A BEGUILING SERPENT IN THE PROTECTED ZONE OF COLLECTIVE BARGAINING: DISMISSAL TO ENFORCE DEMANDS

by

FIGHTWELL NEVHULAMBA

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of laws (labour law) has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

_____ **August 2021**

Fightwell Nevhulamba (**a beguiling serpent in the protected zone of collective bargaining: dismissal to enforce demands**)

ABSTRACT

This study examines the relationship between automatic unfair dismissal under Section 187(1)(c) of the Labour Relations Act,[1] and dismissal for operational reasons under Section 189 of the LRA. Dismissal is automatically unfair if the reason for dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer and this is according to Section 187(1)(c) of the LRA Employees have the right to refuse the new terms and conditions of employment, and they cannot be dismissed for doing so.

However, if the employer's business is in decline and thus causes financially loss to the employer, the employer may change the operation of the employment in order to sustain the employment. The employer must initiate consultation process (collective bargaining) with the employees' representatives in order to reach an agreement that protects both the employer's and the employees' interests. To avoid retrenchment, the employer and the employees' representatives through collective bargaining have to agree to new conditions of the employment and should the parties agree on the new conditions of the employment this will automatically set aside the terms and conditions of the employment contract.

In *K Ngubane v NTE Limited,*[2] "the court observed and noted that the requirement is that the old contract of employment must be terminated with the purpose of inducing acceptance of a demand or proposal, or the employer can simultaneously terminate the contract of employment and give the employee his/her final offer".

Before resorting to dismissal, the employer must exhaust all the alternatives available to him and this could include, *inter alia*, change of job descriptions since this will not have adverse financial consequences for the workers. If the employees refuse to accept the demands of the employer that were aimed to avoid retrenchments for operational reasons, the employer may dismiss them in accordance with the provisions of section 189 of the LRA.

[1] Labour Relations Act 66 of 1995 ('the LRA').
[2] *K Ngubane v NTE Limited* (1990) 1 (10) *SALLR* 11 (IC).

List of abbreviations

CCMA	Council for Conciliation Mediation and Arbitration
ILO	International Law Convention
LRA	Labour Relations Act
S	Section
SS	Subsection
LC	Labour Court
LAC	Labour Appeal Court
MoL	Minister of Labour

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CHAPTER ONE: INTRODUCTION AND DESCRIPTION OF THE STUDY

1.1 INTRODUCTION

Marais and Hofmeyr avers that "the increase in global competitiveness, together with advances in technology and ongoing changes in the environment, requires organisations to continuously adapt and be willing to change their structures, strategies, methods and practices to remain competitive".[3] In fact, in some cases, a decrease in operating profit forces employers to rethink their work method or system, which may result in mass job losses.[4] In this case, the employer may think about restructuring its organization. Restructuring entails the implementation of a new working system, which may result in changes to the terms and conditions of employment.[5] Employers cannot unilaterally change employment terms and conditions; this must be accomplished through collective bargaining. For the continuation of 'healthy' employment, the employer may require employees to accept new terms and conditions of employment.

Employees are not compelled to accept the employer's demands because they are protected under section 187(1)(c) of the LRA. It should be noted that employees who refuse to accept demands may be dismissed based on operational requirements for refusing to accept such demands, and their dismissal will not be automatically unfair.[6] The employer must discuss the changes of the employment during collective bargaining and the collective agreement reached will bind both the parties. The LRA recognises the importance of collective agreements and provides for their legal effect.[7]

When collective bargaining ends in deadlock, the employer must exhaust all the alternatives to avoid dismissal or retrenchment and if the employees remain reluctant, the employer will have no choice but to enforce section 189 of the LRA. This section

[3] Marais A and Hofmeyr K "Corporate restructuring: Does damage to institutional trust affect employee engagement?" (2013) vol. 37 (2) *South African Journal of Labour Relations* 9.
[4] Burden J and Roodt G "The Development of an Organisational Redesign Model" (2009) vol.6 (23) *SA Tydskrif vir Menslikehulpbronbestuur* 22.
[5] Cf Katiso MW "Organisational restructuring and its impact on job satisfaction, career mobility and stress levels of employees at Lesotho highlands development authority" (Unpublished Masters of Administration Dissertation, submitted at the University of Fort Hare, 2009) 7.
[6] Section188 (1)(a)(ii) of the LRA.
[7] Section 23 of the LRA. See also Govindjee *et al Labour law in context* 211.

allows employers to retrench employees based on operational needs. Because employees' jobs become redundant as a result of the restructuring exercise under this provision, some employees may lose their positions in the organisation.

When the employer proposes changes to the terms and conditions of employment, the dispute can be classified as one of mutual interest. The Court held in *Gauteng Provinsiale Administrasie v Scheepers,* [8] that disputes of mutual interest include "proposals for the creation of new rights or the diminution of existing rights". As a result, the conflict of mutual interest can be resolved through collective bargaining. The employer must provide justifiable and fair reasons for the dismissal, and a fair procedure must be followed.[9]

Given the foregoing, this study investigates the relationship between automatic unfair dismissal under section 187(1)(c) of the LRA and dismissal for operational reasons under section 189 of the LRA.

1.2 PROBLEM STATEMENT

The purpose of this study is to investigate the relationship between automatic unfair dismissal under section 187(1)(c) of the LRA and dismissal for operational reasons under section 189 of the LRA. It also emphasises the role of collective bargaining in protecting the mutual interests of the employer and employees. The study also analyses the impact that Coronavirus pandemic (COVID-19) on South Africa's economy and the employment law, in particular, on retrenchment of employees based on operational requirements.

1.3 QUESTIONS FOR RESEARCH

This research aims to answer the following three fundamental and yet intricate questions:

[8] *Gauteng Provinsiale Administrasie v Scheepers* (2000 ILJ 1305 (LAC).
[9] Section 188(1)(a) (ii) of the LRA.

- Whether an employer can unilaterally change an employee's terms of employment and then dismiss that employee for refusing to accept the new terms of employment?
- It investigates the issue of how should the right to dismiss striking workers for operational reasons be balanced with the protection afforded by the definition of automatic unfair dismissal?
- Finally, the study explores how the courts strike a balance between the competing interests of employees and employers when the employers' business is not doing well.

1.4 AIMS AND OBJECTIVES

This research looks at how the competing interests of employers and employees are addressed in South African labour law. An examination of the legislative framework is conducted in order to determine how the legislation provides for changes in workplace practices as well as the protection it provides employees against unwanted or unilateral changes.[10] Furthermore, the study examines relevant South African court jurisprudence on the interpretation and application of the law in relation to the issue of changing terms and conditions of employment.

1.5 THE STUDY'S IMPORTANCE

Employee retrenchment in South Africa has far-reaching implications not only for employers and employees, but also for the South African economy. The economy is struggling, and the current unemployment rate, which has risen to 32.6 percent in the first quarter of 2021, cannot be sustained.[11] Employers must, however, keep up with changes in the market economy, including competition from other countries. Even though employers are free to dismiss employees for operational reasons, the question remains whether the Labour Relations Amendment Act of 2014 (hereafter 'the LRAA of

[10] Petersen *Changing terms and conditions of employment in the South African Labour Relations Arena- The approach of the courts: A comparative analysis,* 1.
[11]Statistics South Africa 1st Quarterly Labour Force Survey, 2021 available at www.statssa.gov.za/?p=14410 (accessed on 25 June 2021.

2014')[12] has struck an appropriate balance between worker retrenchment during protected strikes and collective bargaining as an institution, most recently during the COVID-19 pandemic.

1.6 RESEARCH METHODOLOGY

All techniques and methods used to conduct research are included in research methods. The research is qualitative in this regard. Qualitative research is concerned with qualitative phenomena such as quality or variety. Such research is typically descriptive and more difficult to analyse than quantitative data. In qualitative research, non-numerical data is examined in depth. It is more naturalistic or anthropological in nature. The methodology used in this study is primarily a desktop literature review of books, journal articles, case laws, newspaper articles, online articles, and international conventions within this context.

1.7 LITERATURE REVIEW

The relationship between employer and employee is marked by inherent inequality, with the employer wielding enormous power.[13] Tshoose and Tsweledi agree that the employer-employee relationship is because the employer wields far more power than the employees, putting employees at a disadvantage in terms of negotiating a fair wage for their labour.[14]

As a result, the narrow power imbalance inherent in the employment relationship has created a conundrum in South African labour law, attracting the attention of many scholars and courts to review section 187(1)(c) dismissal, which appears to be justified by section 189 of the LRA, which permits employers to dismiss employees who refuse to accept their demands, based operational needs of the employer.

[12] Labour Relations Amendment Act 14 of 2014.
[13] Qotoyi *Dismissal within the context of collective bargaining* 16.
[14] Tshoose I and Tsweledi B "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law, Democracy and Development Journal* 340.

This type of dismissal appears to be based on operational requirements, but it also appears to have the effect of compelling an employee to accept a demand concerning a matter of mutual interest between the employer and the employee.[15] Section 187(1)(c) of the LRA is the key section relating to such disputes, and the central question in such disputes is whether they are automatically unfair or operationally justifiable.[16]

This inquiry leads to the conclusion that the fundamental questions that must be addressed includes, *inter alia*, who bears the onus of dismissal. In order to establish the existence of a dismissal under the LRA, the employee must establish the existence of the dismissal.[17] Once the existence of a dismissal has been established, the burden shifts to the employer to demonstrate that the dismissal was fair.[18]

The section of labour law where the definition of "automatically unfair dismissal," the employer's right to terminate employment contracts on the basis of operational requirements, and the establishment of collective bargaining overlap creates a contentious legal ground.[19] Collective bargaining acts as a core negotiation in the changing of the employment terms and conditions because the employer has to bargain with the employees' representatives before changing employment terms and conditions. A collective bargaining agreement that is reached during the collective bargaining process binds the parties, and a breach of such an agreement has legal ramifications.

Section 1 of the LRA expressly encourages collective bargaining as a means of determining "wages, terms and conditions of employment, and other matters of mutual interest."[20] Collective bargaining is also strengthened insofar as trade unions are granted organisational rights and the right to strike is explicitly recognised.[21] Employee

[15] Ismail R and Tshoose I *"Analysing the onus issue in dismissals emanating from the enforcement of unilateral changes to conditions of employment" PERJ* 2011 (14) 7.
[16] Ismail R and Tshoose I *ibid*.
[17] Section 192(1) of the LRA.
[18] Section 192(2) of the LRA.
[19] Newaj K and Van Eck S *Automatically unfair and operational requirements dismissal PERL* 2016 (19) 4.
[20] Section 1 of the LRA.
[21] Newaj K and Van Eck S *ibid* 4.

dismissal is prohibited during the collective bargaining process when the goal is to force employees to agree to changes in working conditions, and these disputes should be resolved through collective bargaining and power-play rather than through threats of dismissal.[22]

In the context of collective bargaining, when employees engage in strike action, employers have the option of a lockout in response to a strike, as well as the use of replacement labour.[23] They are not, however, free to take the initiative in forcing the issue of changing working conditions by dismissing employees who refuse to accept the demand, or by using an offensive or attacking lockout and hiring replacement labour.[24] This is the framework in place for resolving collective bargaining disputes.

When contemplating the dismissal of employees on operational grounds, an employer must, according to section 189 of the LRA, "engage in a meaningful joint consensus-seeking process" with workers' representatives to consider "alternatives that the employer considered," which could potentially limit or avoid the dismissals.[25] This could include working for a shorter period of time, lowering salaries, and other changes to working conditions. Should the consultation come to a halt, the employer retains the right to terminate the employment contracts based on operational needs.

Toit,[26] asserts that 'where collective bargaining has reached a stalemate, nothing prevents an employer from initiating consultation about dismissals based on operational requirements as a result of its stated need to implement the changes it desires, and those changes may be on the table as an alternative to dismissal'. The right of an employer to dismiss employees who refuse to accept its demand based on operational requirements is supported by several case laws, which will be discussed further below.

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[22] *Ibid.*
[23] *SACTWU v Stuttafords Department Stores Ltd* 1999 *ILJ* 2692 (LC).
[24] Section 76(1)(b) of the LRA.
[25] Section 189 (2)-(3) of the LRA.
[26] Darcy du Toit "The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?" 2016 (37) *ILJ* 1 at 21.

The court held in *Schoeman v Samsung Electronics (Pty) Ltd,* [27] that "an employer may not dismiss employees in order to compel acceptance of a demand, but this does not preclude the employer from resorting to dismissal for operational requirements in a genuine case." An employer has the right to run its business profitably, which may necessitate changing the terms and conditions of employment when market forces demand it.

The court held in *MWASA v Independent Newspapers (Pty),*[28] that if a change in employee conditions of service is proposed as a means of avoiding retrenchment, dismissal of employees for refusing to accept the change is not covered by section 187(1)(c) of the LRA.

Todd and Damant,[29] argue that there is no proper conceptual distinction that can be drawn between the subjects of collective bargaining and retrenchment consultation, and that no proper distinction can be maintained in the two processes Both collective bargaining and retrenchment issues can be addressed in the same process. All these issues are related to wage-worker bargaining. The only tool for measuring the difference is the employer's operational requirements. The managers have the final say on the viability of the business entity. Managers are said to have exclusive managerial prerogative because they have knowledge and expertise in business operations.

The court allowed retrenchment for profit in *Hendry v Adcock Ingrams*.[30] The court argued that if the employer can demonstrate that a good profit is to be made in accordance with sound economic rationale and that a fair procedure was followed during the retrenchment process, the employer can dismiss the employees. The court upheld retrenchment for profit in *Fry's Metals v National Union of Metalworkers of South Africa*. [31] The court argued that the principle of 'operational requirements' includes measures calculated to increase efficiency and profitability as well as measures to save

[27] *Schoeman v Samsung Electronics (Pty) Ltd* (1997) 10 BLLR 1364 (LC) para 19.
[28] *MWASA v Independent Newspapers (Pty)* (2002) 23 *ILJ* 918 (LC).
[29] Todd and Damant "Unfair Dismissal - Operational Requirements" (2004) 25 *ILJ* 896 at 915.
[30] *Hendry v Adcock Ingrams* (1998) 19 *ILJ* 85 (LC).
[31] *Fry's Metals v National Union of Metalworkers of South Africa* (2003) 24 *ILJ* 133 (LAC) ('*Fry's Metals*').

a business from bankruptcy. According to the court the employer can dismiss and profit more.

The LAC held in *NUMSA v Aveng Trident Steel,*[32] that the dominant reason or proximate cause for the employees' dismissal was Aveng's operational requirements, which underpinned the entire process throughout 2014 and 2015 and informed all consultations regarding changes to the terms and conditions of employment. As a result, the employees' dismissals fell within the range of permissible dismissals for operational reasons and did not violate section 187(1)(c) of the LRA. As a result, the Labour Court's decision was correct.

The criminal law “causation test” is also applicable in the labour law context. Factual and legal causations are also the tests used to determine the fairness of dismissal. The key question under LRA section 187 (1)(c) is whether the reason for the dismissal a refusal was to accept the proposed changes to employment.[33] In *SA Chemical Workers Union v Afrox Ltd*,[34] the test for determining the true reason is laid out.[35] Accordingly, the court must determine factual causation by determining whether the dismissal would have occurred had the employees not refused the demand. If the answer is yes, the dismissal is not necessarily unfair. If the answer is no, the dismissal is not automatically considered unfair. The next point to consider is legal causation, specifically whether the refusal was the primary, dominant, proximate, or most likely cause of the dismissal. Employees who refuse to accept demands and are dismissed by their employers for operational reasons must be subjected to criminal causation tests as well.

