions from the courts deviated from the *Atlantis Diesel's* position and perhaps it was the courts view that it was too exacting on employers.

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<sup>290</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 473.

<sup>291</sup> Todd C & Damant G (2004) 'Unfair Dismissal-Operational Requirements' (2004) 25 *ILJ* 896 at 902.

<sup>292</sup> Thompson C 'Bargaining, Business Restructuring and the Operational Requirement Dismissal' (1999) 20 *ILJ* 755 at 770.

Three years later, therefore, the LAC in *East Rand Propriety Mines Ltd v UPUSA*<sup>293</sup> recanted the position proclaimed in *Atlantis Diesel* that dismissal for operational requirement will be fair only as a measure of last resort or the only available option left for the retrenching employer. In the case in issue, the court considered an appeal against an Industrial Court decision. The dismissed employees in this case were all Zulu speaking members of the United Peoples Union of South Africa (UPUSA). Serious episodes of violence had occurred in the mines between these workers and members of the National Union of Mine Workers. After mine management had made extensive efforts to resolve the conflict in the mines, they came to the conclusion that the only way to restore peace and full production was to dismiss the minority Zulu grouping on the mines.<sup>294</sup> They did this on the basis of the operational requirement of the business. Cameron J noted that 'where a dismissal is actuated by operational reasons which arise from ethnic or racial hostility, the court will in my view countenance the dismissal only where it is satisfied that management not only acted reasonably, but it had no alternative to the dismissal'.<sup>295</sup> The court found the dismissal to be unfair but refused to reinstate the dismissed employees.<sup>296</sup> They were awarded compensation. The unfairness came from the procedural aspect of the dismissal. Of pertinence here is the fact that the court was not in any way prepared to decide the matter on the basis whether the employer's decision was 'reasonable' the court concluded that there was no alternative left for the employer save dismissal of the employees.<sup>297</sup> The test applied by

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<sup>293</sup> (1996) 17 *ILJ* 1134 (LAC) 1150.

<sup>294</sup> At 1147.

<sup>295</sup> At 1151B.

<sup>296</sup> The LAC refused to reinstate the employees because their safety could not be guaranteed due to ethnic hostility in the mines.

<sup>297</sup> At 1151B.



the LAC in this case was not that of scrutiny but that of necessity.<sup>298</sup> In *Van Rensburg v Austen Safe Co*<sup>299</sup> for example, the LC declined to scrutinise the employer's decision to retrench for operational requirements and found that it was not the role of the court to decide which decision is best for an employer to take in a given circumstance. What is required, the court maintained, is that the employer must show a fair reason to retrench.<sup>300</sup> In a language displaying abstention and deference, Revelas J noted:

The respondent was entitled to restructure its business activities. If the need to restructure arises from such an activity and provided the employer followed a fair procedure, it cannot be criticised by this court. A court should be mindful not to interfere with the legitimate business decision taken by employers who are entitled to profits and even better profit if it can be achieved.<sup>301</sup>

The learned Judge's position in the *Van Rensburg* case supports the view that the role of the court in operational requirement dismissal is confined to assessing the fairness of the decision to dismiss, but not the business virtue of the restructuring exercise including the pursuit of profit. But what of an employer seeking more profit even though it is doing well? Will such contemplation be operationally justified on rational grounds to an extent that it passes the fairness test under section 188? Revelas J answered this question in the case of *Hendry v Adcock Ingram*,<sup>302</sup> when the LC took the view:

If the employer can show that a good profit is to be made in accordance with a sound economic rationale and it follows a fair process to retrench an employee as a result thereof it is entitled to retrench. When judging and evaluating an employer's decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employer's who are entitled to make a profit and who, in doing so, are entitled to restructure their business.<sup>303</sup>

There is obviously a higher standard of proof on the employer doing profitably well but who desires to do better than an employer at the verge of financial ruin or corporate

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<sup>298</sup> Grogan J 'Hobson's Choice: Firing Workers to save their lives' (1997) 13 *Employment Law* 53.

<sup>299</sup> (1998) 19 *ILJ* 158 (LC).

<sup>300</sup> At 168E.

<sup>301</sup> At 168G-H.

<sup>302</sup> (1998) 19 *ILJ* 85 (LC).

<sup>303</sup> At 92B-C.



collapse. Hence, in *NCBAWU & Others v Natural Stone Processors (Pty) Ltd*,<sup>304</sup> Mpofu

AJ held that

The court commented that the legislature has seen fit to attach stringent and peremptory requirements to be strictly followed if a retrenchment is to pass muster. This does not take away management's prerogative to restructure its business enterprise. That prerogative remains intact even in a case such as the present one where the retrenchment has been fueled by the arrival of happy times for the company, as opposed to the usual case where the enterprise itself resorts to retrenchment to protect its survival. However, an employer in the happy position in the company should possibly be adjudged by a relatively stricter standard in relation, for example, to its failure to consider seemingly achievable in-service training of its long-serving employees in circumstances where it could easily afford to do so.<sup>305</sup>

In *Benjamin & Others v Plessey Tellumat SA Ltd*,<sup>306</sup> the respondent employer dismissed thirteen employees for operational reasons. The employees instituted proceedings in the LC complaining that their dismissals were substantively and procedurally unfair. Basson J held that the fact that the retrenchment may have been caused by mismanagement was irrelevant in determining the fairness of the dismissal.<sup>307</sup> The abstentionist approach here may not be different from the former LAC's position in *NUMSA v Atlantis Diesel Engines (Pty) Ltd*<sup>308</sup> when it stated that 'perhaps management has the right to be foolish as long as it is strictly bona fide in its deliberations.'<sup>309</sup> Fairness as stated in section 188 of the LRA is a two way traffic applicable equally to both the employer and the employee. A decision that maybe fair to the employer, may not be fair to the employee and vice-versa.

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<sup>304</sup> (2000) 21 *ILJ* 1405 (LC).

<sup>305</sup> At 1406A-B.

<sup>306</sup> (1998) 19 *ILJ* 595 (LC).

<sup>307</sup> At 603H-J.

<sup>308</sup> (1992) 13 *ILJ* 405 (IC).

<sup>309</sup> At 408A.

### 3.7 The Abstention Approach before the 2002 Amendment

Amid this paradigm shift from abstention to intervention and back to abstention, the LAC in *SA Clothing & Textile Workers Union v Discreto-A division of Trump & Springbok Holdings*,<sup>310</sup> following the enactment of the current LRA, appeared to dispose decisively of the approach of its predecessor, asserting in effect that the substance of an employer's decision to dismiss, provided it is based on actual operational reasons, falls beyond the jurisdiction of the courts.<sup>311</sup> The view of the court as to what constitute fairness and its role was expressly summed up by Froneman DJP:

The function of the court in scrutinising the consultative process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the later issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.<sup>312</sup>

The position of the court in this matter did not only depart from the position that retrenchment should be the 'measure of last resort' adopted by the former LAC in *Atlantis Diesel Engines*, but it revived the abstentionist (deference) position long adopted by the courts. Apart from articulating the unwillingness of the courts to probe the commercial rationale of employers' decision to dismiss for operational requirements,

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<sup>310</sup> (1998) 19 ILJ 1451 (LAC). See also *SA Chemical Workers Union v Afrox (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at para 43 where the court took the view that dismissal need not be a measure of last resort and the court need not find the dismissal unfair just because the employer could have implemented alternatives without folding up.

