

AN APPRAISAL OF THE RETRENCHMENT OF WORKERS DURING STRIKES

by

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The main object of labour law has always been, to counteract the inequality of bargaining power which is inborn in the employment relationship. Furthermore, collective bargaining enjoys protected status under the law and aims to resolve more than just issues concerning wages. It regulates the economy as well as the country's democracy.

The International Conventions *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (hereafter *Convention 87*) and the *Right to Organise and Collective Bargaining Convention*, 1949 (hereafter *Convention 98*) state that both employer and the employee have the right to organise and bargain collectively. The International Labour Organization (hereafter the *ILO*) *Convention on the Termination of Employment Convention*, 1982 (hereafter *Convention C158*) also states the grounds on which an employee can be terminated. South Africa is member state of the *ILO* and has only ratified *Convention 87* and *Convention 98* and has not ratified *Convention C158*.

The Constitution on South Africa No 108 of 1996 contains the right to strike as set out in section 23 of the Constitution, and section 39 ensures that the obligations incurred by South Africa as a member state of the *ILO* are given effect to, furthermore, the Labour Relations Act 66 of 1995 (hereafter the *LRA*) gives effect to the right to strike. The *LRA* also sets out limitations to the right to strike.

The *LRA* on the one hand, states that an employer is not allowed to dismiss workers who are participating in a protected strike. Such a dismissal will be automatically unfair in terms of section 187(1)(a). However section 67(5) of the *LRA* states that it is not unlawful to dismiss a striking employee for reasons based on the employer's operational requirements. The two provisions clash, and thus this dissertation seeks to determine what the right to strike entails and furthermore, the paper explores the concept of automatically unfair dismissals against the provisions in section 188 (1) (a) (ii) of the *LRA* that allows an employee to be dismissed based on the employers' operational requirements.

The LRAA brought some changes to the definition of automatically unfair dismissal. The dissertation seeks to discover whether the said amendments to section 187(1)(c) adequately solve the anomaly that the two clashing provisions caused.

CHAPTER ONE

INTRODUCTION

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1. Contextual background

South Africa has a high unemployment rate, at 26.5 %¹, a huge wage gap, and vast economic inequalities between the rich and the poor.² The country is a member of the International Labour Organization (hereafter the ILO), which has norms regarding freedom of association, collective bargaining and the validity of reasons for dismissal.

The right to collective bargaining and the right to strike are enshrined in the South African Constitution, while unfair dismissal is regulated in the *Labour Relations Act* (hereafter the *LRA*). On the one hand, employers may retrench employees during protected strikes, and on the other hand, dismissal is automatically considered unfair if it is made to compel employees to accept a demand.

One of the objectives of the *LRA*³ is to promote orderly collective bargaining.⁴ According to Grogan, collective bargaining is the manner in which employers and groups of employees, which are usually organised, seek to resolve their conflicting goals mutually.⁵ The *LRA* regulates the right to strike and also prescribes the principles regarding the fair termination of contracts on grounds of operational requirements. Apart from national law, international law also regulates the employment relationship and the right to collective bargaining in South Africa. Section 23 (2) of the *Constitution*

¹ Statistics South Africa 2017 <http://statssa.gov.za>.

² Massie et al (2014); Van Eck (2017) 1.

³ Act 66 of 1995.

⁴ S1 of the LRA.

⁵ Grogan (2014) 404.

of the Republic of South Africa, 1996 (hereafter the *Constitution*) enshrines the right to engage in collective bargaining and the right to strike. Furthermore, South Africa is a member state of the ILO, which has established norms regarding the right to organise and bargain collectively.⁶

Closely connected to the right to engage in collective bargaining is the right to strike, as enshrined in the *Constitution*.⁷ However, just as with most rights, there are limitations to the right to strike, as envisioned in Chapter IV of the *LRA*.⁸

When workers participate in strikes, employers all too often resort to lock-outs and employ replacement labour.⁹ Employers may retrench workers engaged in a protected strike. Section 187(1)(c) of the *LRA* seeks to protect workers by prohibiting employers from dismissing them during the collective bargaining process if the aim is to compel the workers to accept changes regarding any matter of mutual interest.¹⁰ Furthermore, employers are not at liberty to force workers to accept changes to work conditions and to threaten to dismiss those who do not accept the changes.¹¹ Despite this prohibition, employers may still terminate a contract of employment based on operational requirements, if rules of fairness are followed.¹²

Amendments to section 187(1) (c) of the *LRA*,¹³ under the heading "Automatically unfair dismissals" have changed when dismissal is regarded as "automatically unfair". Whether this amendment has had any effect, however, is still a question to be answered.¹⁴ Cases decided by the court even after the amendment suggest that employers can dismiss workers for operational requirements.¹⁵

In the words of the judge Froneman "fairness has become the hallmark, or essence, of labour law and practice and it does not merely serve as a moral adjunct

⁶ Convention 9 of the International Labour Organisation (1949).

⁷ Grogan (2015) 429; S 23 of the Constitution.

⁸ Van Niekerk *et al* (2015) 415; Grogan (2015) 429.

⁹ Newaj and Van Eck 2016 *PELJ* 3.

¹⁰ As above.

¹¹ Newaj and Van Eck 2016 *PELJ* 3.

¹² S189 of the *LRA*.

¹³ S187(1)(c) of the *LRA*.

¹⁴ Le Roux (2016) 44.

¹⁵ *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 LAC; *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2005 ILJ 689 (SCA).

thereto.”¹⁶This clearly indicates that the constitutionality and fairness of Section 187(1) (c) has been a challenge in recent years.

In this dissertation, I seek to examine how the right to dismiss striking workers on grounds of operational requirements should be balanced with the protection extended by the definition of automatically unfair dismissals. Further, I consider whether an employer may strong-arm employees by threatening to dismiss them during collective bargaining.¹⁷

As correctly stated by Thompson, collective bargaining enjoys protected status under the law and aims to resolve more than just issues concerning wages. It regulates the economy as well as the country’s democracy.¹⁸ It is submitted that collective bargaining forms an integral part of the retrenchment of workers for operational requirements. A gap in the law has been identified whereby employers may get away with dismissing workers unfairly under the guise of operational requirements. Further, the South African economy is underperforming, so now, more than ever, the retrenchment of workers should be regulated in a way that does not limit the constitutional right to strike. This is consistent with the purpose of the Act,¹⁹ which is to advance economic development, social justice and orderly collective bargaining.

2. Research questions

This dissertation poses two research questions:

- Does the *LRA* establish an appropriate balance between the retrenchment of workers during strikes and the protection afforded to workers during collective bargaining?
- Has the amendment that was made to the definition of “automatically unfair dismissals” adequately resolved the problems that existed prior to the amendments?

¹⁶ *Afrox* case para 22.

¹⁷ Thompson (2006) ILJ 707.

¹⁸ Thompson (2006) ILJ 707.

¹⁹ S1 of the LRA.

3. Significance of the study

The retrenchment of workers in South Africa has extensive consequences not only for employers and employees but for the South African economy as a whole. The economy is struggling and cannot afford the current unemployment rate of 26.5%.²⁰ Employers, however, need to keep up with changes in the market economy, including competition from other countries and even though employers are at liberty to dismiss workers during strikes on the ground of operational requirements, the question remains whether the Labour Relations Amendment Act (hereafter the LRA of 2014)²¹ has established an appropriate balance between the retrenchment of workers during protected strikes and collective bargaining as an institution.

4. Research methodology

My research methodology will be a critical analysis of the applicable books, articles, case law and statutes, and will also include a critical analysis of South African literature and case law, as well as international law. In essence, I will employ a desktop research methodology. It was decided merely to focus on international norms rather than embarking on a comparative analysis. Countries could not be identified which permit retrenchments during strikes and which also provide for automatic unfair dismissals.

5. Structure of the chapters

Chapter 1 gives the background of the subject title and explains the research questions and the significance of the study and the research methodology.

Chapter 2 discusses the international norms on collective bargaining, the right to strike and the dismissal of workers, with specific reference to the ILO.

Chapter 3 explains protected strikes and operational requirements and looks at the circumstances in which employees participate in protected and unprotected strikes, as well as the consequences according to the *LRA*. It also analyses the position of various case laws.

Chapter 4 explores employers' constitutional right to a lockout and the interaction between strikes and lockouts. It also explains whether the amendments to the *LRA*

²⁰ Statistics South Africa 2017 <http://statssa.gov.za>

²¹ Act 6 of 2014.

have resolved the problems regarding the interplay between lockouts and automatically unfair dismissals.

Chapter 5 is a critical evaluation of large-scale retrenchment on the grounds of operational requirements in South Africa.

The dissertation concludes with a discussion on whether the *LRA* established an appropriate balance between the retrenchment of workers during strikes and the protection afforded to workers during collective bargaining. It also discusses whether the amendment to the definition of automatically unfair dismissals has adequately resolved the problems that existed prior to the amendment.

CHAPTER TWO

THE INTERNATIONAL LABOUR ORGANIZATION: COLLECTIVE BARGAINING AND DISMISSAL

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1. Introduction

Before 1994, international standards performed only an indirect role in the development of South African labour law. This has changed significantly and a meaningful study of labour law is impossible without at least a basic knowledge of the institutions that shape international labour standards, the content of those standards and the relationship between them and domestic labour relations.²²

The new constitutional dispensation initiated after the creation of a democratic government in 1994 expressly recognises international law as a foundation of democracy.²³ The ILO constitutes an important source of customary international law, and international instruments that validate international standards are clearly recognised by the Constitution as points of reference for the interpretation of labour laws and other legislation.²⁴

²² Van Niekerk *et al* (2015) 21.

²³ S39, The Constitution, 1996.

²⁴ Van Niekerk *et al* (2015) 21; S39 The Constitution, 1996.

In this chapter, we discuss the structure and role of the ILO and the purpose and significance of international labour standards for South African labour law with regards to the dismissal of workers during strikes.

2. The International Labour Organization

The *Treaty of Versailles* signed in 1919 established the ILO.²⁵ The organisation comprises three bodies: the International Labour Conference, the Governing Body, and the International Labour Office. The primary purpose of the ILO is to provide for the international regulation of labour standards, founded on three principles:

- universal and lasting peace can be established only if it is based upon social justice
- conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled;
- the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.²⁶

South Africa is a member of the ILO.²⁷ According to South African law, ratification of an international convention does not automatically make it part of national law.²⁸ Therefore, the *LRA* was enacted to apply the important provisions of the Bill of Rights and also to give effect to the public international law obligations on labour relations.²⁹

Section 39(1) of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Further, when interpreting any legislation, courts must prefer any reasonable explanation of the legislation that is consistent with international law above any other interpretation that is inconsistent with international law.³⁰

The ILO operates by way of ILO standards and these are included in the conventions and recommendations, which are then adopted by the International Labour

²⁵ The Constitution of the ILO was included in the Preamble of Part XIII of the Treaty.

²⁶ Preamble of the Constitution of the ILO; Du Toit *et al* (2015) 76.

²⁷ South Africa was a member state from 1919 to 1996 and rejoined the ILO on 26 May 1994.

²⁸ Erasmus & Jordaan *SAYIL* (1993) 65.

²⁹ Du Toit *et al* (2015) 76.

³⁰ S233 of the Constitution.