The International Labour Organization (ILO) also played an important role in protecting employees from unfair dismissal by employers. It also grants employees the right to associate freely and protects them against workplace discrimination. The Constitution of the Republic of South Africa, 1996 (‘the Constitution’) protects employees and

[32] *NUMSA v Aveng Trident steel* (2019) *ILJ* 2024 (LAC) para 75.
[33] *NUMSA v Aveng Trident steel* (2019) *ILJ* 2024 (LAC) (2019) *ILJ* 2024 (LAC) para 68 (‘*NUMSA v Aveng Trident steel’)*.
[34] *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718 (LAC).
[35] *NUMSA v Aveng Trident steel*.

employers' rights while balancing the competing rights of employees and employers, According to section 23 of the Constitution, everyone has the right to fair labor practices.[36] Furthermore, section 23 (2) of the Constitution guarantees the right to collective bargaining and the right to strike. Furthermore, South Africa is a member of the International Labor Organization, which has established norms governing the right to organize and bargain collectively.[37]

According to Grogan,[38] the general entrenchment of labour rights raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court, which could have a far-reaching impact on how the employment contract and the employment relationship are approached in the future. Cheadle holds a similar viewpoint,[39] citing recent Constitutional Court decisions, "the Court has claimed jurisdiction over the interpretation and application of the constitutional right to fair labour practices in so far as that right has been given effect in the LRA. Because the determination of fairness is always a matter of interpretation and application of the constitutional right, the Constitutional Court may have opened its portals to every labour practice, including dismissal, in which the fairness of the practice or dismissal is in dispute".

1.8 BRIEF OUTLINE OF THE STUDY

Chapter 1: Overview of the research

This chapter provides an abstract of the study as well as an introduction to the subject matter. It delved deeper into the following topics: problem statement, research questions, aims and objectives, study significance, research methodology, and literature review.

[36] The Constitution.
[37] Convention 9 of the International Labour Organisation (1949).
[38] Grogan J *Workplace Law* 15.
[39] Cheadle *Labour Law and the Constitution: Current Labour Law* (2003) 91.

Chapter 2: Legal framework on collective bargaining and the right to strike in South Africa

This chapter explains the legal framework and the true nature of collective bargaining in the context of strike protection.

Chapter 3: Automatically unfair dismissal in terms of section 187(1) (c) of the LRA

This chapter examines the protection of employees who are dismissed for refusing to accept their employers' demands.

Chapter 4: Dismissal based on operational needs under section 189 of the LRA

This chapter explains the employers' powers to restructure the business and change the terms and conditions of employment in order to save the company from financial ruin. Employers have the authority to dismiss employees for refusing to accept changes in terms and conditions of employment based on operational requirements. The chapter also goes into detail about the negative effects of the Coronavirus pandemic outbreak on the South African economy and labour market.

Chapter 5: The connection between dismissal under section 187(1)(c) and operational requirements

The focus of this chapter will be on balancing the competing interests of employees and employers in the workplace.

Chapter 6: The test for procedural fairness, substantive fairness, factual causation and Legal causation

This chapter examines the tests used to determine the fairness of dismissal by the employers.

Chapter 7: Conclusion and recommendations

This will be the final chapter of this study. This chapter ends everything with a list of recommendations as well as an analysis of collected data and conclusion.

CHAPTER 2*:* LEGAL FRAMEWORK ON COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE IN SOUTH AFRICA

2.1 Introduction

Successful collective bargaining will culminate in collective agreement that binds parties to it. However, the deadlock of a collective bargaining may result in strike actions against the employers. Every trade union, employers' organization/s, and employer/s have the right to collective bargaining under section 25(5) of the Constitution. Furthermore, section 23(2)(c) of the Constitution expressly grants the right to strike to all workers.[40]

The LRA does not explicitly grant the right to collective bargaining; however, it contains provisions that encourage collective bargaining in the workplace, and section 64 (1) of the LRA grants employees the right to strike. This chapter describes the nature of collective bargaining as well as the right to strike if collective bargaining fails.

2.2 Legal framework of collective bargaining

The principle of freedom of association and the right to organise underpins the right to bargain collectively.[41] Collective bargaining primarily focuses on resolving employment terms and conditions, as well as other issues of mutual interest between employers and employees.[42] Matters of mutual interest can be broadly defined as issues relating to employment terms and conditions such as employee compensation, remuneration, and service benefits.[43] In *Rand Tyre and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister of Labour, and Minister for Justice,*[44] the concept of “matters of mutual interest between the employer and employee” was

[40] Garbers C *et al The new essential Labour Law* 425.
[41] Budeli ‘Understanding the right to freedom of association at the workplace: Its components and scope’ (2010) vol 31/1 *Obiter* 16–33 at 27–28.
[42] Qotoyi *Dismissal within the context of collective bargaining* 2.
[43] Qotoyi *ibid.*
[44] *Rand Tyre and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister of Labour, and Minister for Justice* (1941) TPD 108 at 115.

defined as “whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade, must be of mutual interest to them”.

By engaging in collective bargaining with management, organised labour seeks to give effect to its legitimate expectations that wages, and other working conditions should be such that they guarantee a stable and adequate way of life while remaining compatible with the physical integrity and moral dignity of the individual, and that jobs should be reasonably secure.[45]

The LRA does not define collective bargaining; however, Item 4(1) of the Code of Good Practice defines collective bargaining as a voluntary process in which organized labour bargains on behalf of its members, for example, trade unions and employers or employers' organisations may negotiate in order to enter into collective agreements to determine wages, terms and conditions of employment, or other matters of mutual interest.[46] An employer who is considering changing the terms and conditions of employment must consult with the parties who may be affected by such changes, which can be accomplished through collective bargaining.

The LRA strongly supports collective bargaining as a means of regulating employment terms and conditions and resolving disputes. Its provisions are intended to promote and encourage collective bargaining.[47] The LRA ensures that employees' rights to form, join, and participate in trade union activities are effectively protected, and it allows trade unions to obtain organisational rights.

This strengthens their position in the workplace, making it easier for trade unions to persuade or force an employer to bargain collectively with them, allows employees to strike in an attempt to force an employer to bargain collectively with them, and regulates

[45] Davies and Freedland Kahn-Freund’s *Labour and the Law* (3rd ed 1983) 325.
[46] Garbers, Le Roux and Strydom *The New Essential labour Law Handbook* 425.
[47]Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 423.

the legal status and enforceability of collective bargaining products, specifically, collective agreements make collective bargaining more effective.[48]

Every trade union, employers' organisation, and employer have the right to engage in collective bargaining under the Constitution.[49] The Interim Constitution recognised the right to bargain collectively.[50] The right to engage in collective bargaining is granted by the current Constitution. The general consensus is that unions do not have a legally enforceable right to bargain unless that right is conferred by collective agreement.[51]

Collective bargaining as a process is typically initiated when an existing agreement expires and the management-union relationship must be reviewed, when conflicts of interest arise and existing agreements are rejected, or when the need for an agreement arises as a result of a dispute or grievance.[52] Because it involves interaction, collective bargaining is commonly referred to as a process.[53] This interaction involves more than one person or group, and these individuals or groups have a common effect on one another because the behavior of one person or group influences the behavior of the other.[54]

Collective bargaining rights are also recognised by the International Labour Organization. The Collective Bargaining Convention puts the right to bargain collectively in the workplace into action.[55] The Collective Bargaining Convention defines "collective bargaining" as negotiations between employers and/or employers' organizations on the one hand and workers' organizations on the other, for:[56]

- Determining working conditions and employment terms;
- Governing employer-employee relationships; and/or

[48] *Ibid.*
[49] Section 23(5) of the *Constitution of the Republic of South Africa*, 1996.
[50] Grogan *Workplace Law* 383.
[51] *Ibid.*
[52] Nel *et al South African Employment Relations* 135.
[53] Harrison *Collective bargaining within Labour Relationship: in a South African context* 24.
[54] Harrison *Collective bargaining within Labour relationship: in a South African context* 24.
[55] Collective Bargaining Convention 154 of 1981 (‘Collective Bargaining Convention’).
[56] Collective Bargaining Convention.

- Governing relations between employers or their organizations and a workers' organization or organizations of workers.

In order to promote collective bargaining, Convention No. 154 outlines the goals of the measures that will be implemented by public authorities after consultation and, whenever possible, agreement with employers and workers' organizations:[57]

- Collective bargaining should be made available to all employers and worker groups to the greatest extent possible. National law and practice may determine the extent to which the armed forces and police can bargain collectively.
- Collective bargaining should gradually be extended to all areas covered by the Convention. This means that, over time, relations between employers and workers, as well as relations between their respective organizations, can be collectively negotiated, as can working conditions and terms of employment.
- To encourage the development of procedure rules that have been agreed upon by employers' and workers' organizations. A framework like this should make it possible to conduct collective bargaining in an efficient manner.
- Collective bargaining is also promoted by labour dispute resolution bodies and procedures (such as conciliation and mediation bodies). They should be designed to encourage the two parties to reach an agreement.

Collective bargaining and collective agreement cannot be discussed in isolation because the outcome of successful collective bargaining is embodied in a collective agreement.[58] Section 23 of the LRA recognizes the importance of collective agreements and provides for their legal effect.[59] The LRA defines a collective agreement as “a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions, on the one hand, and one or more employers, registered employers'

[57] *Ibid.*
[58] Govindjee *et al Labour law in context* 211.
[59] *Ibid.*

organizations, or a combination of employers and employers' organizations, on the other hand".[60]

Statutory recognition is granted only to agreements reached by registered trade unions with individual employers or registered employers' organisations.[61] The contract must be in writing.[62] A collective bargaining agreement does not have to be contained in a single document.[63] A collective agreement does not need to be signed unless both parties agree that signing it will bring the agreement into existence.[64]

Collective agreements can be set aside for reasons similar to those that can be used to invalidate ordinary contracts, such as breach by the other party, duress, ambiguity, and so on.[65] In *NEHAWU v Public Health & Welfare Sectoral Bargaining Council*, [66] after some employees went on strike due to the provincial government's failure to adjust their salaries, a representative of the Department of Health signed an agreement with the employees' union under which the government agreed to implement salary adjustments for qualified personnel. When the situation stabilized, the government decided to reverse the promotions made in accordance with the agreement. An arbitrator ruled that the employees' promotions were illegal because the collective agreement was signed under duress, rendering the agreement void. The Labour Court upheld an arbitrator's decision, citing the strike as a threat to the provinces' health-care systems' continued operation.

Section 23 of the LRA specifies the legal effect of collective agreements.[67] This section states that collective bargaining agreements bind both the parties to the agreement and their members. Employees who are not members of a majority union that is a party to a

[60] Section 213 of the *Labour Relations Act* 66 of 1995.
[61] Grogan *Workplace law* 394.
[62] *IMATU v Cape Town Municipality* (1999) 20 *ILJ* 960 (CCMA).
[63] *NUMSA & others v Hendor Mining supplies* (2003) 24 *ILJ* 2171 (LC).
[64] Grogan *Workplace law* 394.
[65] *Ibid*.
[66] *NEHAWU v Public Health & Welfare Sectoral Bargaining Council* (2002) 23 *ILJ* 509 (LC).
[67] Section 23 of the LRA.

collective agreement are also bound by it if they are identified in the agreement and the agreement contains a provision expressly binding them.

Employees and employers could easily avoid provisions that are no longer agreeable to them if collective agreements ceased to bind parties after they resigned from unions or employer parties.[68] The LRA prevents evasion by declaring that a collective agreement binds for the duration of the collective agreement every person who was a member at the time it became binding, regardless of whether that person continues to be a member of the registered trade union or registered employers' organisation.[69] As a result, trade union members and employers are unable to withdraw from collective agreements by resigning from the signatory parties.[70] In *Vista University v Botha*,[71] the court halted a strike by former members of a trade who were party to a collective agreement that limited their right to strike. Workers who had downed tools over a dispute with their own union were bound by an agreement between that union and their employer to return to work, according to *Mzeku v Volkswagen South Africa Ltd*.[72] Noncompliance with the provisions of the agreement is not a criminal offense, and the party who is not in breach of the agreement will be entitled to legal recourse.

According to section 23(1)(d) of the LRA,[73] a registered trade union and an employer may agree that a collective agreement they have concluded will be extended to and bind employees who are not members of the union and may be members of another competing union, provided that the employees are identified in the agreement and the agreement expressly binds the employees and the trade union (s) represent the vast majority of all workers in the workplace. Section 32 also allows the Minister of Labour, in certain circumstances, to extend a collective agreement reached in a bargaining council to non-parties in the industry.[74]

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[68]Grogan *Workplace law* 395.
[69] Section 23(2) of the LRA.
[70]Grogan *Workplace law* 395.
[71] *Vista University v Botha* (1997) 18 *ILJ* 1040 (LC).
[72] *Mzeku v Volkswagen South Africa Ltd* (2001) 222 *ILJ* 1575 (LAC) at para 60.
[73] Section 23(1)(d) of the Labour Relations Act 66 of 1995.
[74] McGregor *et al Labour Law Rules* 261.

The constitutionality of section 23(1)(d) has been challenged, primarily on the basis that it infringes the constitutional right to strike. Furthermore, it requires a union that does not have a majority of members to abide by an agreement reached by a union with a majority of support in the employer's workplace. Furthermore, if the union has a majority of support in the employer's workplace to extend the collective agreement reached with it, including the peace clause, to employees who are not members of the union.[75] After that, the agreement will bind all employees in the bargaining unit. This would imply that members of the other union, which has a small membership, would be unable to engage in a protected strike in support of any demand relating to employment terms and conditions because the peace clause would prevent them from doing so.[76] In *Association of Mineworkers & Construction Union & Others v Chamber of Mines of South Africa & Others*, [77] the Constitutional Court determined that section 23(1)(d) did infringe on the right to strike, but that this infringement was justifiable under section 36 of the Constitution. The violation was justified because it upheld the principle of majoritarianism.[78] The court also held that majoritarianism is not unconstitutional and is both rational and reasonable in that it ensures workplace labour peace.

Collective agreements are valid for the time period agreed upon by the parties.[79] If the collective agreement does not state how long it will be in effect or if it is for an indefinite period of time, any party to the agreement can terminate it by giving notice to the other parties, unless the agreement states otherwise.[80] If the agreement was reached through arbitration pursuant to section 21(7) of the LRA, the employer must apply to the CCMA for permission to withdraw a union's organizational rights.[81]

[75] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 433.
[76]Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 432.
[77] *Association of Mineworkers & Construction Union & Others v Chamber of Mines of South Africa & Others* (2017) *ILJ* 831 (CC) at para 46.
[78] For a critical analysis on the principle of majoritarism, see Tshoose CI and Kruger J "The impact of the labour relations act on minority trade unions: A South African perspective" (2013) Vol.16 (4) *Potchefstroom Electronic Journal* 285-318.
[79] Grogan *Workplace Law* 396.
[80] Section 23(4) of the LRA.
[81] Section 21(11) of the LRA.

2.3 The legal framework regulating the right to strike

In most cases, parties' resort to a strike when their negotiations have come to a halt. A strike, from a functional standpoint, provides the bargaining power required to drive meaningful and fair collective bargaining. The Labour Appeal Court ruled in *Stuttafords v SACTWU*,[82] that the purpose of strike action is to cause economic harm to the employer in order for the employer to give in to employee demands.