<sup>311</sup> Du Toit D 'Business Restructuring and Operational Requirement Dismissals: Algorax and Beyond' (2005) 26 ILJ 595 at 599.

<sup>312</sup> At para 8. See also *Decision Surveys International (Pty) Ltd v Dlamini & Others* (1999) 5 BLLR 413 (LAC) para 27.

it re-invented the abstentionist approach. By abdicating its role to interrogate the commercial rationale proffered by the employer in assessing fairness in operational requirement dismissal, the court ignored the hardship of affected employees who bore the brunt of retrenchments.<sup>313</sup>

Just one year after he handed down the decision in *Discreto* under the former LRA, Froneman DJP, in the case of *SA Chemical Workers Union v Afrox Ltd*<sup>314</sup> had the opportunity to apply the new LRA in a new democratic and free South Africa with a new constitution. Given the new realities, the court was obviously required to do more.<sup>315</sup> In a sharp departure from his previous ruling in *Discreto*, the learned Judge took the view that:

It can no longer be said that the court's function in scrutinising the consultation process in dismissal for operational requirement is merely to determine the good faith of the employer. The matter is now one of proof by the employer on a balance of probability of-

The cause or reason for the dismissal;

The defined operational requirements that the dismissal was based on;

A fair procedure in accordance with section 189;

The facts upon which a finding of a substantively fair reason for the dismissal can be made.....

[D]ismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational requirement.<sup>316</sup>

Commenting on the LAC's decision in the *Afrox* case, Grogan noted that,

the court was stating here that the requirement that a dismissal for operational reason must be "substantively fair" does not mean that the retrenchment can only be used as a

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<sup>313</sup> See *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) where at para 70, Zondo JP likened retrenchment to a 'death penalty in the field of labour and employment law' and in *General Food Industries Ltd v FAWU* (2004) 25 ILJ 1260 (LAC) at para 55, Nicholson AJA referred to the impact of retrenchment on workers and their families as 'deleterious.'

<sup>314</sup> (1999) 20 ILJ 1718 (LAC).

<sup>315</sup> Thompson C & Benjamin P. *South African Labour Law* (2006) 473.

<sup>316</sup> *SACWU & Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) para 38-41.

measure of last resort. Although the court did not elaborate, it apparently had in mind the debate over the test for the dismissal of legal strikers under the 1956 LRA. If that is so, the court appears to have been saying that employers need neither wait, nor prove, that their businesses were on the verge of collapse before resorting to retrenchment.<sup>317</sup>

The court was of the opinion that in retrenchment cases, dismissal must not be the first option but certainly not the last option and that it will scrutinise the employer's bona fides but that it will not find it unfair just because the employer could have implemented alternatives without shutting down.

The LAC's approach in both *Discreto* and *Afrox* regarding the issue of substantive fairness in operational requirement dismissal evince not much difference in that in both cases, the court was unprepared to interrogate the commercial rationale of the employer and the court was not concerned if there were alternatives to dismissal. Jammy AJ, deciding *Steyn & Others v Driefontein Consolidated Ltd t/a West Driefontein*,<sup>318</sup> had little problems in pursuing this same path (avoiding to interrogate the employer's bona fides) when he expressed the following

It is the employer's prerogative, provided that it is exercised rationally...to determine...the objectives of its business operations. The competitive challenges prevailing in the commercial sphere will invariably be differently assessed and addressed from enterprise to enterprise and how this is done will inevitably bear emphatically on the success or failure of the business concerned. The role of this court is not one of judgmental business consultant or adviser and it will not readily presume to dictate or prescribe to commercial sophisticates or industry captains how they should direct or manage their business affairs.<sup>319</sup>

Three years after *Discreto*, the LAC operating under the current LRA expressed some doubts in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*<sup>320</sup> as to whether the degree of deference inherent in the approach taken in *Discreto* was

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<sup>317</sup> Grogan J *Dismissal* (2010) 357.

<sup>318</sup> (2001) 22 *ILJ* 231 (LC) para 30. See also *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 *ILJ* 129 (LAC).

<sup>319</sup> Referring to *Mamabolo & Others v Manchu Consulting CC* (1999) 20 *ILJ* 1826 (LC) 1831. See also, Cohen T (2003) 'The Reasonable Employer's Test-Creeping in Through the Back Door?' 15 *SAMerLJ* 201.

<sup>320</sup> (2001) 22 *ILJ* 2264 (LAC).

appropriate in the light of the requirement that a dismissal must be for a fair reason. In essence, the test enunciated in *Discreto* followed the approach of judicial review of administrative action enunciated by Froneman DJP in *Carephone* namely that ‘the courts should afford administrative bodies a significant margin of appreciation and not evaluate their actions in terms of value judgments impose upon the activities of such bodies’<sup>321</sup> and concluded that ‘as long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof but to determine whether the outcome is rationally justifiable, the process will be in order.’<sup>322</sup> The deferential approach in *Discreto* was not followed in this case. The court expressed its reservation with this approach when Davis AJA held that

I have some doubts as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the section of the Act , namely, “the reason for the dismissal is a fair reason”. The word “fair” introduces a comparator that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the dismissal. But rather than take such a decision at face value, a court is entitled to examine whether the particular decision is also fair to the affected party, namely, the employees to be retrench. To this extent the court is entitled to inquire as to whether a reasonable basis exist on which the decision, including the proposed manner, to dismiss for operational requirement is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the contents of the reasons given by the employer, albeit that the inquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness, is the mandated test.<sup>323</sup>

The court, in *Discreto*, went further to state that the substance of the employer’s decision to dismiss, provided it is based on actual operational reason and complies with procedural fairness, falls beyond the jurisdiction of the court.<sup>324</sup>

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<sup>321</sup> *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC) para 18.

<sup>322</sup> *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC) 1435.

<sup>323</sup> *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC) para 19.

<sup>324</sup> *SACTWU & Others v Discreto* (1998) 19 ILJ 1451 (LAC) 1455B-C.

The position of both the LC and LAC on substantive fairness in dismissal for operational requirements from *Atlantis Diesel Engines* to *BMD Knitting Mills* has shown that when adjudicating the fairness in retrenchment cases, the courts have been unwilling to scrutinise the commercial rationale proffered by the employer for dismissal. Albeit the decision in *BMD Knitting Mills* mentioned fairness, it did not seem to reconcile it with the hardship of the employees who will be retrenched. By not scrutinising every alternative route available to the employer to determine which option would have lessened the hardship on the affected parties, the courts maintained a deferential approach in assessing the substantive fairness or otherwise in dismissal for operational requirements.