Conference. The conventions are not automatically binding; ILO member states must first ratify the convention to make it enforceable.³¹

3. The right to strike according to the ILO

According to the supervisory bodies of the ILO,³² the right to strike can be derived from the *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (hereafter *Convention 87*) and the *Right to Organise and Collective Bargaining Convention*, 1949 (hereafter *Convention 98*).³³ The right to strike is drawn from collective bargaining and is an important component of collective bargaining.³⁴ Workers can use industrial action as a weapon to maintain the equilibrium between labour and the strong power of capital.³⁵ Jacobs maintains that in the process of collective bargaining, the parties involved should be at liberty to enforce economic pressures to force the opposite party to make allowances. Without this, the author contends that collective bargaining would amount to collective "begging".³⁶ The purpose of *Convention 98* is to protect workers and their representatives against being victimised by their employers because of their trade union activities.³⁷

Convention 87 deals with freedom of association, but the ILO supervisory bodies do link the protection of the right to strike with *Convention 98*.³⁸ However, in terms of *Convention 87*, the supervisory bodies have interpreted that the right to strike exists,³⁹ even though the Constitution of the ILO, *Conventions 87* and *Convention 98* do not contain an "explicit right to strike".⁴⁰

³¹ Van Niekerk *et al* (2015) 23.

³² ILO Governing Body Committee of Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations.

³³ ILO Convention 87 of 1949 and ILO Convention 98 of 1949; Du Toit (2016) 478; Van Niekerk *et al* (2015) 415.

³⁴ ILO Convention 98 of 1949.

³⁵ Van Niekerk *et al* (2015) 415.

³⁶ Jacobs (2010) 659.

³⁷ Du Toit *et al* (2015) 659.

³⁸ Creighton(2010) 331.

³⁹ Creighton(2010) 331.

⁴⁰ Brik (2001) ; Creighton(2010) 331; Van Niekerk (2015) 415.

4. Challenges of the right to strike

As mentioned earlier, the supervisory bodies had interpreted that in terms of *Convention 87* a right to strike exists although not explicitly stated in the Convention. However, the reason why Convention 87 did not contain an explicit right to strike was due to difficulties in procedures and political challenges that were of the opinion that a certain explanation was not important. Furthermore, workers were concerned that a certain right to strike would cause restrictions.⁴¹

At a later stage, employers' organisation disputed the status of the ILO's supervisory bodies, stating that the ILO bodies went beyond their mandate when they alleged that the right to strike can be inferred from *Convention 87*.⁴² Furthermore, the employers' organisation was of the opinion that *Convention 87* does not explicitly refer to the right to strike.⁴³

In 2012, the right to strike, as interpreted by the ILO, was contested by the employer's organisation,⁴⁴ which argued that *Convention 87* makes no mention of that right. In addition, the organisation argued that the job of the supervisory bodies is to comment on the application of *Convention 87* and that the supervisory bodies did not have a mandate to interpret the right to strike in *Convention 87*.⁴⁵ And lastly that the latter did not change its mandate since it was started in 1926.⁴⁶ Furthermore, the organisation argued that, according to Article 37.1 of the Constitution, only the International Court of Justice can interpret ILO Conventions.⁴⁷

In February 2015, the workers and the employers' organisations delivered a statement in which they acknowledged the mandate of the supervisory bodies in terms of the Committee's 2015 report.⁴⁸ The statement said:

⁴¹ Deakin *et al* (2012) 1029.

⁴² Novitz (2015) 55.

⁴³ Jacobs (2010) 659.

⁴⁴ La Hovary *ILJ* (2013) 338.

⁴⁵ As above.

⁴⁶ La Hovary *ILJ* (2013) 337.

⁴⁷ La Hovary *ILJ* (2013) 337; Article 37 (1) ILO Constitution.

⁴⁸ Novits (2015) 57.

“The right to take industrial action by workers and employers in support of their legitimate industrial interest is recognised by the constituents of the ILO.”⁴⁹

5. Limitation of a strike under international law

The traditional definition of a strike has two important parts: “concerted action” and “withdrawal of labour”.⁵⁰ This is applied differently in certain countries, however. In France and Italy, for example, the right to strike can be exercised even though the “concerted action” is not related to labour relations,⁵¹ while in the United Kingdom (hereafter the UK), Germany and United States of America (hereafter the USA), the right to strike is seen only as an economic freedom.⁵² Some countries, such as France, only offer protection where there is a complete withdrawal of labour, which means that a go-slow or retardation of work is not considered a strike and is not afforded the same protection, since it amounts to a breach of contract.⁵³ This is not the case in South Africa, where a strike is defined as a “partial or complete concerted refusal to work, or the retardation or obstruction of work”.⁵⁴ An in-depth discussion of this follow in Chapter 2.

Cheadle states that, ninety eight countries have included the right to strike in their constitutions.⁵⁵ In most of the countries that have not included the right to strike in their constitutions, the right to strike streams from the constitutional right to freedom of association and collective bargaining.⁵⁶ In countries where there is a constitutional right, ordinary laws are tested against a higher norm for conformity,⁵⁷ although the consequences of these tests depend on the legal systems.⁵⁸ Akin to this, the ILO standards cannot suppose that the standards find constitutional citation universally

⁴⁹ Novits (2015) 57; see also TMF Tripartite Meeting report TMF APROC/2015/2, Geneva 23-25 February 2015.

⁵⁰ Hepple (2015) 28.

⁵¹ Hepple (2015) 30.

⁵² As above.

⁵³ Hepple (2015) 29.

⁵⁴ S213 of the LRA

⁵⁵ Cheadle (2015) 67.

⁵⁶ Cheadle (2015) 67 originated from Article 3 Convention 87; Countries such as Britain, Austria, Denmark, Austria and Israel.

⁵⁷ Cheadle (2015) 67.

⁵⁸ As above.

and these do not change the fact that in many countries, the right to strike is not enshrined in the constitution.⁵⁹ This is exemplary in countries such as the UK, Australia, Denmark and Israel, whose constitutions do not grant an explicit right to strike.⁶⁰ In these countries, striking is a freedom, not a right.⁶¹

Jacobs, in his discussion on numerous international standards, rounded off by saying that none of the standards he reviewed were clear on the right to strike or on the derogation and restriction of the right to strike.⁶² In addition, Van Niekerk also notes that the ILO warns "that although strike action is a fundamental or basic right, it is not an end in itself".⁶³ Furthermore, Birk was of the view that there are no concise guidelines to any acceptable limitations to the right to strike under international law and that it is perhaps impossible to establish definitive general standards.⁶⁴

The right to strike can only be exercised collectively, unlike other human rights, which can only be exercised individually.⁶⁵ This suggests that the individual right of the worker is merely to participate in the decision to strike or not.⁶⁶ The worker's individual right is dependent on whether the collective action is lawful,⁶⁷ which, in turn, is determined by what kind of collective action is constitutionally or legislatively allowed.⁶⁸ In some countries, such as Germany, only a trade union may exercise the right to strike.⁶⁹ In Italy, on the other hand, the right to strike may be exercised by any group of workers, regardless of whether they are part of a trade union or not.⁷⁰ This shows clearly that it is not mandatory that a collective action be exercised by the trade union only, any group of workers may also do so.

⁵⁹ Jacobs (2010) 662.

⁶⁰ As above.

⁶¹ Jacobs (2010) 662.

⁶² As above.

⁶³ Van Niekerk et al (2015) 415.

⁶⁴ Birk (2001) 97.

⁶⁵ Cheadle (2016) 55; Hepple (2016) 13; Novits (2003) 276.

⁶⁶ Hepple (2016) 16.

⁶⁷ Cheadle (2016) 56.

⁶⁸ As above.

⁶⁹ Cheadle (2016) 56.

⁷⁰ As above.

6. Application of the ILO standards to South Africa

Notwithstanding the fact that the employers' group in the ILO had questions regarding the interpretations of the ILO expert committees, as discussed earlier, South Africa has accepted that the right to strike forms an important part of the right to freedom of association.⁷¹ South Africa also agrees that the right to strike is a basic human right, but that limitations to the right to strike are justifiable in an open and democratic society.⁷²

South Africa only ratified ILO *Conventions* 87 and 98 two years after the African National Congress came to power. The findings of the ILO Governing Body's Committee of Experts on the Application of Conventions and Recommendations (CFA) regarding the restrictions that South Africa placed on trade union freedoms and industrial action had to be founded on constitutional guarantees of freedom of association.⁷³

Although the South African government refused to ratify *Conventions* 87 and 98, in *Case No. 102 (1955)*,⁷⁴ the CFA decided that the right to strike is afforded to workers and their organisations as part of their right to defend their collective interests and that there should therefore be no racial discrimination in respect of whom it should be afforded to.

When South Africa joined the ILO in 1994, the organisation helped the new South African government with drafting the LRA. South Africa was then able to ratify ILO *Conventions* 87 and 98 in 1996.⁷⁵

7. Dismissal for operational requirements in terms of the ILO and South African law

The Governing Body of the International Labour Office held a meeting in Geneva,

⁷¹ Van Eck (2017) 1.

⁷² Ss 23 and 36 of the Constitution, 1996.

⁷³ Novitz (2016) 35.

⁷⁴ *Case No. 102 (South Africa)*, Report No. 15 (1955), para 75.

⁷⁵ Grawitzky (2013) 35.

Switzerland, on 2 June 1982, where it implemented the Termination of Employment Convention, 1982 (hereafter *Convention C158*).⁷⁶ The meeting was held to discuss Convention C158, which South Africa has not ratified. *Convention C158* requires member states to specify the grounds on which a worker can be terminated from employment.⁷⁷ Article 4 states:

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

Similarly in South Africa, employers are allowed to dismiss workers only where a legitimate reason exists. The provisions regulating dismissal disputes are a three-fold classification. According to Grogan, a dismissal can be based on three grounds, namely automatically unfair dismissals, dismissals related to the conduct or incapacity of the employee, and dismissals related to operational requirements.⁷⁸ The employer should then be able to show how the dismissal falls under any of the above-mentioned grounds. This indicates clearly that the ILO only acknowledges three types of legit grounds on which a worker may be terminated from the employers service.

Section 188(1) of the LRA reflects the ILO convention:

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

(a) that the reason for dismissal is a fair reason-

(i) related to the employee’s conduct or capacity; or

(ii) based on the employer’s operational requirements;
and

(b) that the dismissal was effected in accordance with a fair procedure.”⁷⁹

⁷⁶ See Convention C158, downloaded from the ILO website at www.ilo.org, on 23 October 2017.

⁷⁷ Termination of Employment 1982 (No.158).

⁷⁸ Grogan (2014) 179.

⁷⁹ S188 of the LRA.

An in-depth discussion follows in Chapter 3 of this dissertation.

Similarly, Schedule 8 item 2(1) specifies that a dismissal is considered unfair if the reason for dismissal is not fair.⁸⁰

Article 8 of the ILO *Convention* 158 requires that workers who are unfairly dismissed be entitled to refer their disputes to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.⁸¹ The ILO Examination of Grievances Recommendation⁸² also states that disputes concerning rights should to be referred to adjudication.⁸³ The LRA complies with the Convention, since when small-scale dismissals take place, employees must refer disputes to conciliation and thereafter adjudication to the Labour Court. The LRA, however, goes further than what is required by the ILO by providing employees who are dismissed due to large-scale operational requirements for substantive reasons with an option to refer disputes to the Labour Court or to go on strike.⁸⁴ However, if the dispute is regarding procedural fairness, it must go to the Labour Court.⁸⁵ A discussion on large-scale retrenchment follows in Chapter 5 of this paper.