2.3.1 The right to strike as entrenched in the Constitution

Section 23 of the Constitution guarantees the right to strike.[83] The right to strike is expressly granted to all workers in section 23(2)(c) of the Constitution. The constitutional right is regarded as a higher standard, and it is against this standard that ordinary legislation is tested for compatibility.[84] Employees have the right to strike as well as other fundamental labour rights.[85] Employees have the right to strike, in addition to other basic labour rights.[86] The court ruled in *NUMSA v Bader Bop,*[87] that "it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood".

2.3.2 The right to strike according to the Labour Relations Act 66 of 1995

The LRA makes it clear that it is intended to ensure not only the implementation of section 23(2)(c) of the Constitution, but also the regulation of the right to strike. The LRA's preamble contextualizes this by detailing the LRA's purpose, which includes, among other things:[88]

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[82] *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC) at para 27.
[83] Section 23 of the Constitution.
[84] Van Niekerk *et al Law at Work* 415.
[85] Cheadle *Constitutionalising the Right to Strike Laws against strikes: The South African experience in an international and comparative perspective* 67.
[86] Garbers *et al The New essential Labour Law Handbook* 458.
[87] *NUMSA v Bader Bop (PTY) LTD & Another* 317 para A-B.
[88] See the preamble of the LRA.

- to give effect to section 23 of the Constitution; to regulate trade unions' organisational rights.
- to encourage and facilitate collective bargaining in the workplace and across sectors.
- to govern the right to strike and the use of lockouts in accordance with the Constitution.

2.3.2.1 The definition of a strike

The strike is defined by the LRA as the "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory".[89]

For a conduct to be recognised as a strike there must be a refusal or a stoppage of work. When employees lay down their tools during working hours and refuse to continue working when they should, this is considered a strike.[90] Employees' refusal to work must be accompanied by a threat not to return to work until the employer meets their demands. Where the refusal to work is not coupled with a threat not to resume work until demands are met, the concerned conduct will not fall within the ambit of strike.[91] An example would be when employees in question stop working to discuss proposed changes to their working conditions.[92] In such a case, it cannot be said that the strike action occurred because the refusal to work must have been intended to persist until the demand is met.[93] Employees are considered to be on strike if they mistakenly believe

[89] Section 213 of the LRA.
[90] Grogan *Workplace Law* 406.
[91] *Lebona v Trevenna* (1990) 11 *ILJ* 98 (IC) 103.
[92] *Media Workers Association of SA* The *v Facts Investors Guide (Pty) Ltd* (1986) 7 *ILJ* 313 IC) 316G ('*Media Workers Association of SA*').
[93] *Media Workers Association of SA ibid.*

they are not contractually required to do the work they have refused to do, provided they have the requisite intention to induce their employer to comply with some demand.[94] Partial strikes, such as work-to-rules, slowdowns, and 'grasshopper' stoppages, are also considered strikes.[95] A strike that begins as a partial strike and progresses to a full-fledged work stoppage is considered to have begun at the start of the partial work stoppage.[96]

Individual employees have the right to strike under section 23(2)(c) of the Constitution; however, the definition of a strike in the LRA does not appear to include this possibility.[97] When more than two employees go on strike, their action is only considered a strike if they act with a common goal: they must have agreed to act in concert.[98] In the case of *Schoeman & others v Samsung Electronics (Pty)*, [99] the court ruled that a single employee cannot participate in a strike; more than one person must be involved for the action to be considered a strike. If a number of employees refuse to work at the same time but deviate from the strikes stated goal, they are not considered to have gone on strike. The action must be taken by individuals who are or have been employed by the same or different employers.[100]

To be considered a strike, the refusal to work must be 'for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee'.

Before workers can be considered to be on strike, they must have either a grievance or a dispute, and the strikers must intend to use their action to remedy or resolve that grievance or dispute relevant to the workplace.[101] Workers who agree to stay away from work solely to "play soccer or watch a soccer match" are not considered to be on strike.

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[94] *Gobile v BP Southern Africa (Pty) Ltd & others* (1999) 20 IJL 2027 (LAC) at para 36.
[95] *AECI Chlor-Akali & Plastics Ltd & others v SACWU & others* (186) 7 ILJ 300 (W) at para 17.
[96] *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU & others* (1996) 17 ILJ (LAC) at para 702F-I.
[97] Garbers, Le Roux and Strydom *The New Essential labour Law Handbook* 461.
[98] Grogan *Workplace Law* 407.
[99] *Schoeman & another v Samsung Electronics (Pty)* Ltd [1997] 10 BLLR 1364 (LC) at para 1368 G-H.
[100] Section 213 of the LRA.
[101] Grogan *Workplace Law* 409.

Employees who stop working in support of a demand that their employer discuss a grievance with them are considered to be on strike.[102]

Where there is no demand, workers who have downed tools are not on strike according to the statutory definition of strike. Workers refused to comply with the employer's instruction to work a new shift system in *Simba (Pty) Ltd v FAWU*.[103] The court ruled that this was simply a concerted refusal to work. In *FAWU v Rainbow Chicken Farms*,[104] the Labour Court held that employees who refused to work on a religious holiday were not on strike because they did not refuse to go to work in order to resolve any future grievances.

The purpose of a strike, according to the definition, must be to remedy a grievance or resolve a dispute over a matter of mutual interest between employer and employee.[105] The concept of mutual interest' is critical in defining the issues that can be the subject of a strike.[106] In *Rand Tires and Associates (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, and minister of Justice,*[107] the Supreme Court of Appeal interpreted "mutual interest" as follows:

> Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them.

Section 84 of the LRA sets out matters over which an employer must consult a workplace and section 24 provides for matters over which bargaining councils may develop proposals.[108] The inclusion of these sections in the LRA suggests that a broad meaning should be given to the concept "any matter of mutual of interest".[109] These

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[102] *Media Workers Association of SA & others v Facts Investors Guide (Pty) Ltd & others* (1986) 7 ILJ 313 (IC) at para 316H.
[103] *Simba (Pty) Ltd v FAWU* (1998) 19 *ILJ* 1593 (LC) at para 17.
[104] *FAWU v Rainbow Chicken Farms* (2000) 21 *ILJ* 615 (LC) at para12.
[105] Garbers, Le Roux and Strydom *The New Essential labour Law Handbook* 461.
[106] *Ibid*.
[107] *Rand Tires and Associates (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, and minister of Justice* (1941) TPD 108 para 115.
[108] Govindjee *et al Labour law in context* 233.
[109] *Ibid*.

matters can relate, for instance, to restructuring of the workplace.[110] The court ruled in *Vanchem Vanadium Products (Pty) v National Union of Metalworkers of SA & Others,*[111] that the term "mutual interest" refers to matters that are “work-related” or “concern the employment relationship”.

2.3.2.2 *Primary and secondary strikes*

In a primary strike, employees embark on strike action in respect of a dispute with their own employer and thus seek to advance their own interests.[112] Secondary strikes are defined as ‘a strike or conduct in contemplation or furtherance of a strike that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of the council, have a material interest in that demand'.[113]

Workers taking part in a secondary strike do so in support of the demands of other striking employees. The secondary strikers thus have no direct and substantial interest in the outcome of strike.[114] According to section 66(2) of the LRA, the primary strike must be protected, and the employer must be given seven days' written notice of the secondary strike. The aforementioned section also states that the harm to the secondary employer must be limited to what is necessary to have an effect on the primary employer.

2.3.2.3 *Legal consequences of protected strikes*

A strike is considered protected if it meets the statutory requirements outlined in Section 64 of the LRA. In the event of a protected strike, the employer will provide employees

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[110] *Ibid*.
[111] *Vanchem Vanadium Products (Pty) v National Union of Metalworkers of SA & Others* (2014) 35 *ILJ* 3241 (LC) at para 10.
[112] *Barlows Manufacturing Co of SA (Pty) Ltd v Metal & Allied Workers Union* 1.006B.
[113] Section 66(1) of the LRA.
[114] *Barlows Manufacturing Co of SA (Pty) Ltd v Metal & Allied Workers Union* 1005I.

who participate in such a strike with immunity from delictual claims for breach of contract as well as dismissal.[115] Although an employee participating in a protected strike may be granted immunity from dismissal, the LRA does not preclude an employer from fairly dismissing an employee for reasons related to the employee's conduct during the strike or for operational requirements.[116]

Section 64(1) of the LRA outlines the procedural requirements of a strike and states that:[117]

(1) Every employee has the right to strike, and every employer has the option of locking out employees if-

(a) the disputed issue has been referred to a council or the Commission in accordance with the provisions of this Act, and-

(i) a certificate stating that the dispute has not been resolved.

or

(ii) Since the referral was received by the council or the Commission, a period of 30 days, or any extension of that period agreed to by the parties to the dispute, has elapsed: and after that-

(b) in the case of a proposed strike, the employer has been given at least 48 hours' written notice of the strike's commencement.

A strike must therefore be linked to collective bargaining, and it must not be destructive or devoid of demand, or it will lose legal protection.[118] According to Rycroft, the Labour Court has declared in certain cases in law and equity that the status of a protected strike should be revoked.[119] The LRA specifies the limitations on the right to strike, but other restrictions appear to be implied. Section 23 of the Constitution includes a limit in and of itself.[120] Collective bargaining is the goal of the right to strike. The most common

[115] Van Niekerk *et a*l 450. Myburgh *"100 Years of Strike Law*" (2004) *ILJ* 966.
[116] S67(5) of the LRA.
[117] Section 64(1) of the LRA.
[118] Rycroft (2012) *ILJ* 821.
[119] *Digistics (Pty) Ltd v SA Transport & Allied Workers Union & others* (2010) 31 *ILJ* 2896 (LC) at para 11.
[120] S23 of the Constitution.

expression for this relationship is that the right to strike should be functional to collective bargaining.[121]

Strike that perpetrates violence may lose its legal protection. The Labour Court had to decide whether to award a final interdict to the company against its striking employees in *National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd*.[122] One question raised was whether the strike had lost legal protection as a result of the violence perpetrated by the striking employees.[123] The court was leaning toward the principle that it had the authority to intervene in protected strikes by declaring a protected strike unlawful and thus unprotected if the extent of the violence committed by employees justified the intervention. This is known as the loss of the protection principle.[124]

Employees who go on a protected strike will not be held legally or contractually liable for their actions.[125] Furthermore, the employer is not required to compensate striking employees for the duration of the strike,[126] nor will they be allowed to dismiss them.[127] The employer will also be barred from bringing civil proceedings against the employees as a result of their participation in a protected strike.[128]

2.3.2.4 *Legal consequences of unprotected strikes*

Strikers who violate the provisions of the LRA, in contrast to employees engaged in protected strikes, will not be protected by this Act.[129] Instead, they will be considered to be taking part in an unprotected strike and will face negative consequences as a result.[130] Cohen and Le Roux advise that when faced with strike action, employers

[121] Rycroft (2012) *ILJ* 823.
[122] *Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd* (2016) para 37.
[123] Fergus (2016) *ILJ* 1545.
[124] Fergus (2016) *ILJ* 1546.
[125] Section 67(2) of the LRA.
[126] Section 67(3) of the LRA.
[127] Section 67(4) of the LRA.
[128] Section 67(6) of the LRA.
[129] Du Toit (2016) 488.
[130] Du Toit *et al* (2015) 358.

should not be legally paralysed.[131] According to section 68(1) of the LRA, the following consequences may occur:[132]

a. The Labour Court may interdict the strike or may order the payment of just and equitable compensation for any loss attributable to the strike;[133]
b. The employer may seek compensation for any loss incurred as a result of the unprotected strike;[134]
c. In extreme cases, the striking employees may be dismissed.[135]

The Labour Court has exclusive jurisdiction under section 68(1) of the LRA to grant interdicts prohibiting any person from participating in a strike that does not comply with the provisions of the LRA, or from engaging in any conduct in contemplation or furtherance of such a strike.[136] When deciding whether to grant an interdict, the court follows the same principles as when granting any other type of urgent relief, namely:[137]

i. that the employer has established *prima facie* right for the requested relief.
ii. that there is a well-grounded apprehension of irreparable to the applicant if the relief is not granted.
iii. that the balance of convenience favours the grant of relief; and
iv. that the applicant has no other satisfactory remedy.[138]

The court will not grant an interdict if the employer has not made sufficient efforts to serve notice of the application on each of the strikers or to identify them in the

[131] Cohen and Le Roux (2015) 145.
[132] Section 68(1) of the LRA.
[133] Du Toit *et al* (2015) 358. S 67(5) of the LRA.
[134] Section 68(1)(b) of the LRA.
[135] Cohen and Le Roux (2015) 146.
[136] Section 68(1) of the LRA.
[137] Grogan *Workplace Law* 437.
[138] *Automobile Manufactures Employers Organisation v NUMSA* [1998] 11 BLLR 1116 (LC) at para 118IJ.

papers.[139] Nor will a court confirm a temporary interdict if, by the time of the return date, the strike has long since ended.[140] The court confirmed in *SA Post Office v TAS Appointment & Management Services,*[141] that employers can obtain an interdict even against employees of a labour broker who provide services to them if the strike by the broker's employee affects the employer's business. If members of the public or businesses other than the employer suffer loss or inconvenience as a result of the strikers' actions, they may petition the High Court for an interdict.[142]

The Labour Court has sole jurisdiction to award just and equitable compensation for losses sustained as a result of an unprotected strike.[143] This remedy is not restricted to any particular group of people.[144] The amount granted by the Court must be just and equitable, which is an important aspect of compensation claims.[145] Compensation will not be paid unless the employer can demonstrate that it suffered a loss as a result of the employees' strike participation.[146]

The LRA specifies a number of factors that the court must take into account when deciding on compensation claims.[147] These elements include:[148]

a. Whether attempts were made to comply with the provisions of the LRA.
b. Whether the strike was premeditated.
c. Whether the strike was in response to unjustified conduct by another party to the dispute.
d. Whether there was compliance with an order of the LC interdicting the employees from striking.

[139] *Makhado Municipality v SAMWU & others* (2006) 27 *ILJ* 1175) at para 19.
[140] *Ekurhuleni Metropolitan Municipality v SAMWU & others* [2011] 5 BLLR 516 (LC) at para 31.
[141] *SA Post Office v TAS Appointment & Management Services* [2012] 6 BLLR 621 (LC) at para 13.
[142] *Growthpoint Properties Ltd v SACCAWU & others* (2010) 31 *ILJ* 2539 (KZD) at para 15.
[143] Cheadle (2017) 118.
[144] Rycroft (2015) 112.
[145] Cheadle (2017) 118.
[146] Grogan *Workplace Law* 438.
[147] Section 68(1)(b)(i)-(iv) of the LRA.
[148] Section 68(1)(b)(i)-(iv) of the LRA.

e. The interests of orderly collective bargaining.
f. The duration of the strike; and
g. The financial position of the employer, trade union or employees respectively.

The court must consider the interests of orderly collective bargaining, the duration of the strike, and the financial position of the employer, trade union, and employees when evaluating a claim for compensation.[149]

The *Rustenburg Platinum Mines* case was one of the first in which the Labour Court was forced to use this remedy.[150] In this case, the employer filed a compensation claim against the union. This claim was initially valued at R15 million, but was later reduced to R100,000. The respondent trade union had gone on strike, and the employer had subsequently obtained an interdict against the employees who had gone on strike.[151]

The Court confirmed that a number of factors had to be met before a compensation award could be made, including the amount to be paid.[152] However, three factors should be mentioned:

> First, it must be demonstrated that the strike violated LRA provisions; second, the applicant seeking compensation must demonstrate that they suffered loss as a result of the strike; and finally, it must be demonstrated that the respondent against whom compensation is sought participated in the strike or committed acts in contemplation or furtherance thereof.