### **3.8 The Introduction of Section 189A and the application of the law after the 2002 Amendment of the LRA**



The unpredictability displayed by the various court decisions as to the role of the courts in scrutinising the employer's commercial decision to retrench for operational requirement became lessened by the introduction of section 189A into the LRA following the 2002 amendment. Section 189A was actually designed to cater for larger retrenchments and it imposes procedural obligations under section 189A(2) to (5) and substantive obligations under section 189A(19). These obligations apply if an employer with between 50 and 200 employees contemplate dismissing more than 10 employees, or 20 or more employees in the case of employers with a total work force of between 200 and 300, 30 or more employees in the case of an employer with a work force of between 300 and 400, 40 or more employees in the case of an employer with a work force of between 400 and 500, or 50 or more employees in the case of an employer with

a work force of more than 500 employees.<sup>325</sup> On the aspect of the substantive fairness in dismissal for operational requirement, section 189 A (19) of the Act provides that:

In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if-

- a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural and similar needs;
- b) the dismissal was operationally justifiable on rational grounds;
- c) there was a proper consideration of alternatives, and;
- d) selection criteria were fair and objective.

Since the 2002 amendment came into force, there is now a distinction between small-scale and large-scale retrenchments. Before the amendment of 2002, all retrenchments were regulated by the same yard stick but after the introduction of section 189A, separate sets of rules are now in place to regulate small and large scale retrenchment. The content of section 189A, apart from regulating large-scale retrenchment, also places more obligations to an employer contemplating retrenchment as seen in subsection (19). It is trite that an employer is permitted to dismiss for its operational requirements. However, for the employer to do so successfully, it is obliged to have a bona fide economic rationale for the dismissal and to comply with the provisions of section 189 as well as section 189A of the Act where applicable.<sup>326</sup> The employer must prove as well that the dismissal embraces the purport of section 213 or falls within the confines of any of its indicators and that there was proper consideration of alternatives. It is worth noting that section 189A does not provide expressly or tacitly that the alternative selected by the employer must be the best option in the opinion of the court

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<sup>325</sup> Section 189A(1)(a). See also Thembu MA 'Dismissal for Operational Requirements' (2003) 15 *SAMerLJ* at 351.

<sup>326</sup> *Super Group Supply Chain Partners v Dlamini & another* (2013) 34 *ILJ* 108 (LAC) para 24.



or must be the only available measure to be taken by an employer contemplating dismissal for operational requirement. Thus, retrenchment which would have the effect of increasing the profitability or efficiency of a business has been regarded as fair, provided that the employer is able to prove that alternatives to dismissal were considered prior to taking the decision to dismiss.<sup>327</sup>

Section 189A(19), therefore, defines the notion of 'fair reason' for dismissal based on operational requirement. The only question here now that begs clarity is did subsection (19) of section 189A adequately resolve the legal uncertainty in the substantive fairness in the dismissal for operational requirement? Such adequacy or otherwise will be answered by this mini-thesis. Thompson and Benjamin write that for the substantive dismissal for operational requirement to be fair after the 2002 amendment,

the employer must go beyond showing that the decision was rational or it fell within a band of commercially defensible options-something more taxing than an administrative law-type review is envisaged. But the court or arbitrator will not require the employer to share their specific conception of the best and fairest solution in the circumstances. Nor will they oblige the employer to demonstrate that dismissal was the *only* realistic option (although some of the court decisions seem to raise this high bar); it will suffice if the dismissal decision was fair enough in all the circumstances and all viable alternatives were properly considered.<sup>328</sup>

It has been suggested that

[s]ection 189A prescribes the manner in which the employer must have addressed the issue during consultation. "Proper consideration" entails more than merely considering the alternatives tabled by both the employer and employees during consultation. It entails that the employer must apply its mind and give defensible reasons for dismissing all these alternatives and finally deciding that dismissal was the only option. The employer must, in essence, convince the Labour Court that dismissal was the measure of last resort.<sup>329</sup>

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<sup>327</sup> Grogan J *Dismissal* (2002) 226.

<sup>328</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 465.

<sup>329</sup> Basson AC, Christianson M, Garbers C et al *Essential Labour Law* 5ed (2005) 154.



While section 189A is applicable only to disputes falling within the ambit of section 189, it is submitted that it establishes a uniform benchmark which the courts are likely to apply more generally in the context of operational requirement dismissals.<sup>330</sup>

The substantive fairness in dismissal for operational requirements maybe easy to justify in circumstances where the employer's business is running at a financial loss or facing a down turn in the demand of its goods and services. The question in many retrenchment cases is whether an employer can prove that dismissal is necessary in cases where it has to retrench not to stem losses, but to increase profits.<sup>331</sup> Can a case for retrenchment be made out in these circumstances too even after the introduction of section 189A?

In *Fry's Metals (Pty) Ltd v National Union of Metal Workers of SA & Others*,<sup>332</sup> decided after the 2002 amendment of the LRA, the LAC accepted a retrenchment to increase profits as a fair reason to justify dismissal for operational requirement.<sup>333</sup> *Fry's Metals* 'concerned the stuff of a fairly common contest in the workplace whereby an employer wanted to change its work practices and labour cost structure in order to protect its viability and to improve its competitiveness.'<sup>334</sup> Specifically, the employer wanted to change the shift system and to do away with a transport allowance. The workers concerned, assisted by the union, resisted and the employer threatened to dismiss them

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<sup>330</sup> See *SATAWU v Old Mutual Life Assurance Co. SA Ltd* (2005) 4 BLLR 378 (LC) 403 at para 85 where Murphy AJ applies section 189 A(19)(b) to dismissals not subject to Section 189 A.

<sup>331</sup> Grogan J, *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2007) 441.

<sup>332</sup> (2003) 2 BLLR 140 (LAC).

<sup>333</sup> At 141.

<sup>334</sup> Thompson C 'Bargaining over Business Imperative: The Music of the Spheres after Fry's Metals' (2006) 27 *ILJ* 705 at 707.

if they did not agree to the proposed changes.<sup>335</sup> At first implicit and finally explicit in the threat was the proposition of the employer that if it could not get the changes it sought by a coerced agreement, it would retrench the resisting workers and replace them with employees who are prepared to work on its terms. When words hardened into deeds, the union and its members turned to the LC and obtained an order restraining the retrenchment.<sup>336</sup> Their essential argument was that the employer could not invoke the power option of dismissal to get its way in the bargaining process.<sup>337</sup> While it is true that they pinned their hopes on the narrow platform of section 187(1)(c) of the LRA providing that a dismissal will be automatically unfair if the reason for the dismissal is to 'compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee', the scaffolding in section 187(1)(c) is not a strong one in this case, because if the dismissal will be permanent, it will not offend section 187(1)(c) of the LRA.<sup>338</sup> On appeal, Zondo JP held that the dismissal for a profit oriented reason within the context of operational requirement was fair as it falls squarely in the financial reason as contemplated in section 213 of the LRA.<sup>339</sup> Dealing with the proposition that an employer may not dismiss for operational reasons purely for the purpose of making profits as opposed to resorting to dismissal in order to ensure the survival of the business or undertaking, Zondo JP disposed of it as follows:

That argument has no statutory basis in our law. This is so because all that the Act refers to, and recognise, in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirement

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<sup>335</sup> *Fry's Metals (Pty) Ltd v NUMSA & Others* (2003) 2 BLLR 140 (LAC) 140.