8. Conclusion

The right to strike has been incorporated by most countries, in their constitutions. If the right to strike is not entrenched in their constitution, then it is derived from the right to freedom of association and collective bargaining.⁸⁶

As stated earlier, South Africa acquires obligations as a member state of the ILO in so far as national law and application are involved. According to the LRA, it aims to give effect to South Africa's obligations as a member state of the ILO.⁸⁷ This is also supported by the Constitutional Court. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,⁸⁸ the Court held that:

⁸⁰ Item 4(1) of Schedule 8 of the LRA.

⁸¹ Chicktay (2007) 2.

⁸² ILO Examination of Grievances Recommendation, 1967 (No. 130).

⁸³ Chicktay (2007) 2.

⁸⁴ S189 A(13) of the LRA.

⁸⁵ For an application of section 189A see *NUMSA & Others v SA Five Engineering & others* 2005 (1) BLLR 53 (LC) and *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* 2005 (1) BLLR 78 (LC).

⁸⁶ Cheadle (2015) 67.

⁸⁷ S1(b) of the LRA.

⁸⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 61.

"A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 requires the same."⁸⁹

Even though individual conventions are not automatically binding on all ILO member states, it is submitted that South Africa has complied with Convention 158 of the ILO, even though it is not binding on South Africa. A convention becomes binding only when an individual member state has ratified it.⁹⁰

As seen in the discussions above, the ILO supervisory bodies suggests that the right to strike can be derived from Conventions 87 and 98.⁹¹ The Conventions, however, do not contain an express right to strike, but most countries still recognise the right to strike, which is inferred from the Conventions.⁹²

Although South African law complies with the two ILO Conventions, an examination of whether those conventions provide adequate protection to retrenched employees will follow in later chapters. The ILO allows the right to strike to be denied to employees who are retrenched, while South African law allows the right to strike to be denied in the case of small-scale dismissal.⁹³

An individual employee who has been dismissed on the ground of operational requirement and who feels that the dismissal was unfair on any other ground can refer the dispute to the Labour Court, but is not allowed to strike. A group of employees, however, can go on strike.

⁸⁹ [2007] 12 BLLR 1097 (CC) at para 61.

⁹⁰ Van Niekerk *et al* (2015) 414.

⁹¹ Van Niekerk *et al* (2015) 415.

⁹² As above.

⁹³ S189 of the LRA; Article 8 of ILO Convention 158; Chicktay (2007) 3.

CHAPTER THREE

PROTECTED STRIKES AND DISMISSAL ON GROUNDS OF OPERATIONAL REQUIREMENTS

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1. Introduction

The broad aim of Chapter IV of the LRA⁹⁴ is to regulate industrial action. The chapter brings the pre-1995 law, on which it is based, in line with the *Constitution*⁹⁵ and the relevant ILO standards.⁹⁶

Strikes are considered harmful and costly for both employers (lost wages) and workers (customers and suppliers are inconvenienced).⁹⁷ The right to strike, however, is viewed as a fundamental right in South Africa.⁹⁸ Strikes are protected only if they are in line with the *LRA*, failing which an employer is at liberty to institute disciplinary action against the strikers.⁹⁹ So what restrictions are there on the right to strike and are those restrictions justified?

⁹⁴ Act 66 of 1995.

⁹⁵ S23(2) of the Constitution.

⁹⁶ Conventions 87 and 89 of the ILO.

⁹⁷ Hepple *et al* (2015) 12.

⁹⁸ S23(2) of the Constitution.

⁹⁹ Grogan (2015) 429; Du Toit *et al* (2015) 333.

2. A brief history of the right to strike

Until 1924, the right to strike was affected by the Railway Regulation Act of 1909 and the Transvaal Industrial Dispute Bill of 1909.¹⁰⁰ The Railway Regulation Act prohibited white railway workers from striking. Workers who went on strike were subject to criminal prosecution. The Transvaal Industrial Dispute Act¹⁰¹ required that when an employer or employee proposed changes to the working conditions, one month's notice was required.¹⁰² In the event of a deadlock, no strike or lockout was allowed to take place. Instead, the Government had to appoint a conciliation board to investigate the dispute together with the passing of the one month's notice from the date of publication of the notice. The act openly excluded public service and non-whites from its scope and was passed into law.¹⁰³

During the period from 1924 to 1976, the government introduced the *Industrial Conciliation Act 28 of 1956* (hereafter the *ICA*),¹⁰⁴ which allowed the creation of Standing Industrial Councils with powers for negotiation and wage determination.¹⁰⁵

The period from 1979 to 1995 saw a rise in strikes by black people, especially in Natal. In addition, young idealist lawyers and trade unions got involved and large businesses accepted that black people should be included in the scope of the *ICA*. As a consequence, the Wiehahn Commission was established.¹⁰⁶ The Wiehahn Commission recommended the appointment of the Supreme Court judge to head the Industrial Court.

In 1977, the Commission, in its recommendations, noted that, due to the economic boom of the late 1960s, the growth of industrialisation and the increase in demand for skilled labour led to black employees moving into more skilled occupations.¹⁰⁷ The Commission considered that this placed a strain on the racially exclusive industrial council system that existed, and exposed the limitations in the *Black Labour Relations*

¹⁰⁰ Myburgh *ILJ* (2004) 962.

¹⁰¹ Act of 1909.

¹⁰² Myburgh *ILJ* (2004) 962-976.

¹⁰³ As above.

¹⁰⁴ Industrial Conciliation Act 28 of 1956.

¹⁰⁵ As above.

¹⁰⁶ As above.

¹⁰⁷ Van Niekerk *et al* (2015) 11.

Regulation Act,¹⁰⁸ a statute which conferred limited powers on workplace committees to represent black employees.¹⁰⁹

The Commission issued a report that ended in the amendments to the 1956 Act. The most important of these was the extension of trade union rights to black employees and the establishment of the Industrial Court.¹¹⁰

Two decades later, in 1996, the *LRA*¹¹¹ came into operation, followed by the *Basic Conditions of Employment Act* in 1997, the *Employment Equity Act* in 1998 and the *Skills Development Act* in 1998. Together, these pieces of legislation regulate the South African labour market.¹¹² The *LRA* remains the main labour statute and regulates collective rights (the right to organise, the right to strike and collective bargaining structures).

The major change between the old dispensation and the new one is that the Constitution entrenches certain rights, including the right to fair labour practices, the right to strike, and the right for every trade union, employers' organisation and employer to engage in collective bargaining.¹¹³ In *NUMSA & others v Bader Bop (Pty) Ltd & others*,¹¹⁴ the court held that the right to strike is important to the process of collective bargaining, stating that "it is to the process of bargaining what an engine is to a motor vehicle".

3. The right to strike in the Constitution

The right to strike is contained in section 23 of the Constitution, which states that employee has the right to strike.¹¹⁵ The Constitutional right is considered as a higher standard and this is the standard that ordinary legislations are tested for compatibility.¹¹⁶ The right to strike is also a fundamental labour right that employees are entitled too.¹¹⁷

¹⁰⁸ Act 38 of 1953.

¹⁰⁹ Van Niekerk *et al* (2015) 12.

¹¹⁰ As above.

¹¹¹ Act 66 of 1995.

¹¹² Van Niekerk *et al* (2015) 13.

¹¹³ Myburgh *ILJ* (2004) 968.

¹¹⁴ *NUMSA & others v Bader Bop (Pty) Ltd & others* (2003) 24 ILJ 305 (CC) para 367.

¹¹⁵ S23 Constitution, 1996.

¹¹⁶ Van Niekerk *et al* (2015) 415.

¹¹⁷ Cheadle (2015) 67.

The court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* held that:

“Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.”¹¹⁸

Furthermore, the court in *NUMSA v Bader Bop* held that

“That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, 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.”¹¹⁹

The *LRA* defines the right to strike as:

“The partial or complete 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”.¹²⁰

Under the common law strike action was considered a breach of contract and an employer could dismiss striking employees.¹²¹ This has caused an imbalance in the employment relationship, giving the employer greater bargaining power than the employee. In addition, it has also led to several strikes by employees. Under the current *LRA*, an employee does not commit a breach of contract or a delict by taking

¹¹⁸ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 17 ILJ 821.

¹¹⁹ *NUMSA v Bader Bop (PTY) LTD & Another* 317 para A-B.

¹²⁰ S213 of the *LRA*.

¹²¹ *R v Smit* 1995 All SA 54 (SA).

part in a strike that is deemed a “protected strike”,¹²² whereas under the 1956 *LRA*, there was no explicit protection against the dismissal of striking employees.¹²³ Furthermore, the *LRA* affords protection to strikes that comply with its provisions. Most notable, employees participating in a protected strike are not allowed to be dismissed.¹²⁴ Section 67(4) of the *LRA* stipulates that an employer may not dismiss an employee for participating in or promoting a protected strike.¹²⁵ The *LRA* does not, however, prevent an employer from fairly dismissing an employee for reasons based on an employee’s conduct during a strike or for operational requirements.¹²⁶

A strike that does not comply with the provisions of the *LRA* is not protected, and may constitute a fair reason for dismissal.¹²⁷ A strike must therefore be connected to collective bargaining, and it should not be destructive and without demand, otherwise it will lose its legal protection.¹²⁸

According to Rycroft, there are certain instances in law and equity in which the Labour Court has declared that the status of a protected strike be revoked.¹²⁹ The *LRA* sets out the limits to the right to strike,¹³⁰ but other limitations seem to be implied.¹³¹ Firstly, section 23 of the Constitution contains a limit in itself. The right to strike’s aim is collective bargaining. The most oft-used phrase to express this relationship is that the right to strike should be “functional to collective bargaining”.¹³²

As emulated clearly in *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd-President Steyn Mine; President Brand Mine; Freddie Mine*

¹²² S67(2) of the *LRA*.

¹²³ Myburgh (2004) 966.

¹²⁴ Du Toit *et al* (2015) 355.

¹²⁵ S67(4) of the *LRA* .

¹²⁶ S67(5) of the *LRA*.

¹²⁷ Sch 8 item 6.

¹²⁸ Rycroft (2012) *ILJ* 821.

¹²⁹ See *Afrox Ltd v SA Chemical Workers Union & others (2)* (1997) 18 *ILJ* 406 (LC) ; See also In *TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others* (2006) 27 *ILJ* 1483 (LAC) ; *Digistics (Pty) Ltd v SA Transport & Allied Workers Union & others* (2010) 31 *ILJ* 2896 (LC); Rycroft (2012) *ILJ* 822.

¹³⁰ Section 64 of the *LRA*; Section 65 of the *LRA*.

¹³¹ Rycroft (2012) *ILJ* 822.

¹³² Rycroft (2012) *ILJ* 823; Section 23 of the Constitution.

"Only functional strikes, ie those which have as their concern the industrial or economic relationship between employer and employee (the 'very stuff of collective bargaining') are protected".¹³³

Secondly, for a strike to be protected, there should be a demand and where there is no demand, the requirements of section 213 of the definition of a strike will not be met.¹³⁴ Rycroft agrees that it is possible for a strike to lose its legal protection, as stated earlier.¹³⁵ The court in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others*, as per Judge Van Niekerk, held that:

"When the tranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status".¹³⁶

Rycroft that the last sentence by Judge Van Niekerk opened up a can of worms regarding whether a strike involving misconduct loses its protected status. The court's view is also supported by Cheadle, Le Roux and Thompson, who state that the right to strike can be suspended by the Labour Court if it is carried out in a shocking manner.¹³⁷

Although there is no provision in the *LRA* that expressly requires a strike to lose its legal protection, this may still be implied by the powers of the Labour Court.¹³⁸ An application may be made to the court to declare the strike unprotected in terms of Section 158(1) (a)(11) of the *LRA*, due to misconduct.¹³⁹ Furthermore, prima facie evidence to support these disputes will have to be provided and the union will be afforded a chance to respond.¹⁴⁰

¹³³ *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd- President Steyn Mine; President Brand Mine; Freddie's Mine* 1996 (1) SA 422 (A) at 438B.