The Court was satisfied that all of the above requirements had been met and concluded that the legislature had granted it broad discretion, subject to only one condition: the outcome must be "just and equitable".[153] In essence, the purpose of this remedy is to compensate employers for actual losses, and it should not be interpreted as a means of

[149] Grogan *Workplace Law* 438.
[150] *Rustenburg Platinum Mines Ltd v The Mouthpeace Workers Union* (2001) 22 *ILJ* 2035 (LC) para 85 ('*Rustenburg Platinum Mines Ltd').*
[151] *Rustenburg Platinum Mines Ltd* para 86.
[152] *Rustenburg Platinum Mines Ltd* para 89.
[153] *Rustenburg Platinum Mines Ltd* para 91.

punishing the party against whom the remedy is sought.[154] Finally, the Court determined that a compensation claim should be successful and awarded the applicant employer R100 000.[155] This sum, however, was to be paid in R5 000 monthly installments.[156]

In *Mangaung Local Municipality v SA Municipal Workers Union*,[157] members of the respondent union went on strike while working in the applicant's electricity department. As a result, they blocked the department's entrance, preventing employees from providing services to customers.[158] As a result, the applicant employer sought R272 000 in compensation under LRA section 68(1)(b). The claim sought compensation for losses allegedly caused by the strike as well as the actions of the striking employees.

The Court held that its powers to award compensation were limited to situations where the loss was attributable to an unprotected strike, after interpreting section 68(1)(b) of the LRA. Furthermore, the Court's authority did not extend to losses caused by other factors, such as the strikers' actions.[159] The Court, however, did not follow the reasoning used in the Rustenburg Platinum Mines case discussed above.[160] In determining who would be held liable for the compensation claim, the Court determined that the LRA did not specify against whom such a claim could be instituted; however, a reading of the text would suggest an interpretation in favor of holding either a trade union or its members, or even both, liable.[161]

Participation in an unprotected strike or certain forms of conduct in anticipation or furtherance of an unprotected strike may constitute a fair reason for dismissal under section 68(5) of the LRA.[162] The provisions of the Code of Good Practice: Dismissal

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[154] *Ibid.*
[155] *Rustenburg Platinum Mines Ltd* para 94.
[156] *Ibid.*
[157] *Mangaung Local Municipality v SA Municipal Workers Union (SAMWU)* [2003] 3 BLLR 268 (LC) (‘*Mangaung Local Municipality’).*
[158] *Mangaung Local Municipality.*
[159] *Mangaung Local Municipality* para 26.
[160] *Mangaung Local Municipality* para 31
[161] *Mangaung Local Municipality* para 43.
[162] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 485.

contained in Schedule 8 to the LRA (Code) must be considered when assessing the fairness of such dismissals.[163]

Employees who participate in an unprotected strike should not be dismissed.[164] Item 6 of the Code states that the substantive fairness of dismissing strikers who participated in an unprotected strike must be assessed based on the facts of the case. This includes assessing the gravity of the failure to comply with the provisions of the LRA, any attempts to comply with these provisions, and whether the strike was in response to unjustified employer behavior.[165] If a party deliberately fails to comply with the prescribed procedures set out in section 64 of the LRA, the dismissal of the strikers may be considered fair, and this applies if the deviation from the requirements set out in Section 64 of the LRA is serious.[166]

The court held in *National Union of Furniture & Allied Workers of SA v New Era Products (Pty) Ltd,*[167] that the unacceptable conduct of the employees during the strike, as well as the harm suffered by the employer as a result of the strike, must be considered. The duration of the strike, as well as the legitimacy of the employees' demands, may also be relevant factors.

The dismissal of strikers engaged in an unprotected strike must also be fair in terms of procedure. Item 6(2) of the Code states that the employer must contact a trade union as soon as possible to discuss the course of action that it intends to take.[168] According to the majority decision in *Transport and Allied Workers Union of South Africa obo Ngedle & others v Unitrans Fuel and Chemical (Pty) Ltd*,[169] there may be another reason for

[163] *Ibid.*
[164] *Ibid.*
[165] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 485.
[166] *Ibid*.
[167] *National Union of Furniture & Allied Workers of SA v New Era Products (Pty) Ltd* (1999) 20 *ILJ* 869 (LC) at para 42.
[168] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 486.
[169] *Transport and Allied Workers Union of South Africa obo Ngedle & others v Unitrans Fuel and Chemical (Pty) Ltd* (2016) 37 *ILJ* 2485 (CC) at para 227.

meeting with the union, such as giving it a chance to persuade the employees to return to work.

The employer must also issue an ultimatum to employees who have engaged in an unprotected strike. The ultimatum must be communicated to the strikers or their union in a medium understood by the strikers. In *MM & G Engineering (Pty) Ltd v National Union of Metalworkers of South Africa & Others*,[170] the court ruled that if employees comply with an ultimatum to return to work, the employer cannot take disciplinary action against them for striking unless the employer has reserved the right to do so. The decision to dismiss unprotected strikers by the employer must be both substantively and procedurally fair.

2.3.3 Right to strike according to the International Labour Organisation (ILO)

The right to strike, according to the ILO's supervisory bodies, can be derived from the Freedom of Association and Protection of the Right to Organise Convention,[171] as well as the Convention on Collective Bargaining and the Right to Organise.[172] Strike rights are derived from collective bargaining and are an important component of collective bargaining.[173] Workers can use industrial action as a weapon to maintain the balance between labour and capital's strong power.[174]

Jacobs believes that during the collective bargaining process, the parties involved should be free to apply economic pressure to force the opposing party to make concessions. Without this, the author claims, collective bargaining would be equivalent to collective "begging".[175] The goal of Convention 98 is to protect workers and their

[170] *MM & G Engineering (Pty) Ltd v National Union of Metalworkers of South Africa & Others* (2005) 26 *ILJ* 1686 (LC) at para 21.
[171] Freedom of Association and Protection of the Right to Organise Convention, 1948 (hereafter Convention 87).
[172] The Right to Organise and Collective Bargaining Convention, 1949 (hereafter Convention 98). See also Du Toit *The Right to Strike: South Africa* 478.
[173] ILO Convention 98 of 1949.
[174] Van Niekerk *et al Law at Work* 415.
[175] Jacobs *The Laws of Strikes and Lock outs* 659.

representatives from being victimized by their employers as a result of their trade union activities.[176] Convention 87 addresses freedom of association, but the ILO supervisory bodies link strike protection to Convention 98.[177] However, in accordance with Convention 87, the supervisory bodies have interpreted that the right to strike exists, despite the fact that the ILO Constitution, Conventions 87 and 98 do not contain a "explicit right to strike".[178]

2. 4 Conclusion

Collective bargaining and the right to strike are intertwined on the basis that, when parties to collective bargaining fail to reach a consensus pertaining to their mutual interests, the bargaining process will end in deadlock and industrial actions will result forthwith. The right to collective bargaining is not contained in the LRA. However, every trade union, employers' organisation, and employer have the right to engage in collective bargaining under the Constitution.[179] According to Section 64(1) of the LRA, every employee has the right to strike, and every employer has the option of a lock-out.[180] The constitution also guarantees the right to strike. Section 23(2)(c) expressly grant every worker the right to strike.[181] The relationship between collective bargaining and the right to strike is watertight in the sense that they liaise to maintain a good relationship in the workplace.

[176] Du Toit *et al Labour Relations Law* 659.
[177] Hikumuah *An appraisal of the retrenchment of workers during strikes* 15.
[178] *Ibid.*
[179] Section 23(5) of the Constitution.
[180] Section 64(1) of the LRA.
[181] Section 23(2)(c) of the Constitution.

CHAPTER 3: AUTOMATICALLY UNFAIR DISMISSAL IN TERMS OF SECTION 187(1)(C) OF THE LABOUR RELATIONS ACT 66 OF 1995 (LRA)

3.1 Introduction

Section 187(1)(c) of the 1995 LRA is derived from the definition of lock-out in the 1956 LRA. According to the 1956 LRA, the definition of a lock-out allowed for the use of conditional dismissal as a compulsion tool during the collective bargaining process. Employees who refused to accept the employer's demand during the collective bargaining process could be temporarily dismissed on the condition that they would be re-employed once they agreed to the employer's demand.[182]

Section 187(1)(c) of the LRA, 1995 was enacted to safeguard the integrity of the collective bargaining institution.[183] According to the aforementioned section, a dismissal is automatically unfair if the reason for the dismissal is an employee's refusal to accept a demand in relation to any matter of mutual interest between them and their employer.[184] Section 187(1)(c) prohibits employers from using the threat of dismissal as an economic weapon or bargaining tool in order to gain an unfair advantage during collective bargaining.[185] This chapter investigates the issue of automatically unfair dismissal under section 187(1)(c) of the LRA, 1995.

3.2 Dismissal falling within the ambit of section 187(1)(c) of the LRA, 1995

Employers have not always been able to provide satisfactory reasons for changing the terms and conditions of employment in accordance with operational requirements.[186]

[182] Section 1 of the Labour Relations Act 28 of 1956.
[183] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 159.
[184] Section 187(1)(c) of the LRA.
[185] Garbers, Le Roux and Strydom *The New Essential Labour Law Handbook* 159.
[186] Newaj and Van *Eck Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments PERJ* 2016 (19) 21.

According to section 187(1)(c) of the LRA, “a dismissal is automatically unfair if the reason for the dismissal is to compel employees to accept a demand in relation to any matter of mutual interest between the employer and the employee”. The courts may have to decide when a dismissal, or change in terms and conditions, for operational reasons is justified, and when the dismissal falls within the purview of section 187(1)(c).

The employer in *NUMSA & others v Zeuna-Starker Bop,*[187] dismissed employees based on operational requirements. During wage negotiations, some of the respondent's employees accepted the company's final offer, but the applicant workers went on strike. The respondent locked these employees out and gave them an ultimatum. The strikers went back to work. They were then informed that their employment had been terminated and that their dismissals would remain in effect, unless they accepted the respondent's final offer within seven days. The employees' services were terminated after the deadline was extended. The applicants claimed that the dismissals were unfair by definition. The respondent claimed that the dismissals were carried out due to "tension and uncertainty" in the workplace, as well as for operational reasons. The Court held that the employees' refusal to accept the offer resulted in their dismissal. The Labour Court ruled that the dismissals were carried out in order to force the employees to accept the employer's proposal, and that this fell within the scope of section 187(1)(c) of the LRA, and some employees were reinstated, while ten others received compensation equal to 24 months' remuneration”.

In *Commercial Catering and Allied Workers Union of South Africa v Game Discount World Ltd,*[188] “the employer failed to reach an agreement in negotiations about wages and other terms and conditions of employment”. Employees were dismissed by the employer, and their dismissals were final and irreversible. The court ruled that the dismissals violated section 187(1)(c) and were thus illegal.

[187] *National Union of Metal Workers of SA & others v Zeuna-Starker Bop (Pty)Ltd* (2002) 23 *ILJ* 2283 (LC).
[188] *Commercial Catering and Allied Workers Union of South Africa v Game Discount World Ltd* (1990) 11 *ILJ* 162 (IC).

In *NCBAWU v Hernic Premier Refractories*,[189] "the employer embarked on a typical restructuring exercise following the transfer of another operation in accordance with section 197 of the LRA, in which employees were transferred from Iscor to Hernic. The employer informed both the union and the employees that it intended to begin a restructuring and retrenchment program, and the union was informed that the employer intended to renegotiate the terms and conditions of employment inherited from Iscor. When it became clear that the union would not accept the changes, the employer declared all positions redundant and offered those positions back to the people who had been filling them, but only if they agreed to accept the positions as well as the employer's new terms and conditions of employment".

The Court held per Judge Francis as follows:

> On a balance of probabilities, the true cause of the dismissal of the individual applicants was their refusal to agree to the new terms and conditions of employment that entailed the signing of a new employment contract and the abolition of certain benefits such as winter jackets, canteen subsidies, transport allowances, bursary schemes etc. The dismissals were therefore automatically unfair. It was argued that the individual applicants should not be reinstated since contract workers replaced them. I do not agree. The respondent brought it upon itself when it dismissed the individual applicants under the guise of a retrenchment. There is no reason why the individual applicants should not be reinstated in their previous positions.

In NUM v Mazista Tiles (Pty) Ltd,[190] the employer found itself in an increasingly competitive environment and decided to embark on a restructuring process as a result of being consistently outpriced. The employer informed the union that changes to employment terms and conditions had to be included in the annual wage negotiations. A separate forum was established to discuss the restructuring and changes to working conditions. The employer proposed that the employees become either independent contractors or "incentive" employees in terms of terms and conditions. Negotiations failed, so the employer resorted to a retrenchment exercise.

According to the trade union, the reason for the dismissals had nothing to do with operational requirements and was instead intended to force employees to accept changes to their terms and conditions of employment. The employer believed that the

[189] *NCBAWU v Hernic Premier Refractories (Pty) Ltd* (2003) 1 BLLR 50 (LC).
[190] *NUM & others v Mazista Tiles (Pty) Ltd* (JA52/02) [2004] ZALAC 16 (22 July 2004).

proposed change to its incentive systems had a genuine and rational economic reason, and that the dismissals were solely based on the employer's operational needs. The Labour Court found that the retrenchment was carried out to force individual employees to accept the employer's proposals for changes to their terms and conditions of employment, and it reinstated the retrenched employees.

In *NCBAWU v Hernic Premier Refractories (Pty) Ltd,*[191] the company retrenched its employees because they refused to accept changed employment terms after the company took over their former employer's business. The court held that retrenchment could not have been the true reason for their dismissal because the employee had been replaced with contract workers. The only logical conclusion was that the retrenchment was caused by the employee's refusal to accept the employer's demand. According to the court, the dismissal was automatically unfair.

Employees were dismissed in *Chemical Workers Industries Union v Algorax (Pty) Ltd,*[192] for refusing to work a new shift system. The employer tried in vain to persuade them to reconsider before the final dismissal. Algorax offered to re-employ the dismissed workers if they agreed to work the new shift system, and that offer remained open until the case reached the Labour Court. The dismissal was only procedurally unfair, according to the court. The union challenged the Labour Court's decision, and the LC ruled that the dismissal was not automatically or substantively unfair. In *Chemical Workers Industries Union v Algorax*, the Appeal Court held that the employer violated section 187(1)(c) by offering to reinstate the employees after dismissing them. Algorax did not declare a lockout in writing. If a lockout had been declared, the employer would have kept the employees outside for as long as possible without compensating them for unfair dismissal. The employees were reinstated by the court and were compensated for the entire time they were locked out.

[191] *NCBAWU v Hernic Premier Refractories (Pty) Ltd* (2003) 24 *ILJ* 837 (LC).
[192] *Chemical Workers Industries Union v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC).

3.3 Dismissal not falling within the ambit of section 187(1)(c) of the LRA

Section 187(1)(c)[193] states:(1) A dismissal is automatically unfair if the employer, in dismissing the employees, acts contrary to section 5, or, 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 employee."

This section is intended to prevent employers from resorting to lock-out dismissals when they are unable to obtain their desired outcome in collective bargaining processes. Employers may not threaten employees with disciplinary action if they refuse to accept the employer's demand, according to this section.