<sup>336</sup> At 140.

<sup>337</sup> At 148.

<sup>338</sup> Cheadle H, Le Roux PAK, Thompson C et al *Current Labour Law* 4ed (2005) 54.

<sup>339</sup> *Fry's Metals (Pty) Ltd v NUMSA & Others* (2003) 2 BLLR 140 (LAC) 152.

in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.<sup>340</sup>

The for-profit retrenchment therefore survived both the previous LRA of 1956 and the current LRA judging by the court's decision in the *Fry's Metals* case.

### 3.8.1 The Interventionist Approach after the 2002 Amendment

In deciding *Chemical Workers Industrial Union v Algorax*,<sup>341</sup> the LAC adopted a different view and reasoned that showing deference to the employer's decision to retrench will amount to the court abdicating its role and allowing the employer to decide whether its own conduct is fair or not, a role clearly assigned to the courts.<sup>342</sup> In *Algorax*, it should be noted, the dismissals were found to be automatically unfair; the comments quoted were therefore obiter. Nevertheless, as it will appear, the LC subsequently tended to treat the comments as authoritative statements of the law.<sup>343</sup> They must therefore be given their due weight.<sup>344</sup> In adopting the view that the LAC will no longer follow a deferential approach and rejecting the notion that the court will not have the business knowledge which the employer possess in resolving issues at the work place, Zondo JP observed

Sometimes it is said that a court should not be critical of the solution that an employer has decided in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with problems in the work place. This is true. However, it is not absolute and should not be taken too far. When either the labour court or this court is seized with a dispute of the dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal is fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot

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<sup>340</sup> *Fry's Metals(Pty) Ltd v NUMSA & Others* (2003) 2 BLLR 140 (LAC) 153.

<sup>341</sup> (2003) 24 ILJ 1917 (LAC).

<sup>342</sup> At 1930F-H.

<sup>343</sup> See *FAWU v SA Breweries* (2004) 25 ILJ 1979 (LC) in 3.8.2 below where the LC followed the interventionist approach in *Algorax*.

<sup>344</sup> Du Toit D 'Business Restructuring and Operational Requirements Dismissal: *Algorax* and Beyond' (2005) 26 ILJ 595 at 599.

say that the employer think it is fair, and therefore, it is or should be fair..... Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic.<sup>345</sup>

Recognising the negative impact that dismissal has on employees and their families especially the 'no-fault dismissal', Zondo JP continued:

The respondent's problem required simple common sense and did not involve any complicated business transaction or decision. Accordingly, where, as in this case, the employer has chosen a solution that results in a dismissal or in dismissals of a number of employees when there is an obvious and clear way in which it could have addressed the problem without any employee losing their jobs or with fewer job losses, and the court is satisfied, after hearing the employer on such a solution, that it can work, the court should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs rather than one which causes job losses. This is especially so because resort to dismissal especially a so-called no-fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort...<sup>346</sup>

This pronouncement heralded a more interventionist approach. Is this interventionist position similar in scrutiny to the former LAC decision in *Atlantis Diesel Engines*? Without taking the view that retrenchment in operational requirement dismissal should be a 'measure of last resort', it will seem that some subsequent decisions post *Algorax* see it as thus.<sup>347</sup> It seems that the approach adopted by the LAC is that, it will intervene and declare the dismissal unfair only when common sense indicates that the employer could have realised its operational goals by choosing an option that would avoid retrenchment or reduced the number of dismissals. Perhaps the court was here denouncing the long revered concept of managerial prerogative to the effect that business decisions are at best known and made by corporate captains and that the courts are 'are generally not qualified to pronounce on commercial decisions.'<sup>348</sup> By

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<sup>345</sup> At paras 69-70.

<sup>346</sup> At para 70.

<sup>347</sup> See *County Fair Foods (Pty) Ltd v OCGAWU & another* (2003) 7 BLLR 647 (LAC) at para 27 where the LAC went so far as to state that 'to justify the retrenchment of a particular employee, the employer must show that the dismissal of the employee could not be avoided.'

<sup>348</sup> *SACTWU & others v Discreto* (1998) 19 ILJ 1451 (LAC) para 8.

adopting a less deferential approach in *Algorax*, Zondo JP revived the more interventionist approach in scrutinising the reasons advanced by the employer in operational requirement dismissal adopted by the former LAC in *Atlantis Diesel Engines*.<sup>349</sup>

The decision in *Algorax* was taken the same year as *Fry's Metals* and by the same judge but *Fry's Metals* was decided earlier. The approach adopted in *Algorax* was that of full scrutiny of the employer's reasons for dismissal and had *Fry's Metals* been decided after *Algorax*, it could have failed the fairness test because dismissal for profit cannot be a measure of last resort.

In *Fry's Metals*, the learned judge widened the managerial prerogative of employers by the inclusion of the ingredient of profit in the scope of financial reasons to justify fairness in operational requirements dismissal. Du Toit has suggested that 'if in the *Algorax* line of decisions the LAC appeared to go to new lengths in protecting employees against dismissal for operational reasons, in *Fry's Metals* it appeared to lean in the opposite direction.'<sup>350</sup> By accepting in *Fry's Metals* that an employer can fairly dismiss employees for operational requirement even to increase profit, the court, one can say, abandoned the element of necessity in that the business efficacy to dismiss is left for the employer to determine rather than for the court to ascertain. This position in *Fry's Metals* which amounted to deference is perhaps a return to *Discreto* and an endorsement of *Afrox*, the era of abstention.

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<sup>349</sup> See above at 2.7.

<sup>350</sup> Du Toit D 'Business Restructuring and Operational Requirements Dismissals: *Algorax* and Beyond' (2005) 26 *ILJ* 595 at 605.

The profit justification to fairly dismiss employees for operational reasons as seen in *Fry's Metals* was still held by the minority in the *Algorax* case to be good law. Although the majority judgment delivered by Zondo JP in *Algorax* re-introduced the 'measure of last resort' formula in operational requirements dismissal, the minority judgment was still in favour of the fact that increasing profit as a financial operational factor should be fair enough to justify dismissal for operational requirement. In delivering the minority judgment in *Algorax*, Hlope AJA (as he then was) proclaimed in dissent;

The necessity to effect changes in order for a business to be more viable or to improve efficiency therein falls within the ambit of operational requirement.<sup>351</sup>

While it may be true that the 'for-profit dismissal' sanctioned in *Fry's Metals* could 'open the floodgates virtually at will', the link between a dismissal and the employer's operational needs must still pass the test of fairness.<sup>352</sup> In looking at the difficulties inherent in this for-profit position, Du Toit poses the question in this way

Will it be 'fair' in the given circumstances to dismiss employees in order to increase profit or efficiency? At which point does an employer's right to seek 'more profit' outweigh employees' right not to be dismissed unfairly, and how must that be measured?<sup>353</sup>

Although *Fry's Metals* never addressed this question since it was not a fact in issue, *Algorax* perhaps answered the question by taking the view that dismissal for operational requirements will only be fair as 'measure of last resort'.<sup>354</sup> It may be difficult for an employer to prove that the desire to increase profit was its measure of last resort justifying dismissal for operational requirements. The reason for the 'measure of last resort' test espoused in *Algorax* was according to Du Toit

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<sup>351</sup> At para 46.