¹³⁴ Rycroft (2012) *ILJ* 823.

¹³⁵ Rycroft (2012) *ILJ* 825.

¹³⁶ *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC) at para 13.

¹³⁷ Cheadle et al (2011).

¹³⁸ Rycroft (2012) *ILJ* 877.

¹³⁹ S158(1)(a)(11) of the *LRA*.

¹⁴⁰ Rycroft (2014) *IJCLIR* 10.

Fergus agrees with Rycroft that the right to strike should be “functional to collective bargaining”.¹⁴¹ She further agrees that where both employer and employee are concerned with issues pertaining to the relationship between them, this is by definition “functional to collective bargaining”.¹⁴² However, she states that notwithstanding the abovementioned, the inherent functionality of strikes to collective bargaining has been twisted to mean something different, rather than to show the relationship between strikes and collective bargaining.¹⁴³ Fergus argues that recent court decisions held that there is no judicial or legislative authority for the argument that only the strikes that are “functional to collective bargaining” are legal.¹⁴⁴

In the recent judgment of *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others*¹⁴⁵, the Labour Court had to decide whether to award a final interdict to the company against its striking employees. One of the issues raised was whether the strike had lost its legal protection because of the violence perpetrated by the striking employees.¹⁴⁶ The court was leaning towards the principle that it had the power to intervene in protected strikes by declaring a protected strike unlawful, and therefore unprotected if the extent of the violence committed by employees justified the intervention. This is called the “loss of the protection principle”.¹⁴⁷

It is clear that, the court adopted the “loss of the protection principle” as proposed by Rycroft, whether the misconduct during a strike had worsened, to a point where it rendered the strike no longer functional to collective bargaining and thus losing its

¹⁴¹ Fergus (2016) *ILJ* 1540.

¹⁴² Fergus (2016) *ILJ* 1540; *SA Federation of Civil Engineering Contractors n 10* above para 21; see also *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC) para 61.

¹⁴³ Fergus (2016) *ILJ* 1541.

¹⁴⁴ *Pikitup (SOC) Ltd v SA Municipal Workers Union obo Members & others (1)* (2014) 35 *ILJ* 201 (LC) 33-48; *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 *ILJ* 3241 (LC); *Police & Prisons Civil Rights Union v Ledwaba NO & others* (2014) 35 *ILJ* 1037 (LC); *Komatsu Southern Africa (Pty) Ltd v National Union of Metalworkers of SA & others*, LC 17 September 2013 case no J1437/2013 unreported para 37; Fergus (2016) *ILJ* 1545.

¹⁴⁵ *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others* (2016) para 37.

¹⁴⁶ Fergus (2016) *ILJ* 1545.

¹⁴⁷ Fergus (2016) *ILJ* 1546; *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others* (2016) para 38.

protection.¹⁴⁸ The court held that it had to weigh the degree of violence caused by the striking employees against what the unions had done to combat the violence.¹⁴⁹

In a dissenting argument, Fergus argued that it is still unclear whether the test by Rycroft provides a sufficient answer to the challenge.¹⁵⁰ The most obvious challenge would be how to determine the degree of violence necessary before a strike is declared dysfunctional and thus unprotected.¹⁵¹ Furthermore, Fergus states that there might be challenges in applying the test in practice, and that the legality of the test may be brought to question.¹⁵²

According to Fergus, the test has two inter-related consequences. Firstly, it implies that a strike that would otherwise be protected will no longer be, based on the requirements of a lawful strike if it becomes “dysfunctional to collective bargaining” due to violence.¹⁵³ The second consequence is that it affords the courts power to grant interdicts to injured parties.¹⁵⁴ The scope of this discussion, however, is limited and will not deal with the second consequence.

The abovementioned consequences both limit the right to strike,¹⁵⁵ but the right to strike is rooted in the Bill of Rights and courts have on numerous accounts expressed that the right to strike is a fundamental right which allows workers to bargain with employers.¹⁵⁶ It is also enshrined in the ILO’s Freedom of Association Convention,¹⁵⁷ as explained in chapter 2. It is therefore the duty of the court to develop and interpret

¹⁴⁸ *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others* (2016) para 32; Rycroft (2014) *IJCLIR* 9.

¹⁴⁹ As above.

¹⁵⁰ Fergus (2016) *ILJ* 1547.

¹⁵¹ *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW & others* (2016) para 32; Rycroft (2014) *IJCLIR* 12; Fergus (2016) *ILJ* 1547.

¹⁵² Fergus (2016) *ILJ* 1547.

¹⁵³ As Above.

¹⁵⁴ Fergus (2016) *ILJ* 1547.

¹⁵⁵ Fergus (2016) *ILJ* 1548.

¹⁵⁶ See *SA Federation of Civil Engineering Contractors obo Members & others v National Union of Mineworkers & another* (2010) 31 *ILJ* 426 (LC) para 21; see also *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC) para 61.

¹⁵⁷ ILO Convention 87 of 1949.

the law in line with the “spirit, purport and objects of the Bill of Rights”¹⁵⁸ and the LRA should limit the right to strike as narrowly as possible.¹⁵⁹

Hepple argues that the rationale of the right to strike has changed from being a weapon in collective bargaining to an individual human right, and that this has important consequences for the way in which the right is defined and guaranteed.¹⁶⁰ The right to strike is different from other human rights in the sense that it can only be exercised collectively. The individual right of the employee is merely a right to take part in the decision if they should strike and to take part in the strike itself.¹⁶¹ Furthermore, the right to strike is an independent and individual right and it does not originate from the right to freedom of association or the right to collective bargaining.¹⁶²

According to Cheadle, however, the right to strike has both individual and collective facets. The individual right affords the employee the right to participate collectively with other employees in the collective action. Thus, the individual rights are dependent on the existence of the strike (collective action), which, in turn, brings about the collective facet of the right.¹⁶³

Since a strike is defined as both concerted action and the withdrawal of labour, the withdrawal of labour by an individual employee or by several isolated employees does not constitute a strike, unless those employees “act in agreement” or under the directions of a union.¹⁶⁴

The *LRA* gives a broad definition of the withdrawal of labour:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work for the purpose of remedying a grievance or

¹⁵⁸ S39 (2) of the Constitution.

¹⁵⁹ *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC) para 61.

¹⁶⁰ Hepple (2016) 13.

¹⁶¹ Hepple (2016) 16.

¹⁶² Hepple (2016); s 23 of the Constitution.

¹⁶³ Cheadle (2016) 55.

¹⁶⁴ Hepple (2016)13.

resolving a dispute in respect of any matter of mutual interest between employer and employee".¹⁶⁵

But if the action is aimed at the government, with the aim of promoting or defending the socioeconomic interests of employees, this is regarded as protest action and is separately protected by the LRA.¹⁶⁶ Despite this distinction in the *LRA*, in practice it is still hard to draw a dividing line between strikes and protest action. For instance, the strike in Marikana on 16 August 2012, which resulted in the killing of striking miners, concerned mainly political and economic issues, not labour issues.¹⁶⁷ But it was still considered a strike and was governed by the laws on strike action.¹⁶⁸

4. Dismissals for operational reasons during a strike

The term "operational requirements" has been defined broadly.¹⁶⁹ It includes "the economic, technological, structural or similar needs of an employer".¹⁷⁰

Even though it is hard to outline all the situations that can be considered legitimate reasons for dismissal based on employers' operational requirements, the *Code of Good Practice on Operational Requirements* defines economic reasons as those that concern the "financial management of the enterprise", technological reasons as those that concern "the introduction of new technology which affects work relationships", and structural reasons as those that "relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."¹⁷¹ Such terminations are often connected to the economic survival of the employer.¹⁷² For example, in *Tiger Food Brands Ltd v Levy NO*, the Labour court interpreted operational requirements to include instances where the employer has introduced measures to increase productivity.¹⁷³

Du Toit agrees that the definition of "operational requirements" in section 213 of the *LRA* is so broad that it could include "every conceivable business consideration that

¹⁶⁵ S213 of the LRA.

¹⁶⁶ S77 of the LRA ; Hepple (2016)13.

¹⁶⁷ Ngcukaitobi *ILJ* (2013) I 636.

¹⁶⁸ Hepple (2016)16.

¹⁶⁹ Newaj and van Eck *PELJ* (2016) 4.

¹⁷⁰ S213 of the LRA.

¹⁷¹ Item 1 of the *Code on Dismissal Based on Operational Requirements* (Gen N 1517 in GG 20254 of 16 July 1999). Also see Du Toit *et al* (2015) 473.

¹⁷² Newaj and van Eck *PELJ* (2016) 4.

¹⁷³ *Tiger Food Brands Ltd v Levy NO* (2007) 28 *ILJ* 1827 (LC) para 41.

might lead an employer to consider dismissal in the context of restructuring", including the quest to increase profits.¹⁷⁴

Section 188 of the *LRA* permits dismissals for operational requirements, but subject to the test for substantive and procedural fairness. If the employer fails to prove that the reason for dismissal is fair based on the employer's operational requirement, the dismissal will fail the substantive fairness test.

Although the courts rarely explicitly consider fairness and in most cases and have taken it for granted. The bulk of disputes regarding substantive fairness are related to the issue of whether the dismissal was fair or not, rather than whether an operational reason existed.¹⁷⁵

Dismissal for operational requirements during a protected strike has been a recent bone of contention. The standard test adopted by courts to differentiate between dismissal for taking part in a protected strike and dismissal based on employers' operational requirements is to ask whether the dismissal would have occurred if it were not for the strike, and if not, whether the strike was the main reason for the dismissal.¹⁷⁶ In *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*,¹⁷⁷ the Labour Appeal Court (LAC) held that retrenchment comes as a measure of last resort. In other words, the employer should prove substantive fairness before dismissing employees.¹⁷⁸

It is submitted that in most cases employers misuse section 188 to dismiss workers for operational requirements, making them scapegoats, and to strong-arm workers to accept their demands. According to Van Eck and Newaj, these disputes should be decided through collective bargaining and power play and not through the employer threatening to dismiss the worker.¹⁷⁹ As correctly argued by Kahn-Freud, the main

¹⁷⁴ Du Toit 2005 *ILJ* 602.

¹⁷⁵ Du Toit 2005 *ILJ* 606.

¹⁷⁶ *SACWU V Afrox Ltd* (1999) 10 BLLR 1005 (LAC).

¹⁷⁷ *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* 2003 ILJ 1917 (LAC).

¹⁷⁸ Newaj and van Eck *PELJ* (2016) 4.