In *ECCAWUSA v Shoprite Checkers t/a OK Bazaars Krugersdorp,*[194] the employer was in financial distress before the business could be sold as a going concern to the Shoprite group*. OK Bazaars Krugersdorp* began discussions with its workers' union. It was agreed that both parties would take all reasonable steps to avoid job loss. In order to avoid job losses, OK Bazaars Krugersdorp and the union agreed that flexible work practices were an important component of this plan. Following the union agreement, the employer implemented a new and more cost-effective shift pattern. Employees were adamantly opposed to the new shift patterns. They were laid off by their employer. The court determined that the new shift patterns were implemented as a substitute for retrenchment. As an alternative to retrenchment, changing the terms and conditions of employment can be preferred. Employees who refused to accept the alternative offered by OK Bazaars Krugersdorp were justified in being dismissed.

In *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa,*[195] the Labour Appeal Court had to deal with two issues that were raised in the appeal. "The first issue was whether an employer has a right to dismiss employees who were not prepared to agree to changes to their terms and conditions of employment. The second was the nature of the relation between that right and the employee right not to be dismissed for

[193] Section 187(1)(c) of the LRA.
[194] *ECCAWUSA v Shoprite Checkers t/a OK Bazaars Krugersdorp* (2000) 21 *ILJ* 1347 (LC).
[195] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa* (2003) 24 *ILJ* 133 (LAC).

the purpose of being compelled to agree to a demand in respect of a matter of mutual interest". The court pointed out that one of the grounds for dismissal under the 1995 LRA is operational requirement. The LAC overturned the Labour Court's decision, ruling that the dismissal did not fall under the purview of section 187(1)(c), and that it was justified by operational reasons on the part of the employer.

Mazista Tiles (Pty) Ltd v National Union of Mine Workers,[196] confirmed the dismissal of employees who refused to accept the employer's proposal. In this case, the employer proposed closing the hostel where employees were housed, discontinuing the feeding program, and converting its employees into independent contractors who would be self-employed. Employees would be forced to work for minimum wage and on a productivity-based incentive system as a result of this. Employees expressed willingness to accept the proposal to close the hostel and discontinue the feeding program. They turned down the offer to work as independent contractors or as incentive employees. The employees were dismissed for operational reasons by the employer. The court held that because the dismissal was final and irreversible, it did not fall under the purview of section 187(1)(c).

When employees are locked out or on a legal strike, the employer is not prohibited from dismissing them for operational reasons or disciplining them for misconduct. This point is made more clearly in *South African Chemical Workers Union v Algorax Ltd*:

> The employer had a distribution system that resulted in its drivers working in excess of overtime permitted by law. The employer decided to introduce a staggered shift system to overcome the problem. Drivers embarked on a strike, but subsequently succumbed to the change. Five months later employees, at one of the employer's branches decided to embark on a strike action again, demanding that the staggered shift system be abandoned. The employer responded by locking them out and informing their union that the striking employees would be retrenched. Employees at the other branches embarked on a solidarity strike in support of the threatened drivers. The employer retrenched the strikers. The union claimed that the dismissal was automatically unfair. The Labour Appeal Court held that the dismissal had been affected for operational requirements.

[196] *Mazista Tiles (Pty) Ltd v National Union of Mine Workers* (2004) 25 *ILJ* 2156 (LAC).

The LRA, 1995 allows employers to dismiss employees for just cause relating to the employee's conduct, capacity, or operational requirements.[197] Two employees refused to work under a newly appointed supervisor and were dismissed after several warnings in *Slagment (Pty) Ltd v Building Construction & Allied Workers Union*.[198] The court determined that their dismissal was fair and justified, and thus fell outside the scope of section 187(1)(c).

3.4 Onus of proof in respect of section 187(1)(c) dismissal

In this case, the rule "he who alleges must prove" applies. The general rule on the onus of proof is set out in section 192 of the LRA, 1995. According to this section, in dismissal proceedings, the employee must first establish the existence of the dismissal, and then the employer must prove that the dismissal was fair.[199] However, in cases of automatically unfair dismissal, the employee bears the burden of proving the dismissal and that it is automatically unfair. The employee must present *prima facie* evidence in support of his or her allegation. In *Jada v First National Bank,*[200] the employee was dismissed for misconduct. He claimed that he was victimised and dismissed as a result of his trade union activities, and that he was discriminated against because of his race. The court considered whether the employee was obligated to present *prima facie* evidence of the automatically unfair dismissal.

The court followed the *Mashada v Cuzen & Woods Attorney* decision,[201] which stated that "if an employee alleges that he was dismissed for prohibited grounds e.g pregnancy. Then it would seem that the employee must in addition to making the allegation at least prove that the employer was aware that the employee was pregnant, and that the dismissal was possibly on this ground".[202] In *Kroukam v SA Airlinks*,[203] the

[197] Section 67(5) and 188(1)(a)(ii) of the Labour Relations Act 66 of 1995.
[198] *Slagment (Pty) Ltd v Building Construction & Allied Workers Union* (1994) 15 *ILJ* 979 (A).
[199] Cohen "Onus of Proof in Automatically Unfair Dismissals – *Jada v First National Bank*" (2006) 27 *ILJ* 2627 (LC); (2007) *ILJ* 1465.
[200] *Jada v First National Bank* (2006) 27 *ILJ* 2627 (LC).
[201] *Mashada v Cuzen & Woods Attorney* (2000) 21 ILJ 402 (LC).
[202] Cohen "Onus of Proof in Automatically Unfair Dismissals – *Jada v First National Bank*" 1466.
[203] *Kroukam v SA Airlinks* (2005) 26 *ILJ* 2153 (LAC).

court determined that by imposing the onus, the employee is not required to prove anything. The employee is only required to express reservations about the reason for his or her dismissal.

3.5 Conclusion

Section 187(1)(c) [204] of the LRA prohibits dismissals intended to compel employees to accept the employer's demand on grounds of mutual interest, but it does not prohibit employers from dismissing employees who refuse to accept a demand if the effect of that dismissal is to save other workers from retrenchment, nor does it prohibit employers from dismissing grossly insubordinate employees. The burden of proof under automatically unfair dismissal requires the employee to cast doubt on the reason for dismissal, as opposed to proof on the balance of probabilities required under section 192.[205]

[204] Section 187(1)(c) of the LRA.
[205] Section 192 of the LRA.

CHAPTER 4: DISMISSAL BASED ON OPERATIONAL REQUIREMENTS IN TERMS OF SECTION 189 OF THE LABOUR RELATIONS ACT 66 OF 1995

4.1 Introduction

Employers are rarely compelled to review or consider reducing their wage bill by terminating the employment of some of their employees for a variety of economic reasons. The most common reason is that the employer may think about restructuring its organization. Restructuring may imply the implementation of new working systems, which may result in changes to employment terms and conditions. Some employees may lose their positions in the organization as a result of restructuring because their job becomes obsolete. Some employers may decide to take a long-term approach and invest heavily in advanced technology that requires fewer employees to control and operate. In such circumstance, employees may be laid off once more.[206]

This type of dismissal is known as dismissal for operational reasons, and it is referred to as retrenchment or no-fault dismissal.[207] Dismissal for operational reasons is one of three legitimate grounds for termination of employment recognized by the LRA, 1996. Retrenchment becomes legal if the employer can demonstrate that the dismissal was fair and justified, and that a fair procedure was followed.[208] Sections 189 and 189A of the LRA govern dismissal for operational reasons, respectively.

4.2 What are employer's operational requirements?

The term operational requirements is defined in section 213 of the LRA as follows:[209] "Operational requirements means requirements based on the economic, technological, structural or similar needs of an employer".

[206] Basson *Essential Labour Law* 146.
[207] Grogan *Dismissal, Discrimination and Unfair Labour Practice* 361.
[208] Du Toit *et al Labour Relations Law – A Comprehensive Guide* 394.
[209] Section 213 of the LRA.

The term operational requirements, as well as its definition, are derived from International Labour Organization Convention 158:

> Article 4 of the Convention recognises a valid reason based on the operational requirements of the undertaking, establishment or services as a legitimate justification for dismissal. Article 13 of the Convention imposes specific obligations on employers who contemplate terminations for reasons of an economic, technological, structural or similar nature. The Convention provides little further guidance as to precisely what reasons are contemplated by this provision. The recommendation that accompanies the Convention (Termination of Employment Recommendation No. 66 of 1982) refers to consultation with workers' representatives when an employer contemplates the introduction of major changes in production, programme organisation, structure or technology that are likely to entail termination.[210]

According to the Code of Good Practice on Dismissal Based on Operational Requirements, it is difficult to define all of the circumstances that could legitimately form the basis of a dismissal in these circumstances.[211] However, the Code provides the following guidelines for interpreting section 213 of the LRA:[212]

> As a general rule, economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to new technology that affects work relationships, and structural reasons relate to the reducing of posts consequent on the restructuring of the employer's enterprise.

Van Niekerk contended that the definition of operational requirements is too broad. Over the years, the courts have considered dismissal for incapacity, refusal to accept a change in working conditions as a result of the need to reorganize work, and dismissal at the request of a third party.[213]

The definition of operational requirements "refers to four categories, namely the employer's economic needs, technological need, structural or similar need.[214] This definition clearly shows that the reason for the dismissal has nothing to do with the employee and everything to do with the needs of the employer.

According to Grogan, this definition is as follows:

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[210] Van Niekerk *et al Law@Work* 270.
[211] Van Niekerk *et al Law@Work* 271.
[212] Schedule 8LRA.
[213] Van Niekerk *et al Law@Work* 271.
[214] Basson *et al Essential Labour Law* 146.

> Economic need for example includes those needs and requirements relating to the economic well-being of the enterprise.[215]

Technological need refers to the introduction of new technology, such as more advanced machinery, mechanisation, or computerisation, which results in employee redundancy. The term "structural needs" as a reason for employee dismissal refers to positions that become redundant as a result of an enterprise restructuring. Restructuring is frequently the result of a merger or amalgamation of two or more businesses.

4.3 Changes to an employee's employment terms and conditions

A company's operations may need to be restructured as a result of economic and other business difficulties. This could result in retrenchment due to redundancy, or employees could be offered new positions with different terms and conditions. Employees who refuse to accept changes to their terms and conditions of employment may be dismissed due to operational requirements.

In a number of decisions, the courts have backed the above-mentioned position. In *WL Oschse Webb & Pretorius (Pty) Ltd v Vermuelen,*[216] the employee was a tomato salesman for the employer. He was earning more than the other employees as the sale of tomatoes attracted a higher commission than the sale of the vegetable sold by the other employees. This caused dissatisfaction among other employees. The employer tried to address the issue by proposing a new remuneration system. The salesman was given three alternatives. He could either accept the new system or present an alternative system or resign. He proposed that the old system be retained. When his proposal was rejected by the employer he resigned.

The Labour Appeal Court held that the employer had not acted unfairly. The court's argument was that:

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[215] Basson *et al Essential Labour Law* 147.
[216] *WL Oschse Webb & Pretorius (Pty) Ltd v Vermuelen* (1997) 18 *ILJ* 361 (LAC) ('*WL Oschse Webb & Pretorius (Pty) Ltd*').

> 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 … 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."[217]

The court explained the distinction between a lock-out dismissal and a dismissal for operational reasons in *Fry's Metals (Pty) Ltd v Nation Union of Metal Workers of South Africa* as follows:[218]

> A lock-out dismissal entails that the employer wants his existing employee to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employee does not agree to the proposed changes, he would dismiss them – not for operational requirements but to compel them to agree to the change. In such a case the employees thereafter would have an opportunity to agree to the changed working conditions. When they agree to the change, the dismissal ceases because it has served its purpose, the purpose of a dismissal for operational requirements … is to get rid of employees who do not meet the business requirements of the employer so that new employees who will meet the business requirements of the employer can be employed.[219]

The Labour Appeal Court reached a different conclusion in *Chemical Workers Industrial Union v Algorax (Pty) Ltd*[220] than in *Fry's Metals*. The court emphasized the fundamental distinction between an operational requirements dismissal, as contemplated by section 187(1)(c) of the LRA, 1995, and a dismissal for cause. The difference between the two sections, according to the court, is in the reason for the dismissal. The court held that *Algorax*'s willingness to keep the re-employment offer open was sufficient to distinguish the two cases. *Fry's Metals* could not have intended to force its employees to accept the new shift system after it had finally and irrevocably dismissed them. However, Algorax's actions amounted to lock-out dismissal, which is unlawful under section 187(1)(c) of the LRA.

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In *Mazista Tiles (Pty) Ltd v National Union of Mine Workers*, [221] the company increased its competition and worked with the union for a long time without success. Eventually, the employer decided to go through a retrenchment exercise to meet operational needs.

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[217] *WL Oschse Webb & Pretorius (Pty) Ltd* at 366.
[218] *Fry's Metals (Pty) Ltd v Nation Union of Metal Workers of South Africa* (2003) 24 ILJ 133 (LAC).
[219] *Fry's Metals (Pty) Ltd v Nation Union of MetalWorkers of South Africa* (2003) 24 ILJ 133 (LAC) at para 146 – 147.
[220] *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2004) 24 ILJ 1917 (LAC) at 1929.
[221] *Mazista Tiles (Pty) Ltd v National Union of Mine Workers* (2007) 25 ILJ 2156 (LAC).

The Labour Appeal Court found that the employer intended to terminate the employment contracts of its employees, converting them into independent contractors. The court ruled that the dismissal was not temporary, and that the employer would reverse it if the employees agreed to the change. The court upheld the employees' dismissal and rejected their union's argument that the dismissal fell within the scope of section 187(1)(c).

There was no provision in the service contract in *Steel, Engineering & Allied Workers Union of South Africa v Trident Steel (Pty),*[222] that employees would work overtime as and when the operational needs of the business required it. In order to meet their wage demands, employees declared an overtime ban. Employees were dismissed by the company due to operational needs. The employer contended that overtime was critical to its business operations, and that working overtime allowed it to provide a 24-hour service, allowing it to maintain its market share in a highly competitive field.

It was deemed unnecessary by the court to consider whether an implied term to work overtime existed. It was more concerned with the parties' broader employment relationship. The employees were dismissed for valid operational reasons, according to the court, because the business required workers who were ready to work according to business needs.

4.4 Conclusion

Section 188(1)(a)(ii) of the LRA[223] provides that “a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason based on the employer’s operational requirements”. This section empowers employers to dismissal employees based on operational reason should the employees fail to accept a change in the terms and conditions of employment. If the employer is faced with financial constraints that result in a significant decrease in profit, the employer may

[222] *Steel, Engineering & Allied Workers Union of South Africa v Trident Steel (Pty*) (1986) 7 ILJ 86 (IC).
[223] Section 188(1)(a)(ii) of the LRA.

change the terms and conditions of the employment contract through collective bargaining. If collective bargaining comes to a halt, the employer can unilaterally change such terms and conditions of employment and request that employees accept its demand. Employees who refuse to accept such a demand may be summarily dismissed based on the employer's operational needs, and such dismissal falls outside the scope of automatically unfair dismissal as defined in section 187(1)(c) of the LRA.