<sup>352</sup> Du Toit D 'Business Restructuring and Operational Requirement Dismissals: *Algorax* and Beyond' (2005) 26 *ILJ* 595 at 606.

<sup>353</sup> Ibid. See also Grogan J 'Chicken or Egg? Dismissal to Enforce Demands' (2003) 19 *Employment Law* 2.

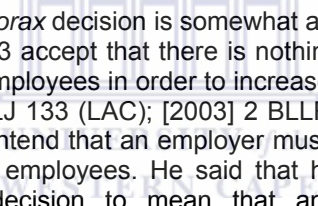
<sup>354</sup> *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) para 70.

a reflection of the acute societal concern about mass unemployment and job losses prevailing in the era of *Algorax*. On the face of it, certainly, the ruling that dismissal is only permissible as a 'measure of last resort' appears to arm the court with powers of prohibiting job losses along the lines demanded by labour during the negotiations leading up to the 2002 amendments to the LRA. But it may also be said to reflect an ongoing judicial concern to make sense of a complex requirement of the law-the requirement that a dismissal based on operational needs must have a "fair" reason, to be tested in the consultation process against criteria such as alternatives to dismissal-which, arguably, had previously been given insufficient weight.<sup>355</sup>

Amid this legal uncertainty between *Fry's Metals* and *Algorax*, how has the law of substantive fairness in operational dismissal been applied subsequently?

### 3.8.2 The application of the law beyond *Algorax*

In *NUMSA & others v Dorbyl Ltd & another*,<sup>356</sup> Fulton AJ adopted the following view regarding the judgment in *Algorax*:



With respect, I think that the *Algorax* decision is somewhat anomalous if one considers that the Labour Appeal Court in 2003 accept that there is nothing in the LRA which precludes an employer from retrenching employees in order to increase profits (*Fry's Metals (Pty) Ltd v NUMSA & others* (2003) 24 ILJ 133 (LAC); [2003] 2 BLLR 140 (LAC). Mr. Van der Riet [counsel for NUMSA] did not contend that an employer must be on the brink of insolvency before it is entitled to retrench employees. He said that he understood the 'last resort' requirement in the *Algorax* decision to mean that an employer must show that retrenchments were necessary. Be that as it may, the court in *Algorax* did not mention, even obliquely, the *Afrox* decision and therefore in my view cannot be taken to have overturned that decision.<sup>357</sup>

By applying *Afrox*<sup>358</sup> and not *Algorax* in this case, Fulton AJ upheld *Afrox* as good law.

In *Food and Allied Workers Union & Others v SA Breweries Ltd*,<sup>359</sup> the LC applied a stricter test of fairness in dismissal for operational requirements. In this case, the court was faced with a situation where the employer, in an effort to become a world class

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<sup>355</sup> Du Toit D 'Business Restructuring and the Operational Requirements Dismissals: *Algorax* and Beyond' (2005) 26 *ILJ* 595 at 611.

<sup>356</sup> (2004) 25 *ILJ* 1300 (LC).

<sup>357</sup> At para 4.1.5.

<sup>358</sup> Discussed above at 3.7.

<sup>359</sup> (2004) 25 *ILJ* 1979 (LC).



manufacturer so as to compete globally and to protect its local market against international competition, proposed a skill-based workplace agreement, declared all positions in its Newlands brewery redundant, job descriptions were re-defined, invited all former employees to re-apply, some who re-applied and met the skill-based requirements were re-employed, others who did not meet the requirements and those who did not re-apply, were retrenched.<sup>360</sup> In this case, Gamble AJ addressed the contrast between *Discreto* and *Algorax* and elected to follow *Algorax*.<sup>361</sup> When counsel for respondent argued against the 'measure of last resort' approach in *Algorax* and contended that *Algorax* did not lay down general principles, Gamble AJ took the view that

I cannot agree with Mr. Gauntlett (Counsel for SA Breweries) on this score. The dictum in the *Algorax* case is one of general application and is based on a thorough analysis of s 189 (2) (a) (i) and (ii) read with subsection (3) (a) and (b).<sup>362</sup>

*FAWU v SA Breweries* was decided along the lines of *Algorax* and so, as of 2004, *Algorax* was upheld as the relevant position to be followed in assessing the substantive fairness in dismissal for operational requirements.

The more interventionist approach entertained in *Algorax* was even broadened subsequently in *Enterprise Food (Pty) Ltd v Allen & Others*.<sup>363</sup> In this case, the employer's decision to close down a particular operation at Montague Gardens in the Cape Town region, rendering several hundred workers redundant, was over-turned by the LAC on both substantive and procedural grounds. The court was especially critical

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<sup>360</sup> At para 12.

<sup>361</sup> Du Toit D 'Business Restructuring and the Operational Requirements Dismissals: *Algorax* and Beyond' (2005) 26 *ILJ* 595 at 608.

<sup>362</sup> At para 43.

<sup>363</sup> (2004) 25 *ILJ* 1251 (LAC).



of the fact that the employer was unable to explain how the shareholder's profits of 25% which motivated the closure decision, was arrived at. Davis AJA stated

The court must examine whether there is a fair reason to dismiss. If, as Zondo JP noted in *Algorax*, there are two rational solutions, one of which preserve jobs, fairness as mandated by the Labour Relations Act 66 of 1995 (the Act) dictates that this is the solution that must be adopted by the employer (at para 70).<sup>364</sup>

The LAC's decision here demonstrates that it is ready to scrutinise the employer's rationale for dismissal and would not hesitate to set it aside if there is alternative to that dismissal. This builds on the previous decision of the LAC in *County Fair Foods (Pty) Ltd v OCGAWU & another*,<sup>365</sup> where the LAC even went further in its scrutiny of the employer's reason to dismiss for operational requirement and took the following view:

In terms of the Act once it has been established that a dismissal occurred, the employer bears the onus to prove that there was a fair reason for the dismissal. If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show that the dismissal of the employees could not be avoided. That is why both the employer and the employee or his representatives are required by section 189 of the Act to explore the possibilities of avoiding the employee's dismissal.<sup>366</sup>

Without actually referring to the decision in *Algorax*, Nicholson AJA in *General Food Industries Ltd v FAWU*<sup>367</sup> summarised the employer's position in this way

After consultations have been exhausted the employer must decide whether to proceed with the retrenchment or not. The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that is imperative that, even though reasons to retrench employees may exist, they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchment or to limit this to a minimum.<sup>368</sup>

In establishing a defensible case on the substantive fairness in operational requirements dismissal therefore, the employer's decision to retrench must be valid in that all viable alternatives have been considered and that the ultimate decision must be

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<sup>364</sup> At para 17.