¹⁷⁹ Newaj and van Eck *PELJ* (2016) 3.

object of labour law has always been, to counteract the inequality of bargaining power which is inborn in the employment relationship.¹⁸⁰

More recently, however, the courts have adopted the view that dismissal may be accepted where the survival of the business is at stake and that employers have the right to reduce the number of workers to increase profits.¹⁸¹ Furthermore, when an employer is considering the dismissal of an employee based on operational requirements, section 189 of the *LRA* states that the employer must "engage in a meaningful joint consensus-seeking process" with workers' representatives report the "alternatives that the employer considered", which could limit dismissals.¹⁸²

According to Van Eck and Newaj, the employer could shorten the working hours, decrease salaries or reducing the changes made to the conditions of employment.¹⁸³ However, if this does not bear fruits, the employer retains the right to dismiss employees for reasons based on operational requirements.¹⁸⁴ The authors believe that when an employer engages in consultations with workers to adjust their conditions of employment for operational requirements, this might constitute collective bargaining, and employers are not supposed to threaten to dismiss workers to force them to accept a demand.¹⁸⁵ In the dissenting opinion of Thompson, dismissals for operational requirements should never be allowed in the border of collective bargaining to force employees to accept a demand.¹⁸⁶

5. Dismissals for increased profits

The LAC in *Fry's Metals*¹⁸⁷ held that the *LRA* of 1995 does not differentiate between dismissals for operational requirements with the intention to rescue a business from failing and dismissals to increase profits.

¹⁸⁰ David and Freedland (1983) 18.

¹⁸¹ *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* 2004 ILJ 2156 (LAC); *Fry's Metal v NUMSA* 2003 2 BLLC 140 (LAC).

¹⁸² S189(2)-(3) of the *LRA*.

¹⁸³ Newaj and van Eck *PELJ* (2016) 5.

¹⁸⁴ As above.

¹⁸⁵ Newaj and van Eck *PELJ* (2016) 5.

¹⁸⁶ Thompson *ILJ* (1999) 770.

¹⁸⁷ *Fry's Metals*, LAC para 33; Newaj and van Eck *PELJ* (2016) 24.

As mentioned by Zondo JP:

"This is because all the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit."¹⁸⁸

Nicholson JA in *General Food Industries v FAWU* also agreed with the above:

"I am of the view that a natural consequence of the *Fry's Metals* judgment is that, all things being equal, a company is entitled to insist by economic restructuring that a profitable centre becomes even more profitable. The Act recognises an employer's right to dismiss for a reason based on its operational requirements without making any distinction in the context of a business the survival of which is under threat and a business which is making profit and wants to make profit."¹⁸⁹

Furthermore, the court in *South African Transport and Allied Workers Union v G4S Aviation Secure Solutions*¹⁹⁰ stressed that the definition of the operational requirements in section 213 of the *LRA* has not been changed and that the previous verdicts of the LAC continue to be relevant.¹⁹¹ Newaj and van Eck, however, highlight the dangers of interpreting "operational requirements" too broadly, which is why they believe the courts must establish the actual reasons why employees are dismissed so that the employees are treated fairly.¹⁹²

In connection with what was previously stated, Du Toit agrees with the LAC in *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* and in *Fry's Metal v NUMSA*:¹⁹³

¹⁸⁸ *Fry's Metals*, LAC para 33. The court held "that neither Thompson in his article nor counsel in his argument has pointed to any provision in the Act that can be relied upon to make this distinction".

Also see *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* 2004 ILJ 2156 (LAC) para 57.

¹⁸⁹ *General Food Industries Ltd v Food and Allied Workers Union* 2004 ILJ 1260 (LAC) para 52.

¹⁹⁰ See, for example, *South African Transport and Allied Workers Union v G4S Aviation Secure Solutions* 2016 ZALCJHB 10 (13 January 2016) paras 21-22.

¹⁹¹ Newaj and van Eck *PELJ* (2016) 5.

¹⁹² Newaj and van Eck *PELJ* (2016) 25.

¹⁹³ *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* 2004 ILJ 2156 (LAC); *Fry's Metal v NUMSA* 2003 2 BLLC 140 (LAC).

"...though the notion of employers being free to dismiss workers "merely to increase profit" may seem to open the floodgates to dismissal virtually at will, the causal nexus between a dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?"¹⁹⁴

As stated earlier, it is usually hard to distinguish between an automatically unfair dismissal of workers, due to their refusal to accept the employer's changes in the employment relationship, and a legitimate dismissal based on the employer's operational requirements. An in-depth discussion will follow in Chapter 4.

6. Procedural fairness

Citing section 189 of the *LRA*, Gandidze explains that:

"An employer who contemplates dismissing employees for operational requirements must consult with the person referred to in a collective agreement or if there is no such collective agreement, a workplace forum and if there is no such forum, a registered trade union...The collective agreement must expressly designate the trade union to be consulted, failing which all trade unions can insist on being consulted."¹⁹⁵

The court in *Baloyi v M & P Manufacturing*¹⁹⁶ held that an employer is not allowed to consult an individual employee if a trade union exists. Allowing such a consultation to take place – it argues – would defeat the purpose of section 198 of the *LRA*.

The *LRA* requires the employer and the employee to discuss the dismissal process and to try to agree on measures to avoid dismissals, to reduce the number of employees dismissed, to alter the timing of the dismissals, or to mitigate the adverse effects of the dismissals. The *LRA* also requires the parties to agree on how to determine which employees will be dismissed and how much payment they will receive for severance.¹⁹⁷

¹⁹⁴ Du Toit 2005 *ILJ* 606.

¹⁹⁵ Gandidze *LDD* (2007) 85.

¹⁹⁶ *Baloyi v M & P Manufacturing* 2001 4 *BLLR* 389 (LAC).

¹⁹⁷ Tapiwa *LDD* (2007) 85.

7. Conclusion

Wages are one of the causes of strikes in South Africa. Employees usually strike because they want higher wages due to the increase in the cost of living. Employers, on the other hand, want to make profits. Trade unions and employers continue to face challenges to ensure that their interests are protected in terms of the current legislative provisions on the right to strike. It is evident that the current legislative framework relating to strikes does not succeed in finding a proper balance between the interests of all parties concerned.

This is obvious with regard to the remedies offered to employers who are faced with failing businesses because of a strike. While a provision is made in the legislation for employers to dismiss workers for operational reasons, it remains clearly impossible to regulate labour markets or the employment relationships by working against prevailing socio-economic circumstances. In addition, the recognition afforded to lawful strikes does not guarantee the protection of workers against dismissal. It is submitted that the labour unions, employer organisations and the government should consider legislative amendments to extend the limitation of the right to strike in South Africa.¹⁹⁸

The *LRA* on the one hand, states that an employer is not allowed to dismiss workers who are participating in a protected strike,¹⁹⁹ such a dismissal will be automatically unfair in terms of section 187(1)(a). However, section 67(5) states that it is not unlawful to dismiss a striking employee for reasons based on the employer's operational requirements. The two provisions clash.

As stated earlier, the difference between an automatically unfair dismissal of workers, due to the fact that they have refused to accept the employers changes in the employment relationship and a legitimate dismissal based on the employer's operational is usually hard to separate and this is discussed later in chapter 4. The duty to decide on how to separate the two should be on the labour courts to determine each case individually.²⁰⁰

¹⁹⁸ Selela *IJSS* (2014) 126.

¹⁹⁹ S67 (4) of the LRA.

²⁰⁰ Van Niekerk *et al* (2015) 258.

CHAPTER FOUR

LOCK OUT DISMISSAL AND AUTOMATIC UNFAIR DISMISSAL

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1. Introduction

The *LRA* affords protection to all workers who take part in a protected strike,²⁰¹ as explained in Chapter 3. Policymakers, however, continue to authorise the right of an employer to dismiss employees participating in a strike for reasons based on the employer's operational requirements, as noted in Chapter 3.²⁰² Section 187 (1)(c) of the *LRA* deals with automatically unfair dismissals,²⁰³ while section 188 (1)(a)(i) permits the termination of contracts on grounds of operational requirements²⁰⁴ and permits collective bargaining. These three factors overlap, thus creating an anomaly.²⁰⁵

Back in 1990, the Industrial Court (IC) struggled to distinguish between lock-outs, dismissals and collective bargaining.²⁰⁶ This chapter discusses the employers' constitutional right to lock out, as well as the interaction between strikes and lock-

²⁰¹ S64 of the LRA; Van Niekerk *et al* (2015) 433; Grogan (2015) 452; Du Toit *et al* (2015) 354

²⁰² S67(5) of the LRA of 1995.

²⁰³ S187 (1) (c) of the LRA of 1995.

²⁰⁴ S188 (1)(a)(i) of the LRA of 1995.

²⁰⁵ Newaj and van Eck *PELJ* (2016) 1.

²⁰⁶ *Commercial Catering and Allied Workers Union v Game Discount World Ltd* 1990 ILJ 162 (IC).

outs. It also looks at amendments to the LRA regarding the interplay between lock-outs and automatically unfair dismissals.

2. A brief history of the right to lock out and lock-out dismissal

A lock-out can best be described as:

“the employers side of the economic pressure when the parties are unable to resolve their problems in negotiations or agree on the terms and conditions of employment.”²⁰⁷

The 1956 *LRA*²⁰⁸ included, among its definitions of lock-out, breach or termination of contracts by the employer, or refusal by the employer to reemploy former employees in order to force them to agree to the employer’s demands in terms of conditions of employment.²⁰⁹

In an effort to limit the employees’ doings and exclusions included in the definition of locks and operational requirements, the definition of the lock out was amended by removing all remarks to dismissals.²¹⁰ The definition now pertains only to employers excluding employees from their workplace to force them to accept a demand.²¹¹

According to Grogan, a lock-out is the employers’ equivalent of a strike. The right to exclude employees from the workplace also affords the employers powers to carry out actions that amount to a breach of contract, on condition that the aim is to compel employees to comply with certain proposals or demands.²¹²

The main aim of a lock-out is to allow the employer to force its employees to choose between doing without their salaries while they are locked out, or accepting the employer’s demands.²¹³ Lock-outs are actually strikes of capital.²¹⁴ Very different from strikes, a lock-out does not require concerted action, which means that a single

²⁰⁷ Roberts Dictionary of Industrial Relations (Bureau of National Affairs 1966); Benjamin et al (1989).

²⁰⁸ Labour Relations Act 28 of 1956.

²⁰⁹ S1 of the LRA of 1956.

²¹⁰ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 ILJ 821 (CC) 841.

²¹¹ S213 of the LRA of 1995.

²¹² Grogan (2014) 485.

²¹³ Grogan (2014) 482.

²¹⁴ Hepple (2016) 19.

employer can lock out workers with the aim of forcing them to accept his or her demands.²¹⁵

The 1995 *LRA* no longer differentiates between defensive and offensive lock-outs. The law only protects the exclusion lock-out.²¹⁶

Referring to the IC's previous judgement, in *Game Discount World*, the LAC confirmed that under the old legislation, only temporary and strategic dismissals, i.e. where the aim was to force a demand upon workers, were covered by the part of the definition of "lock-out" that referred to collective bargaining, and were therefore protected.²¹⁷

3. Constitution and the right to lock out

It is worth mentioning that, unlike the right to strike, lock-outs do not enjoy constitutional protection in South Africa.²¹⁸ Section 64 (1) of the *LRA* merely states that "every employer has recourse to a lock-out" if that action is in accordance with the statutory requirements.²¹⁹ If employers were afforded the right to lock out, then they would have raised section 7(2) (b) of the *LRA* (which prohibits any person from preventing another from exercising any right under the Act) against unions.²²⁰

Employers' freedom to lock out was included in the interim Constitution, but was removed from the Constitution of 1996.²²¹ The Constitutional Court in *Ex parte Chairperson of the Constitution of the Republic of South Africa*²²² dealt with the argument that the exclusion of the right to lock out did not comply with the constitutional principle of equality, mainly because the right to strike was entrenched in the Constitution, so the employers' right to collectively bargain was weakened.²²³

²¹⁵ As above.