CHAPTER 5: THE RELATIONSHIP BETWEEN SECTION 187(1)(C) DISMISSAL AND DISMISSAL ON OPERATIONAL REQUIREMENTS

5.1 Introduction

Section 188(1)(a)(ii) of the Labour Relations Act 66 of 1995 (‘the LRA') allows for the dismissal of employees for operational reasons, whereas section 187(1)(c)[224] prohibits the dismissal of employees for refusing to accept a demand imposed by the employer. The courts had failed for decades to balance the competing interests of employees and employers; however, with the passage of the new LRA, this has changed.[225] According to the new LRA, the interests of employers outweigh the interests of employees on the basis that an employer may lock-out employees who refuse to accept new terms and conditions of employment, and the dismissal of such employees is always justifiable by the operational requirements of the employer's business, given that the employer has properly exhausted the procedure contained in the LRA.[226] This chapter intends to give a clear understanding on how employees enjoy their protection under section 187(1)(c) and also how employers make use of section 188(1)(a)(ii) in order to protect their interests.

5.2 Section 187(1)(c) application

Section 187(1)(c) of the LRA[227] does not purport to prohibit dismissal where the reason for the dismissal is the employees' refusal to accept a change in their working conditions. This section does not prohibit the use of the threat of dismissal as a form of persuasion during the collective bargaining process. This section prohibits dismissal for the purpose of compelling employees to accept a collective bargaining demand, which

[224] Section 187(1)(c) of the Labour Relations Act 66 of 1995 (‘the LRA’).
[225] LRA.
[226] Section 189 of the LRA.
[227] Section 187(1)(c) of the LRA.

may appear to be calculated to induce (via force of argument) acceptance of a demand but falls short of an attempt to compel that acceptance.[228]

Employers are permitted to dismiss employees based on operational needs under section 188(1)(a)(ii) of the LRA.[229] However, dismissal is not an acceptable tool of coercion in the collective bargaining process, and as a result, dismissals made because employees refused to agree to proposed changes to their terms and conditions of service will violate section 187(1)(c) of the LRA and be automatically unfair. This may imply that making changes to an employee's existing terms and conditions of service may be difficult, especially if the need to make such changes is prompted by operational requirements.

Lockouts or dismissals are actions that go beyond persuasion. An employer whose goal is to persuade his employee to accept his demand may not use dismissal to accomplish that goal. Section 187(1)(c)[230] forbids the use of dismissal in this situation. An employer who requires its employees to work in a new shift pattern for rational and justifiable operational reasons and is willing to replace its existing workforce with a new workforce may dismiss if the test for operational requirements dismissal is met.[231] On rational grounds, the dismissal must be operationally and commercially justifiable.

The employer in *Fry's Metals,*[232] made it clear to its employees that if they did not signify their acceptance of the proposed new shift system by a certain date, their contract would be terminated. Many efforts were made to emphasise the significance of the deadline, but once it had passed, the employer took decisive action. Employees were eventually dismissed, with no chance of being re-hired if they changed their minds. This meant that the dismissal did not violate the prohibition in section 187(1)(c).

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[228] Todd and Damant "Unfair Dismissal - Operational Requirements" 916.
[229] LRA.
[230] LRA.
[231] *National Union of Metal Workers of South Africa and others v Aveng Trident Steel and another 2020* ZACC 20 at para 97.
[232] *Fry's Metals (Pty) Ltd v Nation Union of MetalWorkers of South Africa* (2003) 24 *ILJ* 133 (LAC).

In *Algorax*,[233] on the other hand, the employer went above and beyond to persuade employees to accept the proposed new shift configuration. The deadline was repeatedly extended. Employees were asked to rethink their positions. Following the dismissal of employees, Algorax reiterated its offer to re-employ those who had been dismissed if they indicated their willingness to return under the new conditions. This meant that the employees' dismissal amounted to lock-out dismissal, in violation of section 187(1)(c). The employer's behavior was deemed automatically unfair. Employees were reinstated to the old shift system and given several years of back pay.

The Labour Court emphasized in *Schoeman v Samsung Electronics (Pty) Ltd,*[234] that an employer is not permitted to dismiss employees in order to compel them to accept a demand in respect of mutual interest. However, in genuine circumstances, the employer is not prohibited from resorting to dismissal for operational requirements.

In *South African Chemical Workers Union v Afrox Ltd,*[235] the LAC applied a broad interpretation of section 187(1)(c). The court in this matter had this to say:

> The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not be applied here. ….. The first step is to determine factual causation: was participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike?

The effect of prohibiting lock-out dismissal is to signal to employers that the decision to dismiss may be made only when it is clear that no amount of persuasion is likely to persuade the workers to change their minds and accept the employer's new shift system or terms. At that point, the employer must take a firm stance against those employees who continue to oppose the necessary change. The choice must be

[233] *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2004) 24 *ILJ* 1917 (LAC).
[234] *Schoeman v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC).
[235] *South African Chemical Workers Union v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

commercially sound. It must pass the ordinary test for substantive fairness of operational requirements dismissal.

5.3 The application of operational requirements in the workplace

When the employer contemplates reviewing its operations, sections 188(1)(a)(ii) and 189(1) of the LRA give the employer the authority to fire employees based on the employer's operational needs. In order to appropriately position its enterprise in response to market competitiveness, an employer may be required to make changes to its employees' terms and conditions of service. Regardless of the provisions of sections 188(1)(a)(ii) and 189(1) of the LRA,[236] an employer is prohibited from dismissing an employee for refusing to accept a demand relating to a matter of mutual interest under section 187(1)(c) of the LRA.[237] Disputes arising from the employer's intention to change the terms and conditions of employment are classified as conflicts of interest and must be resolved through collective bargaining.

Cohen[238] asserts that, while there is a clear distinction between disputes of interest and disputes of rights, as well as their respective dispute resolution forums and processes, there appears to be some overlap in practice.

Cohen best summarizes this dichotomy as follows:[239]

> Interest disputes are intended to be settled through collective bargaining. Allowing an employer to undermine this process by unilaterally exercising the power to dismiss in order to compel an employee to accept a demand would be a violation of section 187(1) (c) 4 and constitute an automatically unfair dismissal. Despite the broad range of mutual interest.... Regardless of the clear demarcation between interest and rights disputes and their respective dispute-resolution forums, such disputes, by definition, fall under the purview of s 189. Provided the employer can demonstrate on the facts that the proposed changes and resulting dismissals are motivated by operational needs and is "not underpinned by an ulterior motive to dismiss for refusing to comply with a demand," no conflict between sections 187(1) (c) and 189 is required.[240]

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[236] Section 188(1)(a)(ii),189(1) of the LRA.
[237] Thompson 1999 *Obiter* 755.
[238] Cohen 2004 *Obiter* 1883.
[239] *Ibid.*
[240] *Ibid.*

According to section 187(1)(c) of the LRA,[241] employers are not permitted to use dismissal as a coercive tool during the negotiation process to force employees to accept the new terms and conditions of employment. The court stated in *NCBAWU v Hernic Premier Refractories (Pty) Ltd,*[242] that dismissals for the purpose of compelling employees to comply with a demand are automatically unfair.

Todd and Damant,[243] identified an unresolved or insufficiently resolved question about the relationship between collective bargaining and the automatically unfair dismissal provided for in section 187(1)(c), [244] as well as the operational requirements dismissal in terms of section 188(1)(a)(i)(ii) [245] and section 189 of the LRA, as contributing to the uncertainty. Section 187(1)(c), as amended, categorizes a dismissal as automatically unfair if the reason for the dismissal is employees' refusal to accept a demand relating to a matter of mutual interest.[246]

Section 188(1)(a)(ii), on the other hand, states that a dismissal is not automatically unfair if the reason for dismissal is a fair reason and is based on the employer's operational requirements, [247] and the dismissal was carried out in accordance with a fair procedure. The uncertainty identified by Todd and Damant still exists considering the fact that the expectations and the interests between the parties in the employment relationship (employers and employees) will always be opposing. Froneman J in *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen,*[248] elegantly captured the foregoing chronic opposing interests and had this to say:

> Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee exacts in return is not only a wage, but a continuing obligation of fairness towards the

[241] LRA.
[242] *NCBAWU v Hernic Premier Refractories (Pty) Ltd* (2003) 24 *ILJ* 837 (LC).
[243] Todd, Damant "Unfair Dismissal – Operational Requirements" 2004 896 *Obiter* 896-922.
[244] Section 187(1)(c) of the LRA.
[245] Section 188(1)(a)(i)(ii) and section 189 of the LRA.
[246] Section 187(1)(c) of the LRA.
[247] Section 188(1)(a)(ii) of the LRA.
[248] *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC) ('*W L Ochse Webb & Pretorius (Pty) Ltd'*)

> employee on the part of the employer when it makes decisions affecting the employee in his or her work.[249]

The above entails that market forces dictate to the employer the need for flexibility in order to flourish economically or risk bankruptcy if the required flexibility is stifled. As Newaj and van Eck correctly argued, the law must be applied in a way that recognizes commercial principles and recognizes that circumstances may justify the dismissal of employees when the business is fighting for survival.

In response to the market forces, employers may have to utilize the collective bargaining process as a mechanism to introduce new terms and conditions of employment. In an event where an agreement is not reached, the employees who refuse to agree to these new terms and conditions, may in terms of section 188(1)(a)(ii)[250] of the LRA be dismissed based on the operational needs of the company.

In *Schoeman and another v Samsung Electronics SA (Pty) Ltd,*[251] Samsung experienced a situation where the remuneration of the employees was too high to what the Company could afford to pay as it was out of kilter with the marketplace. After negotiations did not yield the required outcomes, the company migrated from collective engagement and dismissed one of the employees involved in the dispute. The Labour Court in this matter was of the view that: "where the pursuit of their rights lead to operational dislocation, it may, in appropriate circumstances, give rise to a situation where dismissal, for operational requirements, as opposed to dismissal for the exercise of rights, becomes permissible. The occasions are liable to be extremely rare. Genuine operational requirements will have to be shown."[252]

[249] *W L Ochse Webb & Pretorius (Pty) Ltd* para A.
[250] Section 188(1)(a)(ii) of the LRA.
[251] *Schoeman and another v Samsung Electronics SA (Pty) Ltd* (1999) 20 *ILJ* 200 (LC).
[252] *Schoeman and another v Samsung Electronics SA (Pty) Ltd* (1999) 20 ILJ 200 (LC).

In *NUMSA v Aveng Trident steel*,[253] employees refused to work according to new shifts as suggested by the employer. The employer tried several times to persuade employees to accept its demand; however, employees remained hesitant to accept their employer's demand, and Aveng dismissed them based on operational requirements. The LAC held that Aveng's operational requirements were the dominant reason or proximate cause for the employees' dismissal, which underpinned the entire process throughout 2014 and 2015 and informed all consultations regarding the changes to the terms and conditions of employment. As a result, the employees' dismissals fell within the range of permissible dismissals for operational reasons and did not violate section 187(1)(c) of the LRA. As a result, the Labour Court's decision was correct.

According to Van Niekerk, the employer cannot simply dismiss employees during a dispute because they refuse to comply with his demands.[254] Van Niekerk goes on to say that the employer is not prohibited from dismissing employees for reasons related to operational requirements if the true intention is to replace the employees with those who are willing to work in accordance with the new changes.[255] The true reason for the dismissal is thus not the employees' refusal to accept the employer's demand, but is motivated by the employer's economic need.[256] Furthermore, Van Niekerk claims that the line between a section 187(1)(c) dismissal and an operational requirement dismissal is always blurry, and it is up to the courts to decide where it should be drawn.[257]

In *Aveng* case since there was a protracted dispute on the true reasons for the employer's decision to dismiss employee. The trade union (NUMSA) petitioned the Constitutional Court for a proper interpretation of section 187(1)(c) and the dismissal of an operational requirement.[258] In a nutshell, NUMSA claimed that the dismissal was justified because the employees refused to accept a demand, and thus it was

[253] *National Union Metal Workers of South Africa v Aveng Trident Steel* (2019) *ILJ* 2024 (LAC) para 75.
[254] Van Niekerk *et al* (2015) 258.
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel* (a division of Aveng *Africa (Pty) Ltd) and another* (2021) 42 ILJ 67 (CC).

automatically unfair. Aveng claimed that the reason for the dismissal was due to legitimate operational requirements, and that the dismissal was therefore fair.

In casu the CC had the opportunity to reconsider the application of the LRA's section 187(1)(c) in relation to automatically unfair dismissals. This judgment has far reaching implications, in the sense that it confirms a long body of prior jurisprudence permitting employers to engage in retrenchments in order to secure a reduction in terms and conditions of employment, but also significant because it has created substantial uncertainty in relation to the legal test that applies where disputes arise.

The Constitutional Court agreed that the appeal should be dismissed and that the Labour Appeal Court's decision should stand. That is, they agreed that where there is a genuine operational need to reduce employment terms and conditions, section 187(1)(c) does not apply, and the dismissal is fair. The critical question, as it has always been, is what the reason for the dismissal is. Appropriately, the Justices split five-five across three separate Judgments in relation to the legal test that applies to determining the cause of dismissal.

In the first instance, the Court favoured the so-called '*Afrox*' test. That test involves two parts. Firstly, the Court must determine whether the act (i.e., a reduction in terms and conditions of employment) is a *sine qua non* or pre-requisite for the dismissal. If that is the case, then an assessment must be made as to the dominant/proximate cause of the dismissal. This involves drawing inferences from the facts. These parts are often referred to as 'factual' and 'legal' causation in criminal law and delict matters. As a result, if the true reason for the dismissal (based on the dominant impression) is the employees' refusal to accept a demand, the dismissal is automatically unjust. If, on the other hand, the dominant impression were that the reason for the dismissal was the employer's operational needs, then the dismissal would be justified.

In the second and third judgments, however, the remaining five Justices rejected the factual and legal causation test and instead applied the test adopted by the Supreme

Court of Appeal in *Stellenbosh Farmers' Winery* in relation to resolving material disputes of fact. This involves an assessment of the credibility of the witnesses (including internal and external contradictions in the evidence given, bias as well as demeanor in the 1witness box), their reliability (including the opportunity to observe the event in question as well as the quality, integrity and independence of the witness's recall) and generally the probabilities or improbabilities of the contradictory versions. Consequently, in the second and third judgments, considerations of factual and legal causation have no bearing on any assessment of what the true reason for the dismissal is. The fact that the Constitutional Court split five-five means that there is presently no certainty in relation to the legal test applicable to determining the true reason for the dismissal in terms of section 187(1)(c) or more generally in relation to automatically unfair dismissals as a whole.

5.4 Conclusion

The balancing of competing interests between employees and employers is problematic in the workplace law since the interests of the employer's trumps-over those of the employees on the basis that the employers are vested with the prerogative to dismiss employees who refuse to accede to their demands based on operational requirements. Employees have been put in a position where they must comply with their employers' demands in order to keep their jobs. Literally, section 187(1)(c) of the LRA does not provide complete protection against employees who refuse to comply with the employer's demands, because the employer always goes above and beyond this section by invoking the provisions of sections 188(1)(a)(ii) and 189 of the LRA. These sections allow employers to dismiss employees who rely on section 187(1)(c) due to the operational needs of the employer's business.

CHAPTER 6

ASCERTAINING THE TEST AND THE TRUE REASONS FOR DISMISSAL IN CASES WHERE THE EMPLOYEES ARE DISMISSED FOR REFUSING TO ACCEDE TO THE EMPLOYER'S DEMAND AND OR BASED ON OPERATIONAL REQUIREMENT OF THE EMPLOYER

6.1 Introduction

The question of what constitutes a valid reason for dismissing employees who refuse to accept proposed changes to their employment terms and conditions has long been a source of contention. According of section 189 of the LRA[259] a dismissal based on operational requirements must be both substantive and procedurally fair. The key question under LRA section 187(1)(c)[260] is whether the reason for the dismissal is a refusal to accept the proposed changes to employment. In the case of *SA Chemical Workers Union v Afrox Ltd*, [261] the court used the criminal law causation test to determine the true reason for the dismissal of employees who were protected under section 187(1)(c) of the LRA because of operational requirements. This chapter discusses how the courts used the aforementioned tests to justify dismissing employees who refused to comply with the employer's demands based on the operational requirements of the employer's business.