<sup>365</sup> (2003) 7 BLLR 647 (LAC).

<sup>366</sup> At para 27.

<sup>367</sup> (2004) 7 BLLR 667 (LAC).

<sup>368</sup> At para 55. See also Du Toit D 'Business Restructuring and the Operational Requirements Dismissals: *Algorax* and Beyond' (2005) 26 ILJ 595 at 600.

fair to the employee as well. In making this decision, its implications for the employee must be taken into consideration for that decision to stand scrutiny. Hence, in *Food and Allied Workers Union & Others v SA Breweries*,<sup>369</sup> an employer who went all out to ensure that the decision to dismiss was at least fair to the retrenched employees was still found wanting. But on the other hand, there are decisions like *Mazista Tiles (Pty) Ltd v NUM & Others*,<sup>370</sup> where the employer appears to have come off rather lightly, having only 'proved competitiveness as one of the reasons for the dismissal' under section 188 of the Act.<sup>371</sup>

However, in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union & Others*,<sup>372</sup> the LAC did not follow the *Algorax* approach. In this case, the employer took over the business of another motor transport company as a going concern and management informed the majority union that it intended to restructure its operations.<sup>373</sup> The union argued that Forecourt Express could not retrench the transferred employees because their contracts of employment had transferred to Forecourt Express in terms of section 197 of the LRA. After further consultations, the union proposed that the retrenchments be deferred for six months. That proposal was rejected and the 55 respondent employees were retrenched. The LC found that their dismissal was both substantively and procedurally unfair.<sup>374</sup> On appeal, the LAC was not unanimous in their decision. The majority judgment delivered by Zondo JP observed that, while a retrenchment maybe unfair if it can be avoided by adopting an alternative plan, the

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<sup>369</sup> (2004) 25 *ILJ* 1979 (LC).

<sup>370</sup> (2005) 3 *BLLR* 219 (LAC).

<sup>371</sup> Cheadle H, Le Roux PAK, Thompson C et al *Current Labour Law* (2005) 57.

<sup>372</sup> (2006) 27 *ILJ* 2537 (LAC).

<sup>373</sup> At 2541G.

<sup>374</sup> At 2552D.

union had not suggested any alternative plan other than suggesting a postponement to the retrenchment.<sup>375</sup> The majority found itself in no position to judge whether the business should have been run differently for that period, which the minority judgment delivered by Mlambo AJA concluded was the case.<sup>376</sup> In the dissenting judgment, Mlambo AJA held that, the employer had acted unfairly in refusing to defer the retrenchments. The dismissals, he concluded, 'were clearly not a measure of last resort and that rendered them substantively unfair.'<sup>377</sup>

The majority judgment in this case revived the doctrine of abstention where the courts generally declined to second guess the employers decision. The majority held the view that the court is not qualified to tell the employer how to manage and direct its operation when adjudicating the fairness or otherwise of decision to retrench for operational requirements.<sup>378</sup> Mlambo AJA in a minority judgment is of the view that

the courts retain the power to decree whether anything done by the employer in the name of business alignment or restructuring which lead to loss of jobs was fair. The determination of whether this was fair entails an examination of the reasons relied on to undertake the restructuring.<sup>379</sup>

These are two fundamentally different views in assessing an employer's rationale to dismiss for operational requirements. On the one hand, in this case, the majority position represented the abstentionist approach and the minority, on the other hand, represented the interventionist approach. There was clearly disagreement on the assessment of the substantive fairness in dismissal for operational requirements.

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<sup>375</sup> At 2548D.

<sup>376</sup> At 2548H.

<sup>377</sup> At 2565D.

<sup>378</sup> At 2548H.

<sup>379</sup> At 2566B.

In *NUMSA & Others v Genlux Lighting (Pty) Ltd*,<sup>380</sup> the respondent suffered losses as a result of poor productivity, absenteeism, theft, cheaper import commodities from the far east and the volatile Rand-Dollar exchange rate.<sup>381</sup> The respondent decided to retrench its entire production staff and engaged the services of a temporary employment agent to administer all recruitment and employment related duties. Sixty-three of the 70 employees were re-employed who continued doing the same work as they had done prior to their retrenchment.<sup>382</sup> The LC under Cele AJ accepted that the company had suffered severe losses through theft. However, the solution it had chosen was not a proper dismissal for operational requirements. Each of the 40 applicants seeks reinstatement with retrospective effect from the date of dismissal and on terms and conditions which were applicable at the time of their dismissal.<sup>383</sup> The court stated:

A need to keep at least the 63 employees existed before and after their retrenchment. That there were economic and structural needs due to restructuring of human resources, productivity processes and downsizing to affect the 63 employees is clearly far from the truth. The economic decline and financial difficulties faced by the respondent did not stop it from taking back the services of the 63 employees in the same positions and the doing the same work. The reasons advanced for retrenchment when seen against the behavior of the respondent after retrenchment show that the decision to retrench was nothing but a sham. The overwhelming evidence shows that the retrenchment was not properly and genuinely justified by operational requirements. The decision to retrench was undoubtedly not a reasonable option in the circumstances.<sup>384</sup>

In this case, the court was less differential and it was prepared to look beyond the losses sustained by employer.

The different views taken in the cases above of course do not mean that the law on substantive fairness for operational requirements is in disarray, but it is definitely

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<sup>380</sup> (2009) 30 *ILJ* 654 (LC).

<sup>381</sup> At 656F.

<sup>382</sup> At 657D.

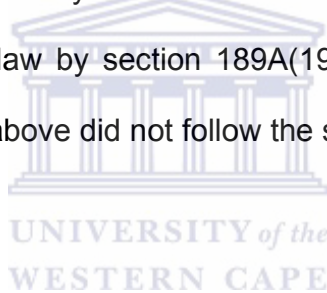
<sup>383</sup> At 657H. See also Grogan J *Dismissal* (2010) 344.

<sup>384</sup> At 662D-G.

uncertain. In highlighting the unpredictability in this area of operational requirements dismissal, Thompson and Benjamin explain as follows:

The uncertainty factor does not mean that the law is disarray. Section 188 and 189 along with the relevant code and the case law offer considerable guidance, and generally speaking the parties know what is their due and what is expected of them. It is only the really tough nuts that are hard to crack in advance. Though greater statutory precision may bring greater certainty, it may come at the price of justice. The marginal cases are identifiable as such at the point they become full blown disputes, and then the parties should look hard at alternatives form of dispute resolution-facilitation under creative terms of reference, mediation coupled with recommendations, pre-emptive arbitration and the like-rather than weather out their chances in inevitable protracted appeal processes.<sup>385</sup>

Thompson and Benjamin were here proposing recommendations and at the same time painting a bleak but true picture of the law on substantive fairness in operational requirement dismissal. While it may be true that despite the statutory expectation imported into this area of the law by section 189A(19), one thing remain abundantly clear, some decisions as seen above did not follow the stricter approach in *Algorax*.<sup>386</sup>



### 3.9 Concluding Remarks

In this chapter, it is shown that there was no statutory provision of substantive fairness in operational requirements dismissal when the LRA came into force in 1996. With the introduction of section 189A in August 2002, the law on substantive fairness in operational requirement dismissal became regulated by statute. The courts on their part, did not adopt a consistent approach in adjudicating dismissal for operational requirements. The various cases examined in this chapter, proved the uncertainty in this area of the law.