²¹⁶ S99 of the *LRA*.

²¹⁷ *Commercial Catering and Allied Workers Union v Game Discount World Ltd* 1990 ILJ 162 (IC); Newaj and van Eck *PELJ* (2016) 13.

²¹⁸ Hepple (2016) 20.

²¹⁹ Grogan (2014) 484.

²²⁰ As above.

²²¹ Hepple (2016) 20.

²²² *Ex parte Chairperson of the Constitution of the Republic of South Africa* 1996(4) SA 77 CC at 794-7.

²²³ Grogan (2014) 485.

The Constitutional Court further held that collective bargaining infers a right of both the employer and employee to use economic power against the other, but it rejected the suggestion that the right to strike is equal to the right to lock out.²²⁴

Furthermore, the court said that collective bargaining is founded on the fact that employers have greater social and economic power in comparison to an individual worker.²²⁵ Workers therefore need to work as a collective to give them enough power to bargain successfully with employers.²²⁶

The court also rejected the argument that the exclusion of the right to lock out from the Constitution would make legislation protecting the right to lock out unconstitutional. The effect of such legislation, it said, would merely regulate the right of employers to use economic weapons by legislation within a constitutional framework.²²⁷

The court furthermore found that the right to lock out is not a universally accepted right, since it is not mentioned in the International Covenant on Economic, Social and Cultural Rights or the reports of the International Labour Organization's Committee of Experts. It rejected the argument that the right to lock out is the employers' equivalent of the right to strike, arguing that the right to strike is balanced by employers' right of property and their power to introduce changes alone without the employees' intervention.²²⁸ Employers also have a number of weapons apart from lock-outs to use their social and economic powers, including dismissal and the employment of replacement labour.²²⁹

3. Lock-out dismissals

In Chapter 8 ("Unfair dismissal and unfair labour practice"), section 187 seems to have been intended to end the dispute over whether employers are allowed to fairly dismiss

²²⁴ As above.

²²⁵ Grogan (2014) 485.

²²⁶ As above.

²²⁷ Grogan (2014) 485.

²²⁸ Hepple (2016) 21.

²²⁹ Hepple (2016) 21.

employees following a lock-out, but this raises further problems.²³⁰ Contrary to the definition of lock-out in the 1956 Act, the current definition of lock-out does not cover the termination of contracts of employment.²³¹

Section 187(1) (c) of the *LRA* states that “a dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 5 or, if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer” and the latter is the main reason for a lock-out.²³²

This section was criticised, the way in which the definition of the LRA was interpreted by the Labour Appeal Court in *Frys Metal*²³³ and the Supreme Court of Appeal in *Frys Metal*.²³⁴ On 1 January 2015, the *Labour Relations Amendment Act 6 of 2014* (hereafter the *LRAA* of 2014) came into effect. It aimed to clarify the situation surrounding automatic unfair dismissal.²³⁵ Nevertheless, section 187(1)(c) of the LRA of 1995 still gives the employer the right to terminate jobs for economic reasons if they do so according to the principles of fairness.²³⁶

Strikes and lock-outs form an essential part of the process of collective bargaining. The *LRA* of 1995 limits both these type of actions to what it calls “disputes of mutual interest”.²³⁷ Even though the *LRA* of 1995 does not define “mutual interest”, the courts in *De Beers Consolidated Mines V CCMA*²³⁸ gave it a broad interpretation, stating that it should be interpreted literally to mean “any issue concerning employment”.²³⁹

²³⁰ Grogan (2014) 489.

²³¹ *Food Workers Council of SA & others v Fresh Mark (Pty) Ltd* (1995) 16 *ILJ* 175 (IC); *SACCAWU v Laeveldse Kooperasie Bpk* (1996) 17 *ILJ* 361 (IC).

²³² Section 5 affords protections relating to the right to freedom of association and on members of workplace forums. See Chapter 3.

²³³ *Fry's Metal (Pty) Ltd v National Union of Metalworkers of South Africa* 2003 *ILJ* 133 (LAC).

²³⁴ *Fry's Metal (Pty) Ltd v National Union of Metalworkers of South Africa* 2005 *ILJ* 689 (SCA).

²³⁵ The memorandum of objects: Labour Relations Amendment Bill, 2012, 17.

²³⁶ Newaj and van Eck *PELJ* (2016) 4.

²³⁷ S213 of the LRA.

²³⁸ *De Beers Consolidated Mines V CCMA* 2000 5 *BLLR* 578 (LC).

²³⁹ Du Toit *et al* (2015) 285; Van Niekerk *et al* (2015) 445.

As correctly stated by Thompson, a union can encourage a collective agreement on any matter of mutual interest between an employer and employee and can take part in protected strikes on issues impacting the employment relationship.²⁴⁰

Furthermore, legal scholars also differentiate between dispute of interest and dispute of right. Van Niekerk and Smit distinguish between the two, but suggest that the notion of dispute of mutual interest covers both terms.²⁴¹ They say that disputes of interest “involve the creation of new rights or the modification of existing rights”.²⁴² As correctly stated by Cohen, the proposed terms and conditions of employment can be labelled as disputes of interest, which he defines as “a dispute in which the claimant party seeks a benefit or advantage to which she has no legal entitlement”.²⁴³ She adds that the *LRA* establishes collective bargaining as the process through which disputes of interest should be resolved.²⁴⁴ Disputes of right, on the other hand, concern a legal claim in terms of an employment contract, a collective agreement, a statute or the common law. In other words, they arise when an existing right is contravened.²⁴⁵

Thompson, however, confirms that, this differentiation is not always absolute.²⁴⁶ In addition, Van Niekerk and Smit also state that this difference is not clear-cut and that for disputes regarding organisation rights or a fair reason for dismissal based on operational requirements, parties can opt for either “arbitration or adjudication on the one hand or industrial action on the other”.²⁴⁷

Newaj and van Eck conclude, based on the above, that changes to the terms and conditions of employment are disputes of interest, and should therefore be resolved through collective bargaining.²⁴⁸ They define dismissals for operational requirements,

²⁴⁰ Thompson *ILJ* (1999) 758-759.

²⁴¹ Van Niekerk *et al* (2015) 445; Newaj and van Eck *PELJ* (2016) 6.

²⁴² This was confirmed in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2001 *ILJ* 701 (LC) para 25.

²⁴³ Cohen *ILJ* (2004) 1884-1885.

²⁴⁴ As above.

²⁴⁵ Thompson *ILJ* (1999) 757.

²⁴⁶ As above.

²⁴⁷ Van Niekerk *et al* (2015) 446; Newaj and van Eck *PELJ* (2016) 6.

²⁴⁸ Newaj and van Eck *PELJ* (2016) 7.

on the other hand, as disputes of right, which should be subject to arbitration or adjudication.²⁴⁹

4. Automatically unfair dismissal

As stated above, there is a contradiction in the law,²⁵⁰ since section 67(5) of the *LRA* of 1995 allows employers to terminate workers' employment for operational reasons during strikes, but section 187(1) prohibits employers from doing so to force employees to accept a demand.²⁵¹

Newaj and Van Eck correctly argue that sometimes the very survival of a business might require a change to the conditions of employment.²⁵² Thompson argues that competition forces businesses to regularly change their terms and conditions of employment to stay afloat.²⁵³ The modification of terms and conditions of employment constitutes a dispute of interest, so it is only allowed if there is a consensus.²⁵⁴ The employer's only option is a lock-out to force workers to accept the changes.²⁵⁵ As fittingly stated by Mischke, the employer may consider locking out employees to force them to accept the changes to conditions of service, but it is not a good remedy for a business that is struggling.²⁵⁶

Moreover, section 187(1) of the *LRA*, as previously stated, determines that a dismissal is automatically unfair if the reason for the dismissal is to force an employee to accept a demand. However, despite this protection, employers have sometimes dismissed employees who refused to accept changes to the terms and conditions of employment.²⁵⁷

²⁴⁹ As above.

²⁵⁰ As above.

²⁵¹ This principle was confirmed by the LAC in *SA Chemical Workers Union v Afrox Ltd* 1999 ILJ 1718 (LAC) para 29.

²⁵² Newaj and van Eck *PELJ* (2016) 7.

²⁵³ Thompson 2006 *ILJ* 705.

²⁵⁴ Newaj and van Eck *PELJ* (2016) 8.

²⁵⁵ Newaj and van Eck *PELJ* (2016) 8.

²⁵⁶ Mischke 2003 *CLL* 32.

²⁵⁷ Such as *Fry's Metal (Pty) Ltd v National Union of Metalworkers of South Africa* 2003 ILJ 133 (LAC) ; *Fry's Metal (Pty) Ltd v National Union of Metalworkers of South Africa* 2005 ILJ 689 (SCA); *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* 2004 ILJ 2156 (LAC) and *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 ILJ 1917(LAC).

5. Fry's Metal decisions

The Fry's Metal case dealt with a classic argument over the terms and conditions of employment, which at the start played out through the collective bargaining process. The business of the company dealt with the smelting and refining of lead. The company, together with the shop stewards of National Union of Metalworkers of SA, had presented for discussion a proposal at a meeting for a new collective agreement between them. The claims turned on the proposal on different working hours, the discontinuation of sick leave bonus, compulsory standard production targets, supply job descriptions, the removal of the transport subsidy and the new disciplinary procedure.²⁵⁸

In the discussions that follows between the parties, an agreement was entered into on most of the company's proposals. However, the discussions fell through on the main two issues: the proposed change in working hours and the discontinued transport subsidy.²⁵⁹

The dilemma came about on 20 September 2000, after the negotiations had started. Fry's Metal put forward a letter stating that it would retrench the employees who were not in agreement with the changes. At another meeting on 28 September 2000, the company decided that the retrenchment would go ahead unless the employees accepted the new changes.²⁶⁰

6.1 The legal challenge and outcome

The National Union of Metalworkers of SA together with its members submitted that the proposed course of conduct was prohibited by section 187(1)(c) of the *LRA*, which prohibits dismissals that attempt to force employees to accept a demand in any matter of mutual interest between the employer and the employee.

The Labour Court ruled in favour of the union and its members. However, it contested that the subsection deserved a wide reading that gives employees protections against

²⁵⁸ LC judgement 704.

²⁵⁹ As above.

²⁶⁰ LC judgement 704.

intimidation of being dismissed if the main aim of the employer is to force employees to accept changes in the terms and conditions.²⁶¹ The decision was overturned on appeal by the Labour Appeal Court (LAC) and further by the Supreme Court of Appeal (SCA). The appeal courts resolved that section 187(1)(c) simply means that an employer may not resort to a temporary, tactical dismissal in an attempt to force employees to accept a certain outcome. A detailed discussion of these decisions and their consequences will follow.

6.2 Fry's Metals: Interpreting the former section 187(1) (c)

In *Fry's Metal*, Francis AJ sought to establish whether the dismissal discussed above was an automatically unfair dismissal.²⁶² To determine whether this was the case, he looked at whether the proposed changes were a "matter of mutual interest", as per *LRA* of 1995 definition of automatically unfair labour practice, and whether the aim of the company's proposed restructuring of workers' shifts was to force employees to accept its demands or for operational reasons.²⁶³

The LC ruled that the dismissal amounted to automatically unfair dismissal, since the dispute created new rights or reduced existing rights.²⁶⁴ Francis AJ also found that *Fry's Metal* had not considered conciliation and a subsequent lock-out to encourage its workers to accept its proposals, choosing a lock-out dismissal as a disguise for a retrenchment, which amounts to an automatically unfair dismissal.²⁶⁵

The LAC raised the following questions, firstly whether employers can dismiss employees who are unwilling to accept changes to the terms and conditions of employment, when such are important for continuity and improvement of the employer's business. Secondly, if then the employer has such a right, what then is the relationship between the right, on the one hand, and on the other hand, an employee's right as contained in section 187(1) (c) which stipulates an employee's right not to be dismissed if they do not give in to the employer's demands in respect of a matter of mutual interest.²⁶⁶

²⁶¹ Thompson (1999) *ILJ*, Cohen (2004) *ILJ* 1833.