6.2 Substantive fairness test in dismissal for operational requirements

According to the courts, the question of whether or not an employer's dismissal for operational reasons is substantively fair is a factual one.[262] The employer must demonstrate that the stated reason for the dismissal is one based on the business's operational needs.[263] In other words, the employer must demonstrate that the reason for the dismissal was based on an employer's economic, technological, structural, or similar

[259] LRA.
[260] Section 187(1)(c) of the LRA.
[261] *SA Chemical Workers Union v Afrox Ltd* (1999) *ILJ* 1718 (LAC).
[262] Basson *et al* (2005) 236.
[263] *Ibid.*

needs, as defined in section 213 of the LRA. Similarly, the employer must demonstrate that the operational requirements existed, that they were the true reason for the dismissal, and that the proffered operational reason was not a cover-up for another reason for the dismissal of the employees.[264]

The requirements for substantive fairness have always been a source of contention.[265] Despite the fact that section 188 of the LRA, 1995 requires the employer to establish a reasonable reason for dismissal, the courts were initially reluctant to scrutinize the employer's rationale for retrenchment.[266]

Following that, a series of Labour Court and Labour Appeal Court cases suggested different formulations for the test to be used when determining the substantive fairness of a dismissal based on the employer's operational requirements, such as "a bona fide reason to retrench", "a commercial rationality to retrench", "a measure of last resort" and "proportionality". The various formulations aided in the establishment of the substantive fairness test. The case law below demonstrates our courts' differing perspectives on the substantive fairness of a decision to dismiss employees for operational reasons.

The court stated in *National Union of Metalworkers of South Africa v Atlantis Diesel Engines (Pty) Ltd,*[267] that 'fairness to retrench goes beyond bona fides and commercial justification to retrench but 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 our courts to state that the termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. This applies equally to termination of employment for economic or operational reasons.'

[264] Basson *et al* (2005) 236.
[265] Van Niekerk *et al* (2015) 315.
[266] *Ibid.*
[267] *National Union of Metalworkers of SA V Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) at 643 B-C.

The Labour Appeal Court held in *SA Clothing & Textile Workers Union & Others v Discreto-A Division of Trump & Springbok Holdings,*[268] that the function of the Labour Court is not to second-guess the commercial or business efficacy of the employer's ultimate decision. The court's function in determining the rationality of the employer's decision is not to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial, or operational decision.

The court stated in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union,*[269] that "the word fair" in section 188 introduces a comparator, which is a reason that must be fair to both parties affected by the decision. The first step is to determine whether there is a commercial rationale for the decision. Nonetheless, rather than accepting such justification at face value, a court is entitled to consider whether the specific decision was made in a way that is also fair to the affected party, namely the employees who will be laid off. To that extent, the court has the right to inquire whether there is a reasonable basis for the decision, including the proposed method, to dismiss for operational requirements. As a result, the test becomes less deferential, and the court has the authority to investigate the content of the employer's reasons, even if the inquiry is not aimed at determining whether the reason offered is the one, which would have been chosen by the court. The mandated test is fairness, not correctness.'

In *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*,[270] the employees' council argued on appeal that the dismissal of the appellants was automatically unfair under section 187(1)(c) of the LRA. The dismissal of the appellants in this case resulted from their refusal to accept the respondent's proposal to change their straight day shift to a rotating shift, which entailed working at night as well as on Saturday and Sunday. On behalf of the appellants, it was argued that the issue of whether the appellants

[268] *SA Clothing & Textile Workers Union & others v Discreto-A Division of Trump & Springbok Holdings* (1998) ILJ 1451 (LAC) at 1455 A-C.
[269] *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2269 (LAC) at 2269 I-2270 A.
[270] *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at para 35 ('*Chemical Workers Industrial Union & others*').

should agree to the respondent's proposed rotating shift was one of mutual interest between the employer and the employee, as contemplated by s 187(1)(c).[271]

The court held that where an employer seeks to reduce costs in his business and demands that his employees agree to work short hours, that employer has genuine operational requirements justifying the working of short hours, but he is not entitled to require them to work short hours without the employees' consent.[272] According to the court, the employer may dismiss the employees for operational reasons in order to permanently get rid of them and hire a new workforce that is willing to work in accordance with the needs of his business.[273] The court also ruled that the employer would be dismissing his former employees because the contracts he has with them no longer adequately serve his operational needs. However, the employer may decide that, for various reasons, such as the employees' skills and experience, he does not want to get rid of his workforce permanently, but rather wishes to retain them, and thus dismisses them not with the intention of permanently employing others in their positions, but rather to compel them to agree to accept his proposals. The court held that such a dismissal is not permitted and, as a result, is automatically unfair, as was the case in this case.[274]

When confronted with a dispute over the fairness of a dismissal, the court further held that it must determine the fairness of the dismissal objectively. The court must answer the question of whether a dismissal was fair or not, rather than deferring to the employer.[275] As a result, it cannot, for example, claim that the employer believes it is fair and thus that it is or should be fair.[276]

The court ruled that the employer chose a solution that resulted in the dismissal of a number of employees when there was clearly a clear way for him to address the

[271] *Chemical Workers Industrial Union & others* at1929 A.
[272] *Chemical Workers Industrial Union & others* at 1929 B-C.
[273] *Chemical Workers Industrial Union & others* at 1929 E.
[274] *Chemical Workers Industrial Union & others* at 1929 I.
[275] *Chemical Workers Industrial Union & others* (LAC) at 1939 G-H.
[276] *Chemical Workers Industrial Union & others* at 1939 J.

problems without any employees losing their jobs or with fewer job losses.[277] As a result, the court should not be hesitant to deal with the matter on the basis that the employer uses a solution that preserves jobs rather than one that results in job losses, particularly a so-called no-fault dismissal, which is regarded as a death penalty in the field of labor and employment law.[278]

In *Mazista Tiles (Pty) Ltd v National Union of Mineworkers*,[279] the court held that the employees were dismissed for a fair reason based on the employer's operational requirements and consequently such a dismissal was substantively fair. Due to fierce competition in the industry, the employer considered restructuring its business in this case in order to reclaim the lost market and remain competitive.[280] As part of the restructuring, he proposed a revision of the benefits and conditions of employment by terminating both the feeding scheme and hostel accommodation he provided to his employees.[281]

The court held that where a dismissal for operational reasons is directly related to the employees' rejection of proposals to change terms and conditions of service, the continued existence of the employees' jobs is irrelevant in determining whether there was a fair reason for dismissal. The court also determined that such dismissal would have been necessary due to changing business requirements, rather than because the jobs themselves were, obsolete.[282] If the requirements of section 189 of the LRA[283] are met, the employer may dismiss employees who reject such proposals and replace them with new employees who are willing to work in accordance with the needs of the business.

[277] *Chemical Workers Industrial Union & others* at 1939 J.
[278] *Chemical Workers Industrial Union & others* at 1940 A-B.
[279]*Mazista Tiles (Pty) Ltd v National Union of Mineworkers* (2004) 25 ILJ 2156 (LAC) at para 58 ('*Mazista Tiles (Pty) Ltd*').
[280] *Mazista Tiles (Pty) Ltd* at para 3.
[281] *Mazista Tiles (Pty) Ltd* at para 10.
[282] *Mazista Tiles (Pty) Ltd* (LAC) at para 54.
[283] Section 189 of the LRA.

The employer proposed ways to increase productivity in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others*.[284] The company intended to make changes to the workplace, such as changing the shift system allowance to increase productivity and improve job security.[285] The employer then dismissed the employees who refused to accept the proposed changes, claiming that the dismissals were necessary due to economic and environmental factors.[286] The Labour Appeal Court ruled that the dismissals were final and were not intended to force employees to accept the proposed changes.[287]

The Supreme Court of Appeal held that section 187(1)(c) only applies to dismissals that are subject to the employer withdrawing them if the employees accept the employer's demand.[288] A dismissal that is final and not subject to revocation is not covered by this section.[289] According to the court, a dismissal contemplated by s 187(1)(c) is temporary because it is subject to withdrawal when employees accept the employer's demand.[290]

In *Food& Allied Workers Union v Kellogg SA (Pty) Ltd,*[291] the court held that dismissing workers to increase profits is permissible; however, the employer must be able to demonstrate that its decision to dismiss was intended to save money.[292] In *Schoeman v Samsung Electronics (Pty) Ltd*,[293] the LC stated that an employer has the right to run his business efficiently and should respond to market demands accordingly. The following is how the LC expressed this point of view:

> "An employer in the private sector needs to be able to survive and prosper economically. To do this the employer must meet changed market circumstances and be competitive. To meet the changes of the market adaptations are required. An employer needs the flexibility to deploy, reasonably, quickly and efficiently, the resources at the employer's disposal".[294]

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[284] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 137 F ('*Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA').*
[285] *Fry's Metals (Pty) Ltd* at 137 G & 138 B-C.
[286] *Fry's Metals (Pty) Ltd* at 149 F-G.
[287] *Fry's Metals (Pty) Ltd* at 152 J.
[288] *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 C-D ('*NUMSA & others*').
[289] *NUMSA & others* at 708 F.
[290] *NUMSA & others* at 708 E.
[291] *Food & Allied Workers Union v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC) at para 413A.
[292] *Food & Allied Workers Union v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC) at para 413A.
[293]*Schoeman v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC).
[294] *Schoeman v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC) para 8.

A merger between two companies resulted in the dismissal of an employee in *Hendry v Adcock Ingram*. [295] As a cost-cutting measure, one employee's work was added to the task of another employee. The Labour Court agreed that this was a reasonable reason for dismissal due to operational needs. The court held that fair labor practices do not entitle employees to indefinite employment with a single employer. The employer has the option to retrench if it is financially crippled or if a sound economic, rationale is demonstrated.

The Labour Appeal Court articulated the role of the courts in assessing fairness in *SACTWU v Discreto-a division of Trump & Springbok Holdings*.[296] The LAC interpreted the court's role in determining substantive fairness as follows in this case:

> "The function of a Court in scrutinising the consultation 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 on 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 latter 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 decision 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."

Zondo JP reiterated in *County Fair Foods (Pty) Ltd v OCGAWU,*[297] that, where the employer relies on operational requirements to establish the existence of a fair reason to dismiss, the employer must show that the dismissal of the employee could not be avoided.

In CWIU v Algorax (Pty) Ltd, Zondo JP emphasized this point, stating that:[298]

> "After all, section(s) 189(2)(a)(i) and (ii) read with subsection (3)(a) and (h) implies that the employer has an obligation, if at all possible, to avoid dismissals of employees for operational requirements altogether or to minimize the number of dismissals', if possible, and to consider

[295] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC).
[296] *SACTWU v Discreto-a division of Trump & Springbok Holdings* [1998] 12 BLLR 1228 (LAC).
[297] *County Fair Foods (Pty) Ltd v OCGAWU* [2003] 7 BLLR 647 (LAC).
[298] *CWIU v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

other alternatives of addressing its problems without dismissing the employees and to disclose in writing what those alternatives are that it considered and to give reasons 'for rejecting each of those alternatives."

6.3 Procedural fairness test in dismissal for operational requirements

The question of whether an employer's dismissal for operational reasons is procedurally fair is determined by whether the employer met all of the requirements for a fair procedure outlined in section 189.[299] The employer must demonstrate, on the balance of probabilities, that the procedure followed was in accordance with section 189.[300] In summary, the requirements for a procedurally fair dismissal that the employer must follow as set out in section 189 are as follows:[301]

a) "The employer must consult with the person(s) whose dismissal is contemplated;"
b) "The consultation must be "a meaningful joint consensus-seeking process" in that it must attempt to reach consensus on appropriate matters;"
c) "The employer must make written disclosure of relevant information, which includes, *inter alia*, the reasons for the proposed dismissals and the alternatives considered before the proposal to dismiss;"
d) "The employer must allow the person whose dismissal is contemplated an opportunity to make representations;"
e) "He must further consider and respond to representations and where denied, reasons must be provided therefore;"
f) "The employee(s) to be dismissed must be selected according to agreed criteria by the parties;" and
g) "The employer must disclose the severance pay that is proposed".

Failure to comply with any of the above-mentioned requirements during a retrenchment exercise for operational requirements will render the retrenchment exercise procedurally

[299] *South African Chemical Workers Union and others v Afrox Ltd* (1998)19 ILJ 62 (LC) at 73 E.
[300] Grogan *Workplace Law* (2014) 319.
[301] Section 189 of the LRA.

unfair. When an employer considers retrenching its employees, the LRA requires it to initiate a consultative process with the employees who will be affected by the dismissals or their representatives.

Section 189(2) of the LRA envisions the consultative process as a "meaningful" joint consensus-seeking process, implying that the employer should make a genuine effort to reach consensus on the issues specified in section 189(2) [302] rather than simply going through the motions.[303] The court held in *Atlantis Diesel Engines,*[304] that the term "contemplate" "simply means that an employer who suspects that he may have to retrench employees in order to meet his operational objectives", must consult with the employees who are likely to be affected (or their representatives) as soon as possible to inform them of the possibility of retrenchment and the reasons for it.

Section 189A of the LRA[305] provides for additional procedural fairness requirements in large-scale retrenchments, the main requirements of which include the employer's duty not to retrench employees during a strike and to submit to facilitation by the Council for Conciliation, Mediation, and Arbitration (CCMA) or an accredited agency during the consultation process.[306] Either party may request that the CCMA appoint a facilitator. Furthermore, section 189A of the LRA establishes a 60-day moratorium during which the employer may not dismiss; beginning on the date notice was given in accordance with Section 189. (3).[307] Section 189A applies to employers with more than 50 employees, but at least 10 must be designated for retrenchment.[308]

Our courts have established procedural fairness principles in numerous decisions. Section 189 requires parties to consult in order to reach an agreement on a variety of issues.[309] As a result, consultation is not one-sided.[310]

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[302] Section 189(2) of the LRA.
[303] Basson *et al* (2005) 240.
[304] *Atlantis Diesel Engines* (1993) 14 *ILJ* 642 (LAC).
[305] LRA.
[306] Grogan *Workplace Law* (2014) 342.
[307] Section 189A(7)(a) of the LRA.
[308] Grogan *Workplace Law* (2014) 319.
[309] Grogan *Workplace Law* (2014) 324.