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<sup>385</sup> Thompson C & Benjamin P *South African Labour Law* (2006) 476.

<sup>386</sup> See also *NUMSA & Others v Dorbyl Ltd & another* (2004) 25 *ILJ* 1300(LC) at para 4.1.5 where the Labour Court did not follow the approach in *Algorax*.

## Chapter 4

### CONCLUSION AND RECOMMENDATIONS

#### 4.1 Conclusions

The purpose of this mini-thesis is to assess the substantive fairness in the dismissal for operational requirements and to determine why the various statutes and judicial decisions have not succeeded to bring this area of the law into certainty. In order to achieve this objective, this mini-thesis assessed the substantive fairness in operational requirement dismissal from both statutory and case law perspectives.

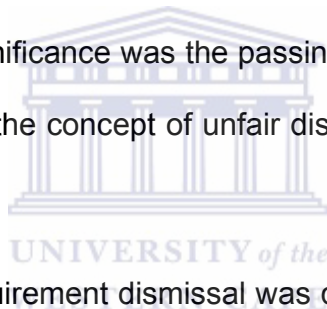
The substantive aspect of the dismissal for operational requirements has posed a lot of challenges in both statutory and case law to an extent that it was imperative to diagnose this inherent controversy, state the law as it stands today and to propose possible recommendations that may help approach this area of the law into some consistency. Eighteen years into the LRA, can anyone say with certainty that the law on the substantive fairness for operational requirements dismissal has attained certainty? The answer is no. The conclusion therefore is set out in these two findings summarised below with possible recommendations.

##### 4.1.1 Statutory Findings

Statutory enactments in the field of labour law could be traced in chronology from the Cape Servants Registry Act of 1906, the Mines and Works Act of 1911, The Factories Act of 1918, the Industrial Conciliation Act of 1924 which was actually the predecessor to the LRA of 1956. While all these acts on the one hand had their impact and relevance

on the development of labour law, they fell short of addressing dismissal issues in general, let alone operational requirements dismissal.<sup>387</sup> The need for statutes in this area of the law was necessitated by the shortcomings of the common law.<sup>388</sup>

It was the recommendation of the Wiehahn Commission of 1979 that revolutionised labour law and by implication the law on dismissal. After the recommendation of the Wiehahn Commission therefore, the Industrial Court was established<sup>389</sup> alongside its unfair labour practice jurisdiction<sup>390</sup> with the coming into force of the Industrial Conciliation Act. Although this act contained no express provision of unfair dismissal, it was soon accepted that the definition of unfair practice was broad enough to encompass it.<sup>391</sup> Of greater significance was the passing of the 1988 amendment to the LRA of 1956 which introduced the concept of unfair dismissal including some elements of substantive fairness.<sup>392</sup>



The concept of operational requirement dismissal was derived from the ILO Convention 158.<sup>393</sup> Operational requirements dismissal is defined by section 213 of the current LRA as one of the accepted grounds of dismissal in terms of section 188. The amendment of August 2002 to the LRA brought in the new section 189A. This amended section addressed the question of the substantive fairness in dismissal for operational requirements especially in large scale retrenchments.<sup>394</sup>

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<sup>387</sup> See above at 2.4.

<sup>388</sup> See above at 2.3.

<sup>389</sup> *Report of the Commission of Enquiry into Labour Legislation Part 1* RP 47/1979 IV para 4.6.

<sup>390</sup> *Report of the Commission of Enquiry into Labour Legislation Part 1* RP 47/1979 V para 4.127. 20.

<sup>391</sup> See above at 2.4.

<sup>392</sup> See above at 2.4.

<sup>393</sup> Termination of Employment Convention 158 of 1982.

<sup>394</sup> See above at 3.5.5.

Although this section was designed to apply only to operational requirement dismissals falling under section 189A, it has become a law of general application to any dismissal for operational requirement.<sup>395</sup> Despite these statutory efforts, the law on substantive fairness in operational requirements dismissal has remained a challenge to the courts.

#### 4.1.2 Case Law Findings

In assessing the substantive fairness in dismissal for operational requirements, it is the findings of this mini-thesis that the LC & LAC's approach in dealing with this ingredient of dismissal has not been unanimous and coherent.

This mini-thesis therefore found that the case law approach has remained split between abstention and intervention in scrutinising the employer's rationale for dismissal. The abstention and intervention approach highlighting the court's inconsistency for more than two decades is set out briefly in the following selected cases as discussed in detail in the previous chapters.

The following selected cases were decided based on the abstentionist approach: *Morester Bande (Pty) Ltd v National Union of Metalworkers of SA & another*,<sup>396</sup> *NUMSA v Atlantis Diesel Engines (Pty) Ltd*.<sup>397</sup> Abstention after the coming into force of the current LRA include decisions such as *Van Rensberg v Austen Safe & Co*,<sup>398</sup> *Benjamin & Others v Plessey Tellumat SA (Pty) Ltd*,<sup>399</sup> *SACTWU v Discreto*,<sup>400</sup> *SACWU & others*

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<sup>395</sup> See above at 3.5.5.

<sup>396</sup> (1990) 11 *ILJ* 687 (LAC). See above at 2.6.

<sup>397</sup> (1992) 13 *ILJ* 405 (IC). See above at 2.6.

<sup>398</sup> (1998) 1 *BLLR* 86 (LC). See above at 3.6.

<sup>399</sup> (1998) 19 *ILJ* 595 (LC). See above at 3.6.

<sup>400</sup> (1998) 19 *ILJ* 1451 (LAC). See above at 3.7.



*v Afrox (Pty) Ltd*,<sup>401</sup> *Steyn & Others v Driefontein Consolidated Ltd t/a West Driefontein*,<sup>402</sup> *BMD Knitting Mills (Pty) Ltd v SACTWU*<sup>403</sup> and *Fry's Metals (Pty) Ltd v NUMSA & Others*.<sup>404</sup> After the 2002 amendment to the LRA, the LAC in *Mazista Tiles (Pty) Ltd v NUM & Others*<sup>405</sup> adopted the abstentionist approach.

The intervention approach was adopted in the following decisions: *NUMSA v Atlantis Diesel Engines (Pty) Ltd*,<sup>406</sup> decided under the LRA of 1956. Intervention after the coming into the force of the current LRA and the amendment in 2002 include decisions such as *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd*,<sup>407</sup> *County Fair Foods (Pty) Ltd v OCGAWU & Others*,<sup>408</sup> *FAWU v SA Breweries*,<sup>409</sup> *General Foods Industries (Pty) Ltd v FAWU*,<sup>410</sup> and *NUMSA & Others v Genlux Lighting (Pty) Ltd*.<sup>411</sup>

The cases outlined above showed the inconsistency in this area of the law despite the 2002 amendment to the LRA. This is so because section 189A did not state that in considering the alternatives, the employer must choose the alternative that would minimise or avoid job losses. Consequent on this statutory indecisiveness, the court's position and approach has remained uncertain.