²⁶² *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* 2001 ILJ 701 (LC).

²⁶³ *Fry's Metal*, LC paras 19-20.

²⁶⁴ *Fry's Metal*, LC para 28.

²⁶⁵ *Fry's Metal*, LC para 51.

²⁶⁶ *Fry's Metal*, LC para 1.

Zondo JP added that an employer that is making a profit may also dismiss employees to make more profit. However, without repeating the above, the LAC acknowledged that it is necessary to determine whether the employer dismisses employees based on operational requirements or to force employees to accept a demand on a matter of mutual interest.²⁶⁷ Furthermore, in its interpretation of section 187(1) (c) of the *LRA* of 1995, the LAC attacked policymakers by tying to definition of lock-out found in the *LRA* of 1956. Zondo JP used the decisions of the IC which “delineated acceptable and unacceptable lock-out dismissals in the wake of collective bargaining”.²⁶⁸

As clearly stated by Van Eck and Newaj, this is the point where the LAC took a wrong turn. The LAC relied on the *Game Discount World*²⁶⁹ case, which took place under old dispensation, in which a lock-out was defined as a strategic (non-permanent) dismissal that sought to force workers to accept a demand. This, Zondo JP reasoned, was what the *LRA* of 1995 sought to prohibit under the umbrella of automatic unfair dismissals.²⁷⁰

The LAC held that a final dismissal does not serve the purpose of forcing, workers that are dismissed to accept the employers demand in respect of a matter of mutual interest, because after the worker has been dismissed, an employment relationship no longer exists between the two.²⁷¹

Because, final retrenchments just as in the *Frys Metal* case, where not included in the definition of a lock-out previously, the Court had a right to determine that such dismissals could be considered operational requirements under section 188 of the *LRA* of 1995.²⁷² Furthermore, the LAC reasoned that whether an employee accepts the employer’s demand in respect of a matter of mutual interest is only important if that employee continues to work for the employer, otherwise there will be no employment relationship.²⁷³

Newaj and Van Eck explain why they believe the decision of the LAC was incorrect:

²⁶⁷ *Fry’s Metal* , LC para 23.

²⁶⁸ As above.

²⁶⁹ *Commercial Catering and Allied Workers Union v Game Discount World Ltd* 1990 ILJ 162 (IC).

²⁷⁰ *Fry’s Metal*, LAC para 27.

²⁷¹ *Fry’s Metal*, LAC para 28.

²⁷² *Fry’s Metal*, LAC para 28.

²⁷³ As Above.

"Firstly, the post-constitutional LRA of 1995's definition of lock-out was amended to exclude all forms of dismissal. It was, therefore, inappropriate for Zondo JP to continue relying on the IC decisions which related to the dividing line between the permissible and impermissible types of dismissal in the new era. Secondly, the *Game Discount World* case concluded that permanent dismissals were unfair in the context of collective bargaining, but that strategic dismissals were acceptable. Had the facts of the *Fry's Metal* case been considered by the IC it would undoubtedly have made an adverse finding against the employer in so far as the final dismissals would have eroded the institution of collective bargaining."²⁷⁴

The LAC found that strategic termination was covered under automatic unfair dismissal, but permanent retrenchment was not. It is submitted that this is not in accordance with the purpose of collective bargaining as discussed in Chapter 3. The question that arises again is, what is the purpose of law? Specifically, what is the function of labour law and how can labour legislation be improved? Labour law responds to many challenges, such as safeguarding the institution of collective bargaining, safeguarding the rights protected in section 23 of the Constitution, and guaranteeing that South Africa gives effect to its obligations as a member state of the ILO.²⁷⁵

Misinterpreting the purpose of labour law is disastrous, as it can lead to the enactment of legislation that does not serve its main purpose successfully. The protective view supports the notion that crucial aspects of democracy should be present to safeguard vulnerable employees who are subordinates of employers.²⁷⁶

The SCA rejected Thompson's argument, as discussed earlier. The author based his argument on the difference between disputes of right and interests based on the LRA of 1995. He submitted that when collective bargaining is taking place, dismissals on the grounds of operational requirements to force workers to accept a demand should not be allowed. However, operational requirements dismissals may be allowed where the employer is restructuring the business because the sustainability of the business is at risk.²⁷⁷

²⁷⁴ Newaj and van Eck *PELJ* (2016) 13.

²⁷⁵ S1 of the LRA.

²⁷⁶ Creighton and Stewart (2000) 2-3.

²⁷⁷ Thompson *ILJ* (1999) 770.

Operational requirements dismissals are in the category of disputes of right. In this case, however, the dispute of right falls under collective bargaining. In addition, Thompson suggests that in a case where a dispute has "migrated" from collective bargaining into a dispute of right, the dismissal of workers should be allowed.²⁷⁸ Thompson contends that this should not be allowed without effort, but that the courts should look at each case differently, and that only where the employer has indicated a rational business assessment is that dismissal acceptable.²⁷⁹

However, according to Mpati DP and Cameron JA :

"The core difficulty with this argument is that the dichotomy between matters of mutual interest and questions of "right" do not in our view form the basis of the collective bargaining structure that the statute has adopted. The unavoidable complexities that arise from the supposed "migration" of matters of mutual interest to matters of "right" demonstrate in our view that the dichotomy does not form the basis of the statutory structure, and s 187(1)(c) cannot, accordingly, be interpreted as if the legislation proceeds from that premise".

The SCA reached the same conclusions and ratified the LAC's decision regarding the enquiry of section 187(1)(c) of the *LRA* of 1995. The LAC and the SCA both rejected the "migration" approach.²⁸⁰ Zondo JP held that, the latter section should begin with defining "dismissal" in terms of section 186 (1)(a). Furthermore, the SCA was of the opinion that collective bargaining and interest-based disputes do not overlap, since there is a difference between dismissal in section 186(1) and those in section 187(1)(c).²⁸¹

Newaj and van Eck state that the criticism brought against the LAC also applies to the SCA, but they add that the SCA erred in finding that there is no inconsistency between the statutory provisions that allows dismissal on the grounds of operational requirements and terminations as a result of the employees failing to accept an employer's demand. The authors agree with Thompson that there are instances where collective bargaining and operational requirements dismissals overlap, especially when

²⁷⁸ *Fry's Metal* SCA para 51; Thompson *ILJ* (1999) 770.

²⁷⁹ Thompson *ILJ* (1999) 770.

²⁸⁰ *Fys Metals*, SCA para 54.

²⁸¹ *Fys Metals*, SCA para 55.

the business is struggling to survive. Furthermore, the SCA should have accepted that such an overlap exists and evaluated the substantive fairness of each case individually. However the SCA was fixed on the separation of the strategic and permanent dismissals.²⁸² In addition, the SCA did overlook what the court held in the case of *Game Discount World*, i.e. that permanent dismissals should not be allowed based on unfairness and that temporary dismissals could be allowed.²⁸³

Furthermore, Newaj and van Eck argue that the SCA was wrong to state that the *LRA* of 1995 does not explicitly use the terms disputes of "interest" and questions of "right". The authors contend that there is no doubt that the dispute resolution structure is based on:

"resolution of interest disputes through collective bargaining, strikes and lock-outs, and disputes of right through arbitration and adjudication."²⁸⁴

Section 65(1) (c) of the *LRA* of 1995 states that nobody may participate in a strike or lock-out if:

"the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act."

The authors contend that it is no mistake the above is included in the *LRA* of 1995.

The decisions in the *Fry's Metals* created precedent and had significant influence on the cases that followed,²⁸⁵ it remained this way until the *LRAA* of 2014 came into operation on 1 January 2015.

7. Amendment to section 187(1) (c)

The *LRAA* of 2014 amended section 187(1) (c) of the *LRA*,²⁸⁶ replacing "to compel the employee to accept a demand" with "is a refusal by employees to accept a demand".

²⁸² Van Eck and Newaj *PELJ* 16.

²⁸³ As above.

²⁸⁴ Van Eck and Newaj *PELJ* 14.

²⁸⁵ See *Solidarity obo Wehncke v Surf4cars (Pty) Ltd* 2011 ILJ 3037 (LC) para 11; *Michael Peter Wilkin v Warwick Invest (Pty) Ltd* 2013 ZALCCT 10 (30 April 2013) paras 9, 12 ; *BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd* 2010 ILJ 2863 (LC) paras 26-29.

²⁸⁶ S187(1)(c) of the *LRA* of 1995.

The amended section 187(1) (c) of the LRA says:

“...a dismissal is automatically unfair if the reason is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.”²⁸⁷

The *Memorandum of Objects: Labour Relations Amendment Bill, 2012* aims to remove the inconsistency that arose from the *Fry's Metals* interpretation of the definition of automatically unfair dismissal, which prohibited the dismissal of employees for their refusal to accept a demand by the employer over a matter of mutual interest. The bill also seeks to implement the intention of the provision as enacted in 1995, which aims to protect the integrity of the process of collective bargaining under the *LRA*.²⁸⁸

The *Memorandum of Objects: Labour Relations Amendment Bill, 2012*, provides the background of the *LRAA* of 2014. It does not, however, clearly indicate the main reason for the amendment and does not explain whether the amendment aims to broaden the scope of automatic unfair dismissal to remove the distinction established by the court in the *Game Discount World* and *Fry's Metals* cases between strategic and permanent dismissals.²⁸⁹

Furthermore, Newaj and van Eck argue that the amendment intends to protect employees that are dismissed in relation to matters of mutual interest while a business is faced with an economic crisis.

The *Explanatory Memorandum Prepared by the Ministerial Legal Task Team, 1995*²⁹⁰ failed to give more details regarding why the word “dismissal” was removed from the definition of a lock-out and why it included the definition of automatic unfair labour practice. The document does explain that in the hard area of collective bargaining, if a business is threatened with closure due to financial adversity then there should be an absolute prohibition on the dismissal of strikers participating in a protected strike.²⁹¹

²⁸⁷ S187(1)(c) of the LRA of 1995.

²⁸⁸ *Memorandum of Objects: Labour Relations Amendment Bill, 2012* 17; Van Eck and Newaj *PELJ* 17.

²⁸⁹ Van Eck and Newaj *PELJ* 17.

²⁹⁰ *Explanatory Memorandum Prepared by the Ministerial Legal Task Team, 1995*.

²⁹¹ *Explanatory Memorandum Prepared by the Ministerial Legal Task Team, 1995*. Emphasis added.