In *Food and Allied Workers Union & others v SA Breweries*,[311] "SA Breweries anticipated that in its pursuit of a World Class Manufacturing (WCM) strategy that such strategy could lead to job losses. It, therefore, attempted to negotiate a 'Workplace Change Agreement' with the union nationally". When the negotiations failed, the company decided to end its ongoing negotiations with the union and refused the unions' request for a month to study the company's business plan and formulate a response.[312] The company then immediately began restructuring each brewery and began implementing its proposal before the union presented its counter-proposal. It then pretended to consult with the union in circumstances where reversal was virtually impossible.[313]

The court ruled that the company's procedural unfairness in this case was serious. The company had unilaterally fixed not only the restructuring model, but also the entry level for the new job specifications on a national scale.[314] Furthermore, the company completely ignored the selection criteria for retrenchment in the parties' collective agreement.[315]

Section 189(1) also requires the employer to consult with any person with whom the employer is required to consult under a collective agreement about dismissals.[316] If there is no collective agreement requiring consultation, the employer must consult with a workplace forum and any trade union whose members are likely to be affected by the proposed dismissals if the employees likely to be affected by the proposed dismissals work in a workplace where there is a workplace forum.[317] If no workplace forum exists, the employer is required to consult with any registered trade union.[318]

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[310] *Ibid.*
[311] *Food and Allied Workers Union & others v SA Breweries* (2004) 25 *ILJ* 1979 (LC) at 1984 I – 1985 B.
[312] *Food and Allied Workers Union & others v SA Breweries* (2004) 25 ILJ 1979 (LC) at 2028 A-G ('*Food and Allied Workers Union & others'*).
[313] *Food and Allied Workers Union & others* at 2029 G-H.
[314] *Food and Allied Workers Union & others* at 2031 B-C.
[315] *Food and Allied Workers Union & others* at 2031 C.
[316] Section 189 of the LRA.
[317] Section 189 of the LRA.
[318] Section 189 of the LRA.

In *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa*,[319] the employer was engaged in a consultative process with NUMSA for the retrenchment of hourly paid workers in accordance with section 189 of the Act.[320] Aside from the retrenchment, Aunde SA intended to re-employ the workers on the minimum level pay and conditions of service prescribed by the bargaining council's main agreement.[321] NUMSA opposed the proposal, but UASA, the other consulting union for monthly salaried employees, accepted it.[322] As NUMSA's membership had dwindled, Aunde SA entered into a recognition agreement with UASA, recognizing UASA as Aunde SA's sole bargaining representative.[323] The latter agreement was followed by a signed agreement with UASA, which stated that the hourly paid employees would be retrenched and re-employed on new terms and conditions.[324] When NUMSA requested to continue consulting, Aunde SA informed it that its membership had fallen below a majority in the bargaining unit.[325]

According to the Labour Court's decision, the main issue for determination was whether the appellant had a duty to consult with the respondent (NUMSA) after it lost its case and after the appellant had signed a recognition agreement with UASA and obtained a majority membership.[326] The Labour Court concluded in its decision that, while Aunde SA and UASA had a recognition agreement, the agreement did not regulate the consultation process in the event of a retrenchment. As a result, because the recognition agreement did not include a retrenchment procedure, Aunde SA was required to consult with NUMSA before the dismissal of its members for operational reasons.[327] As a result of the appellant's failure to consult with the respondent, the Labour Court held that the retrenchment of the respondent's members was procedurally

[319] *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South* Africa (2011) 32 ILJ 2617 (LAC) at 2619 F-G.
[320] Labour Relations Act 66 of 1995.
[321] *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2619 G (‘*Aunde South Africa (Pty) Ltd’).*
[322] *Aunde South Africa (Pty) Ltd* I & 2619 B.
[323] *Aunde South Africa (Pty) Ltd* at 2621 G-I.
[324] *Aunde South Africa (Pty) Ltd* at 2622 F-G.
[325] Aunde South Africa (Pty) Ltd at 2623 H-I.
[326] *Aunde South Africa (Pty) Ltd* at 2624 A.
[327] *Aunde South Africa (Pty) Ltd* at 2623 H-I.

unfair.[328] The current appeal was dismissed because the court found no reason to overturn the Labour Court's decision.[329]

Section 189's procedural fairness requirements apply in the case of large-scale retrenchments by the employer.[330] As a result, in the case of large-scale retrenchment, the employer must comply with the procedural fairness requirements outlined in sections 189 and 189A.[331]

In *National Union of Mineworkers & Others v Revan Civil Engineering Contractors & Others*, [332] a limited retrenchment grew into a larger retrenchment, and the provisions of section 189A were put into effect. This is a case in which three affiliated companies, Requad, Revan Plant, and Revan Civils, began retrenchment of 31 employees, followed by a further 39 employees. The reason for this was that the third respondent (Requad), a company with BEE credentials, had experienced a "dramatic reduction" in the number of tenders available from the government and private sector over a 12-month period and, as a result, had to scale down its activities. Requad's position had an impact on Revan Plant and Revan Civils, whose activities were closely related to Requad.[333] As a result, both Revan Plant and Revan Civils had to curtail their operations. However, the companies' financial situations deteriorated to the point where a further 39 names had to be added to the initial list of potential retrenches. Each company served notices of dismissal on their employees and held consultations in accordance with section 189 of the LRA.

The applicants in the Labour Court challenged this course of action, and as a result, the employers made two concessions, namely: Section 189A was applied to the entire retrenchment exercise, and LIFO (last in, first out) should have been used as a

[328] *Aunde South Africa (Pty) Ltd* at 2624 A.
[329] *Aunde South Africa (Pty) Ltd* at 2624 B-C.
[330] Basson *et al* (2005) 261.
[331] *Ibid.*
[332] *National Union of Mineworkers & others v Revan Civil Engineering Contractors & Others* (2011) 32 *ILJ* 2167 (LC) 2624 D.
[333] *National Union of Mineworkers & Others v Revan Civil Engineering Contractors & others* (2011) 32 *ILJ* 2167 (LC) at 2628 H (‘*National Union of Mineworkers & others’*).

selection criterion across all companies.[334] The union claimed that the dismissals were illegal and invalid under section 189A because no facilitator was appointed and the termination notices were issued prematurely.

The court rejected the union's argument but found that some of the dismissals were procedurally unfair.[335] The union argued on appeal that all of the retrenchments were invalid due to noncompliance with the provisions of section 189A. In response, the employers claimed that the appeal courts lacked "jurisdiction" to hear the case due to the terms of section 189A. (18).[336] Section 189A (18) states that “the Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it under section 191(5)(b)(ii)”. The court ruled that ‘unless there has been a valid dismissal, the court may not intervene on the grounds that the dismissal was unfair, and section 189A(18) is not intended to disturb this principle.[337] The court also held that the dismissals were invalid because they violated section 189A of the LRA.[338]

6.4 Factual and legal causation test for dismissal based on operational requirements

It is difficult to distinguish between a dismissal that is genuinely based on operational requirements and one that is intended to compel employees in relation to a matter of mutual interest in the context of proposed changes to terms and conditions of employment. Cohen[339] argues for the use of the causation test when examining proposed changes to employment terms and conditions. Whether the dismissal is motivated by operational needs or a desire to persuade employees to comply with an employer demand.

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[334] *NUM & Others* at 2174 A & 2176 G.
[335] *NUM & Others* at 2177 B & 2180 C.
[336] *Revan Civil Engineering Contractors & others v NUM & others* (2012) 33 ILJ 1846 (LAC) at 1848 A-B. (‘*Revan Civil Engineering Contractors & others*’).
[337] *Revan Civil Engineering Contractors & others* at 1849 A-B.
[338] *Revan Civil Engineering Contractors & others* at1849 E.
[339] Cohen T *"Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable*?" 2004 *ILJ* 1883.

In *South African Chemical Workers Union v Afrox Ltd,*[340] employees had gone on a protected strike, and the employer had dismissed them due to operational needs. The court had to decide whether the employees were dismissed because of their strike participation or because of genuine operational requirements. Using the causation test, the court determined that the employees were dismissed for operational reasons rather than their participation in the strike.

6.4.1 Factual causation

In terms of the factual causation test, the question that must be asked is whether the employees would have been dismissed if the employer had not attempted to change their working conditions. Firstly, if the answer is that the dismissals would have occurred even if the employer had not proposed changes to the terms and conditions of employment, then the dismissal is not automatically unfair. Secondly, even if the answer is that the dismissal would not have occurred if the employer had not proposed the changes, this does not automatically render the dismissal unfair. The investigation then proceeds to the next stage, legal causation.

6.4.2 Legal causation

The question in the legal causation test is whether the proposed changes to the terms and conditions of employment were the "main" or "dominant" reason for the dismissal. The answer to the question is determined by the purpose of the change and the reason for the dismissal. If it cannot be inferred from the investigation that the dismissal was intended to compel employees to accept the employer's demand, the next step should be to invoke section 189 to determine whether the dismissal was made for a reasonable reason based on operational requirements, as well as whether a reasonable procedure was followed. Section 189[341] is a reliable tool that can be used to distinguish between a

[340] *South African Chemical Workers Union v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).
[341] Section 189 of the LRA.

dismissal that is genuinely based on operational requirements and one that is intended to secure an employee's compliance with a demand.

In *Van der Velde v Business and Design Software (Pty) Ltd,*[342] the Court endorsed the causation test in situations where there is an allegation related to the contravention 187(1)(c) of the LRA. In this regard, the court was of the view that:

> "If the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair. When the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements. The test for factual causation is a 'but for' test - would the dismissal have taken place but for the transfer? If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors".

6.5 Conclusion

Employees should not refuse to comply with the employer's demands in order to save their jobs, and employers should not compel employees to comply with proposed changes to employment terms and conditions. On the one hand, section 187(1)(c) protects employees against dismissal meant to compel them to accede to the employers' demands. On the other hand, section 188(1)(a)(ii) allows employers to fire employees who refuse to comply with their demands based on operational needs. Similarly, section 189, imposes on employers the burden of ensuring that employee dismissal based on operational requirements is both substantive and procedurally fair. Employees dismissal based on operational requirements that is substantively or procedurally unfair falls within the scope of automatically unfair dismissal. The dismissal of employees based on operational requirements must also satisfy or pass the causation test as out in *South African Chemical Workers Union v Afrox Ltd.*[343]

[342] *Van der Velde v Business & Design Software (Pty) Ltd* (2006) 27 *ILJ* 1738 (LC).
[343] *South African Chemical Workers Union v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

Strike action was considered a breach of contract in South Africa under common law, and employers were permitted to dismiss employees who participated in industrial actions. Section 23(2)(c) of the Constitution guarantees the right to strike. Strikes and lock-outs are regarded as necessary components of the collective bargaining process because they provide a sanction for parties to use to back up their demands. In *NUMSA v Bader Bop,*[344] the court held that "it is through industrial action that workers are able to assert bargaining power in industrial relations". The right to strike is an essential component of a successful collective bargaining system. The importance of those rights in promoting a fair working environment must therefore be understood when interpreting the rights in section 23. Furthermore, the LRA also gives effect to the right to strike. The ILO Conventions make no explicit mention of the right to strike. The right to strike is only implied by the Conventions.

The right to collective bargaining as enshrined in the Constitution should be exercised by equally by all parties in the workplace environment in order to resolve matters pertaining to employment. Employers are not permitted to unilaterally change the terms and conditions of employment of their employees under section 64 of the LRA. Employees' consent must be obtained voluntarily. If the employer wishes to make any changes to the employment, the employer is required to initiate negotiations with its employees or their representatives. That alone is enough to start the collective bargaining process. If negotiations reach a point of impasse, the employer has legal remedies.

The LRA provides in terms of section 213[345] that, "the employer may exclude its employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of

[344] *NUMSA v Bader Bop (Pty) (Ltd) & Another* 317 para A-B.
[345] Section 213 of the LRA-"Lock-out".

employment in the course of or for the purpose of that exclusion". This is not without limitations; firstly, employers are not permitted to use replacement labour during a lockout unless it is a defensive lockout (meaning it is in response to a strike). The second limitation is the fact that the company will not produce during the course of the lock-out as there will be no labour force available, which will economically hurt the company.

The LRA further empowers the employer to review its operations in terms of sections 188(1) (a) (ii) and 189(1), which allows the employer to dismiss the employees based on the employer operational needs, provided that the dismissal contemplated by the employer is both substantive and procedural fair. Despite the protection afforded to employers under section 187(1)(c) of the LRA, employers are free to dismiss employees who refuse to accept changes to their working conditions based on the employer's operational needs.

The courts are forced to weigh the interests of employees in terms of social security against the interests of employers in terms of economic needs for their businesses.[346] Section 187(1)(c) forbids employers from dismissing employees who refuse to submit to their employer's demands. If an employer dismisses employees for having refused to accept its demands and later offers to re-employ employees who are willing to accede to his demands, such dismissal will fall foul of automatically unfair dismissal. Dismissal must be final and cannot be accompanied by any condition of re-employment. Section 187(1)(c) was intended to make conditional dismissal unlawful in order to force employees to accept a demand. The dismissal must be irreversible and without the possibility of re-employment. Conditional dismissal or non-final dismissal is equivalent to lock-out dismissal and violates section 187(1)(c) of the LRA.

In *Chemical Industrial Workers Union v Algorax,*[347] the Labour Appeal Court held that the dismissal of employees was unjust, despite the employer's concession that it had a

[346] Section 1 of the LRA.
[347] *Chemical Industrial Workers Union v Algorax* (2003) 24 *ILJ* 1977 (LAC).

valid operational requirement to do so. The dismissal was deemed unjust because Algorax offered to re-employ the dismissed employees even after the ostensibly final dismissal. The court ruled that the employer's actions constituted lockout dismissal and violated section 187(1)(c) of the LRA of 1995.

The courts have on numerous occasions attempted to interpret the actual meaning of section 187(1) (c)[348] of the LRA. In *Fry's Metals*,[349] the court interpreted the dismissal in terms of section 187(1)(c) 442 to prohibit conditional dismissal, and that if the dismissal is final and irrevocable, it could not have been intended to compel them to accept the proposed changes to terms and conditions of employment.

Sections 188(1)(a)(ii) and 189 of the LRA, in particular, allow employers to dismiss employees based on operational needs. As a result, one could argue that section 187(1)(c) does not provide full protection to employees who go on strike to put pressure on employers to meet their needs. The aforementioned sections limit employees' interests while protecting employers.

It is submitted that the tension and contradictions between sections 187(1)(c), 188(1)(a)(ii), and 189[350] militates against the reality that, the terms and conditions of employment ought to be responsive to the operational needs, and where contrary is found, the employer will be forced to restructure its business which may include the termination of employment for some of its employees or risk closing down the business.

The study recommends that employers and employees should help one another to protect their interests and try to balance their competing interests. If an employer faces a decline in profit and which may result in the closing down of the business, the employees should help the employer to save both the business and employment by accepting the proposed changes of terms and conditions of employment, which are meant to save jobs and the business. The employer should not change the terms and

[348] Section 187(1)(c) of the LRA.
[349] *Fry's Metals v National Union of Metalworkers of South Africa* (2003) 24 ILJ 133(LAC).
[350] 188, 187(1)(c), 189 of the LRA.

conditions of employment at his or her discretion. The parties must both initiate the process of collective bargaining in order to find an amicable solution to their conundrum. It is only through collective bargaining whereby employers and employees could solve their problems affecting employment and the business of the employer.

It cannot be disputed that the LRA has vested the employers with more powers and rights than the employees. Employers can dismiss employees who refuse to accede to their demands based on operational requirements. Section 187(1)(c) pf the LRA was rendered inactive by the provisions of section 189 of the LRA because employees could not even rely on it since they were aware of the financial difficulties which the companied endured. Employers are not prohibited by section 187(1)(c) from dismissing employees who refuse to accept a demand if the effect of the dismissal is to save other workers from retrenchment.

Finally, it appears to be a safer approach for an employer who wishes to change the terms and conditions of his/her employees in circumstances where the business's viability is threatened to treat the matter as a retrenchment exercise from the start and replace the workers permanently with those who are willing to work under the terms and conditions to meet the employer's requirements. In addition, employers should not abuse the provisions of section 189 of the LRA in order to exploit employees.

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