The uncertainty in this area of the law, apart from the lack of statutory clarity, is premised on the nature of the dismissal itself. The decision to dismiss for operational

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<sup>401</sup> (1999) 20 *ILJ* 1718 (LAC). See above at 3.7.

<sup>402</sup> (2001) 22 *ILJ* 231 (LC). See above at 3.7.

<sup>403</sup> (2001) 22 *ILJ* 2264 (LAC). See above at 3.7.

<sup>404</sup> (2003) 2 BLLR 140 (LAC). See above at 3.8.2.

<sup>405</sup> (2004) 3 BLLR 219 (LAC). See above at 3.8.2.

<sup>406</sup> (1993) 14 *ILJ* 642 (LAC). See above at 3.6.

<sup>407</sup> (2003) 24 *ILJ* 1917 (LAC). See above at 3.8.1.

<sup>408</sup> (2003) 7 BLLR 647(LAC). See above at 3.8.2.

<sup>409</sup> (2004) 25 *ILJ* 1979 (LC). See above at 3.8.2.

<sup>410</sup> (2004) 7 BLLR 667 (LAC). See above at 3.8.2.

<sup>411</sup> (2009) 30 *ILJ* 654 (LC). See above at 3.8.2.

requirements is basically economic and not a legal one<sup>412</sup> and judicial officers adopted the view that they were not necessarily the best qualified people to assess the merits of business decisions.<sup>413</sup> While section 189A may have to an extent put an end to the showing deference approach mentioned above, there is a need for further amendment to bring the law of the substantive fairness for operational requirements into certainty.

In view of both statutory and judicial uncertainty, the following recommendations calculated to help lessen this statutory inadequacy and case law uncertainty and bring this angle of the law towards some sort of equilibrium.

## **4.2 Recommendations**

### **4.2.1 Statutory Recommendations**

Having assessed the statutory history in the substantive fairness of operational requirement dismissal and the inadequacy of the current statute in force today, it is recommended that the following provisions of the LRA be amended as follows:

1. That the definition of operational requirements as enshrined in section 213 of the LRA be amended to exclude economic and similar needs of the employer.<sup>414</sup>

It is recommended that section 213 should read as follows;

“Operational requirements are requirements based on the financial necessity, technological and structural needs of the employer.”

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<sup>412</sup> Thompson C ‘Bargaining, Business Restructuring and the Operational Requirement Dismissal’ (1999) 20 *ILJ* 755 at 760.

<sup>413</sup> Todd C & Damant G ‘Unfair Dismissal-Operational Requirements’ (2004) 25 *ILJ* 896 at 901.

<sup>414</sup> Maenetjie NH ‘Consultation Versus Negotiation in Operational Requirement Dismissals: The COSATU Proposal’ (2000) 21 *ILJ* 1526 at 1532.

There are two reasons for this recommendation. The first reason is to stem out dismissal for profits as a valid reason to justify dismissal for operational requirements. This recommendation is not against employers making profit, but that corporate profit cannot come at the expense of the very employees who to an extent are the contributors of the same profit. Hence, if financial necessity replaces economic needs in the definition of operational requirements under section 213 of the LRA, the platform to justify dismissal in order to increase profit will be removed.<sup>415</sup> Employers must therefore craft other means to increase profit without taking from the employees their means of survival which in this case is their jobs.

Secondly, the concept of 'similar needs' in the definition of operational requirements has to be deleted in order to bring consistency in this area of the law.<sup>416</sup> This concept has brought in a lot of complication in its application.<sup>417</sup> It has enable employers to attempt to justify retrenchment decisions with it, in that if it is not economic, technological or structural, the employer would always seek validation on the need to retrench on 'similar needs' of the business. It has even blurred the dividing lines between dismissal for operational requirement and the other two forms of dismissals.<sup>418</sup>

2. That section 189A and section 189A(19) be amended:

Secondly, it is recommended that section 189A(19)(c) be amended to include a provision that reads as follows: 'The alternative chosen must be the one that minimises

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<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

<sup>417</sup> See above at 3.4.

<sup>418</sup> See above at 3.4.2.

or avoids job losses.<sup>419</sup> This should be so because of the impact or the debilitating effect that job losses bring to employees and their families. While this recommendation does not in any way profess an indefinite employment or a discouragement for employers to hire more employees, it simply advocates labour justice by denying employers the liberty to see employees as disposable items especially in profit oriented dismissals. The amendment of operational requirements as defined in section 213, removal of 'similar needs' in the definition and the amendment of section 189A and section 189A(19) might help lessen the inconsistency in this area of the law.

#### **4.2.2 Recommendations to the Courts**

This mini-thesis has shown that showing deference to the employer's rationale to dismiss for operational requirement never abated, even after 2002, because some decisions made after the 2002 amendment were still characterised by showing deference to the employer's rationality to dismiss.<sup>420</sup>

In the event that the statutory recommendations above are implemented, there need not be any recommendation to the courts. In the event that the statutory recommendations are not implemented, it is recommended that, to achieve some certainty in the adjudication of the substantive fairness in dismissal operational requirements, the court should adopt the approach of full scrutiny.

The much needed certainty in this area of the law will be beneficial to both employers and employees. Employers will know when to retrench and when not to retrench for

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<sup>419</sup> *Enterprise Food (Pty) Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC) para 17.

<sup>420</sup> See the abstention approach in *Mazista Tiles (Pty) Ltd v NUM & Others* (2005) 3 BLLR 219 (LAC) above at 3.8.2.

operational reasons because there will be certainty of the verdict that awaits a dismissal which falls short of a consistent approach. Employees will enjoy a better job security because their livelihoods are better protected due to the consistency in the law. Consistency in this area of the law will also reduce the workload in the LC and LAC in that less cases will be litigated because employers and employees know exactly what to expect in a legal proceeding before the court due to the certainty of the law.

If the *Algorax*'s 'measure of last resort' approach was predicated on the massive job losses prevailing in 2003, it will be very relevant now given that the situation today is no different or maybe worse than then. With the rampant labour strikes in the country from the government sector, the farms and especially in the mining sector, this area of the law needs certainty. In the context of the regular strikes in South Africa and retrenchment possibilities especially in the mining sector, this mini-thesis recommends a full intervention approach to the courts when adjudicating the substantive fairness in dismissal for operational requirements along the lines of *Algorax*. However, while *Algorax*'s position is that the dismissal must be a 'measure of last resort', this mini-thesis recommends instead that, for a dismissal for operational requirement to be fair, the alternative selected by an employer contemplating retrenchment must be the one with the minimum job losses possible.

The recommendations proposed in this mini-thesis are designed to help bring the law of substantive fairness in operational requirement dismissal into certainty so that the full meaning of fairness as stated in section 188 of the LRA becomes a practical reality for both employers and employees in South Africa.

**Word Count: 32, 304**



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