The document explains that the draft Bill provided employers facing bankruptcy with three options:

“resolve the dispute; employ alternative labour; dismiss on grounds of operational requirements”.²⁹²

Thompson says that some of the people involved in the drafting process of the *LRA* and "many in the trade union leadership" would say that the true meaning of section 187(1) (c) of the *LRA* is as follows:

“matters of mutual interest should be determined solely by the collective bargaining process with its confined weaponry and if employers cannot induce acceptance of their demands for altered terms and conditions of employment, then the status quo.”²⁹³

He contends, however, that this meaning would not benefit industrial society, and that disputes should be allowed to migrate from the collective bargaining realm into the disputes of right realm if the employer has based its decision on a "sensible business analysis that has been probed in the consultative process".²⁹⁴

Newaj and van Eck argue that in the absence of the above and its qualification in the law, uncertainty in this area still exists and leaves a contradiction between sections 188(1) and 187(1)(c) of the *LRA* of 1995.²⁹⁵

8. Conclusion

As stated earlier section 187 seems to have been enacted with the intention of ending the dispute over whether employers are allowed to fairly dismiss employees following a lock-out, but this raises further problems. Contrary to the definition of lock-out in the 1956 Act, the current definition of lock-out does not cover the termination of employment contracts.

As clearly alluded to Newaj and Van Eck, although the LRAA did not clearly state this, it appears that the amendment to section 187(1)(c) tried very hard to move the

²⁹² *Explanatory Memorandum Prepared by the Ministerial Legal Task Team* 1995 *ILJ* 305.

²⁹³ Thompson 2006 *ILJ* 729.

²⁹⁴ Thompson 1999 *ILJ* 770.

²⁹⁵ Van Eck and Newaj *PELJ* 17.

focus away from the employer's motives to terminate the worker's contract to force the worker to accept a demand.²⁹⁶ The effect of this provision is to prevent employers from terminating contracts as an economic weapon, this mean that where a dispute arises between the parties, an employer cannot resort to dismissal of the employee , for the mere fact that the employee refused to accept changes to the employment.²⁹⁷ The LRAA provide that of automatically unfair dismissal should include all instances where workers' contracts are terminated because they did not accept changes to their employment contract, irrespective of the employer's intention.²⁹⁸ Grogan correctly states that the outcome of the amendment is that an automatically unfair dismissal only happens when the employer has made a demand which the employee refused to accept. It is no longer relevant whether the dismissal or threat of dismissal was meant to force employees to accept the changes.²⁹⁹

As stated earlier, when an employee is dismissed for refusing to accept changes to the terms and conditions of employment, this is regarded as an automatically unfair dismissal. However, it is often difficult to differentiate the latter with instances where an employee is validly dismissed based on the employer's operational requirements. It is the courts' to duty to draw the distinction, on the merits of each case.³⁰⁰

²⁹⁶ Van Eck and Newaj *PELJ* 19.

²⁹⁷ Van Niekerk *et al* (2015) 258.

²⁹⁸ As above.

²⁹⁹ Grogan (2014) 216.

³⁰⁰ Van Niekerk *et al* (2015) 258; Van Eck and Newaj *PELJ* 25.

CHAPTER FIVE

LARGE-SCALE RETRENCHMENT

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1. Introduction

The *LRAA* of 2002³⁰¹ introduced amendments to the *LRA*. Section 189A of the *LRA*, enacted in 2002, brought about changes into law dealing with dismissals based on operational requirements.³⁰² Previously, parties resorted to power as a last resort to resolve matters of mutual interest, and other disputes could be directed to the *CCMA*³⁰³ or a bargaining council and/or the Labour Court for settlement. The Labour Amendment Act of 2002 brought about a new way to resolve disputes in cases of large-scale dismissals above a certain threshold.

Chapters 3 and 4 refer to the argument that the *LRA* allows an employer to retrench in order to achieve a change in the terms of conditions of employment with the aim of making profit, whereas a change to the terms ought to be a matter for collective bargaining and eventually industrial action, according to the argument. The *LAC* in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others*³⁰⁴ rejected this argument. However, the amendment to section 189A of the *LRA* of 2002 has to a large extent addressed this argument by introducing additional provisions on large-scale retrenchments.³⁰⁵

2. Large scale retrenchments and section 189A of the Labour Relations Act

The main aim of section 189A is to serve as a procedural counterforce to the

³⁰¹ Act 12 of 2002.

³⁰² Le Roux (2009) 1.

³⁰³ S64 and 191 of the *LRA*; Van Voore *LLD* (2009) 71.

³⁰⁴ (2003) 24 *ILJ* 133 (LAC).

³⁰⁵ Le Roux (2016) 165.

employer's power to retrench and it gives the unions the upper hand by introducing an opportunity for strike action, creating a mechanism to solve any procedural unfairness at an early stage and introducing a chance for facilitation of the consultation process by a third party.³⁰⁶ In the *Edcon v Steenkamp and others* case, the LAC explained that section 189A creates:

"an exception to the general prohibition on industrial action in relation to rights issues, recognising that large-scale retrenchments may involve hybrid issues not always classifiable as disputes of right of interest."³⁰⁷

The section also guides both parties in choosing between industrial action and adjudication where a consensus cannot be reached through the consultation or facilitation. In addition, a number of judgments have debated whether section 189A creates an exception, in that, during the statutory conciliation periods, it now becomes a "dismissal free zone".³⁰⁸

The Constitutional Court, has however, confirmed that retrenchment during the statutory conciliation periods are not legally void, they simply declare the dismissal procedurally unfair.³⁰⁹ Furthermore, sections 189A and 189 are closely related and should not be interpreted in isolation. As clearly stated by the LAC in *Gijima AST (Pty) Ltd v Hopley*:³¹⁰

"The two sections must be read together since they both apply to dismissals for operational requirements. Further, the overall obligation imposed by the two sections is for consultation on the matters referred to in section 189. It is also significant to note that the section 189A process is initiated by the very same section 189(3) notification issued for retrenchments. The items that form the subject of consultation are only listed in section 189(2) which includes the method for selecting employees to be dismissed. Such a provision is not found in section 189A."

What this means, in essence, is that in case of large-scale retrenchment, section 189A affords more options to the parties consulting in response to the employer's notice in

³⁰⁶ Le Roux (2016) 165.

³⁰⁷ *Edcon v Steenkamp and Others* (2015) 36 *ILJ* 1469 (LAC) para 11.

³⁰⁸ Le Roux (2016) 165.

³⁰⁹ *Steenkamp and Others v Edcon Limited* (CCT16/15) (2016) ZACC 1 (22 January 2016)

³¹⁰ *Gijima AST (Pty) Ltd v Hopley* (2014) 35 *ILJ* 2115 (LAC) para 34.

terms of section 189(3). However, the section states that once a certain route is chosen, the other option falls away.³¹¹

The new approach in section 189A only applies to employers with 50 or more employees and, as stated above, only if the number of contemplated dismissals in a twelve-month period is above a certain threshold. This threshold ranges from 10 employees for employers with up to 200 employees, to 50 for employers with 500 or more employees.³¹² However, section 189 is still applicable to all other employers and to larger employers who are below the threshold.

For the purpose of this discussion, the most important change that was brought about by section 189A³¹³ was the right to strike over retrenchments. There is a general limitation on the right to strike in terms of the *LRA*, as discussed in Chapters 2 and 3, in that an employee may not strike if the issue that is in dispute is one that may be referred to the Labour Court and a dispute about the fairness of a dismissal for operational requirements falls under the latter. Notwithstanding this, the *LRA* now affords employees the right to strike if the dispute is regarding the fairness of the retrenchment under circumstances where section 189A is applicable.³¹⁴ Van Voore rightly states:

“the fairness or otherwise of such dismissals, previously thought to be capable of objective determination by means of adjudication, may now be decided through recourse to power.”³¹⁵

3. Conclusion

The whole structure of the *LRA* assumes that a dispute is always referred for conciliation before it becomes the subject of strike action, adjudication or arbitration. When facilitation takes place, it is considered a replacement for conciliation and the parties are exempted from using the normal conciliation procedures.³¹⁶

³¹¹ S189A(10) of the *LRA*.

³¹² S189A(1)(a)-(b) of the *LRA*.

³¹³ S189A.

³¹⁴ S189A(2)(b).

³¹⁵ Van Voore *LLD* (2009) 73.

³¹⁶ Le Roux (2016) 167.

The improvements for a right to strike in section 189A look to be significant. However, the practicality of this section is still to be seen. According to Van Voore, it is not very clear how a resort to power can regulate issues such as the substantive fairness of a dismissal, the ability of the employer to continue employing all or some of the employees it contemplates dismissing, or whether there are alternatives for an employer to use, instead of retrenchment.³¹⁷ Furthermore, the author contends that if new technology forces an employer to consider reorganising the enterprise, which leads to retrenchments, it is not evident how the right to industrial action can change the need for new technology. However, the results are restricted in practice, and industrial action or the threat of it one would hope that it would achieve more than forcing the employer to consider ways of introducing technology in a way that least affects or threatens the employment of the largest possible number of employees.³¹⁸

³¹⁷ Van Voore *LLD* (2009) 83.

³¹⁸ As above.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

In South Africa, under the common law, strike action was considered as a breach of contract and an employer was permitted to dismiss the employees that are striking. The Constitution of South Africa provides for the right to strike and furthermore, the LRA gives effect to the right to strike. The LRA also sets out the limitations to the right to strike. However, in the UK, Australia, Denmark and Israel, the countries only offer the freedom to strike and not the right to strike.

As discussed in this study, the ILO Conventions do not contain an explicit right to strike. The right to strike has only been implied from the Conventions. The ILO Convention on Termination of Employment C158, specify the grounds on which a worker can be terminated, although South Africa has not ratified to the Convention, in South Africa employers are also allowed to dismiss workers only were a legitimate reason exists. It is submitted that South Africa complied with Convention C158 of the ILO.

The LRAA, changes the focus to include all cases where employees' contracts are terminated because they refused to accept changes to their conditions of service. The *Frys Metal* cases are highly debated together with the question of whether this amendment to the definition of automatically unfair dismissal adequately resolve the problems which existed prior to the amendments. The LAC and the SCA in the *Frys Metal* focused mainly on whether the dismissal was strategic or permanent and if the employers' intentions where to force the employees to accept the employers demand. In the event of a permanent dismissal based on the employers' operational requirements, this is usually not the case, because the employee is no longer employed by the employer. Here the LAC concluded that if the dismissal is not temporary the purpose of the dismissal will not be to force workers to accept a demand and therefore the repercussion will be that it is a fair dismissal in terms of section 188 (1) and 189 of the LRA which deals with dismissals based on the employers' operational requirements.

The *LRA* on the one hand, states that an employer is not allowed to dismiss workers who are participating in a protected strike, such a dismissal will be automatically unfair in terms of section 187(1)(a), however section 67(5) states that it is not unlawful to dismiss a striking employee for reasons based on the employer's operational requirements. Collective bargaining and dismissal for operational requirements clearly clash and as illustrated in the *Frys Metal* case the LRAA has not resolved these issues.³¹⁹ Regardless of the debates about the migration of the disputes of right and disputes of interest, it is clear that there are instances where these two meet.

The LRAA provisions to the definition of automatically unfair dismissal, should have clearly stated, that if the reason behind the dismissal is that the refusal of employees to accept the employers demand in any matter of mutual interest, this is it automatically an unfair dismissal but this should not exclude dismissals based on the employers operational requirements.

The study concludes that the clash between the rights to strike and the rights to terminate contracts in line with section 189 of the *LRA* has not been resolved. It is submitted that labour, business and government should engage in social dialogue to clarify this dichotomy. South Africa is faced with high rates of unemployment and job losses should be prevented at all costs. Added to this, the rights to strike as enshrined in the Constitution should not be restricted beyond what is acceptable in terms of the limitation clause.

³¹⁹ Grogan *ELJ* (2003) 6; Newaj and van Eck *PELJ* (2016) 25.

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