

# Determining the True Reason for an Alleged Section 187(1)(c) Dismissal: A Discussion of *National Union of Metalworkers of South Africa v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2021 42 ILJ 67 (CC)

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Online ISSN  
1727-3781

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### Date Submission

26 March 2021

### Date Revised

1 October 2021

### Date Accepted

1 October 2021

### Date published

13 October 2021

Editor Mr M Laubscher

### How to cite this article

Newaj K "Determining the True Reason for an Alleged Section 187(1)(c) Dismissal: A Discussion of *National Union of Metalworkers of South Africa v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2021 42 ILJ 67 (CC)" *PER / PELJ* 2021(24) - DOI <http://dx.doi.org/10.17159/1727-3781/2021/v24i0a10517>

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### DOI

<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a10517>

## Abstract

On 27 October 2020, the Constitutional Court handed down judgment in *National Union of Metalworkers of South Africa v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2021 42 ILJ 67 (CC). Following the judgment, it is now commonplace that the amendment to section 187(1)(c) of the *Labour Relations Act*, 1995 does not preclude an employer from dismissing employees for a permissible reason, such as its operational requirements, should they refuse to accept a demand.

The court confirmed that in cases such as this where they are faced with two opposing reasons for the dismissal, an impermissible reason on the one hand and a permissible reason on the other, an enquiry must be conducted into what the true reason for the dismissal is. However, the approach to be followed in conducting this enquiry caused dissent. Half of the judges were of the view that the correct approach is to follow the causation test set out in *SA Chemical Workers Union v Afrox Ltd* 1999 20 ILJ 1718 (LAC), while the other half disavowed reliance on the causation test. Instead, they opted to support the enquiry conducted in *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 24 ILJ 1917 (LAC).

This case note seeks to establish which approach should be followed in determining the true reason for an alleged section 187(1)(c) automatically unfair dismissal.

## Keywords

Automatically unfair dismissal; operational requirements; causation test; section 187(1)(c); demand; refusal to accept a demand.

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## 1 Introduction

One of the primary functions of the Labour Relations Act<sup>1</sup> (hereafter the LRA) is to protect employees against being unfairly dismissed.<sup>2</sup> In this regard, the LRA contains several safeguards.<sup>3</sup> Of note is section 187(1), which sets out a number of reasons for dismissal which are impermissible and would constitute an automatically unfair dismissal. One of the prohibited reasons is dismissal due to the refusal by employees to accept a demand. Section 187(1)(c) states that a dismissal is automatically unfair 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."

Notwithstanding the protection afforded by section 187(1)(c), it has been argued that if the employer's demand is based on its legitimate operational needs, a refusal by employees to accept the demand can be met with a dismissal for operational requirements.<sup>4</sup> Operational requirements are recognised as a permissible reason to dismiss.<sup>5</sup> A conflict thus emerges between an employer's right to dismiss for operational reasons and the right of employees not to be dismissed for refusing to accept a demand.

In *National Union of Metalworkers of SA v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2019 40 ILJ 2024 (LAC) (hereafter *Aveng LAC*), the Labour Appeal Court (LAC) was called upon to decide what the correct interpretation of section 187(1)(c) is.<sup>6</sup> In other words, should the provision be interpreted to mean that an employer cannot dismiss for operational requirements, which arise from the refusal of employees to accept a demand. Alternatively, are dismissals for operational requirements permitted where a refusal impacts on the operations of the employer?<sup>7</sup>

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<sup>1</sup> *Labour Relations Act* 66 of 1995 (LRA).

<sup>2</sup> Section 185 of the LRA.

<sup>3</sup> Section 188 of the LRA states that "a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or based on the employer's operational requirements; and that the dismissal was effected in accordance with a fair procedure."

<sup>4</sup> Newaj and Van Eck 2016 *PELJ* 20-21.

<sup>5</sup> Sections 188 and 189 of the LRA.

<sup>6</sup> *National Union of Metalworkers of SA v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2019 40 ILJ 2024 (LAC) (hereafter *Aveng LAC*) para 34.

<sup>7</sup> *Aveng LAC* paras 34-42.

It was contended before the LAC by the applicant union that this provision completely prohibits the dismissal of employees for operational requirements.<sup>8</sup> The applicant argued that it was irrelevant if the dismissal resulted from legitimate operational needs.<sup>9</sup> The LAC disagreed with the union's contentions and found that section 187(1)(c) does not preclude an employer from dismissing for operational requirements if the refusal of the demand genuinely impacts on its operations.<sup>10</sup>

The union appealed to the Constitutional Court (CC), averring that the LAC incorrectly interpreted section 187(1)(c). In *National Union of Metalworkers of South Africa v Aveng Trident Steel (a Division of Aveng Africa (Pty) Ltd)*<sup>11</sup> (hereafter *Aveng CC*), the CC had to consider whether the LAC reached the correct decision in its interpretation of section 187(1)(c).<sup>12</sup>

Two different contentions were similarly presented before the CC. On the one hand, the union argued that the dismissal of their members constituted automatically unfair dismissals, as it arose from their failure to accept the employer's demand. On the other hand, the employer maintained that the dismissals were for operational requirements,<sup>13</sup> thereby constituting a fair reason for dismissal in terms of sections 188 and 189 of the LRA.<sup>14</sup>

The CC was *ad idem* that the decision reached by the LAC was correct.<sup>15</sup> It therefore endorsed the finding that section 187(1)(c) does not prohibit an employer from dismissing employees for rejecting a demand that impacts on its operational requirements.<sup>16</sup>

Furthermore, there was unanimity that in order to determine which of the contentions advanced was correct, the court had to embark on an enquiry

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<sup>8</sup> *Aveng LAC* para 35.

<sup>9</sup> *Aveng LAC* para 35.

<sup>10</sup> *Aveng LAC* para 67. See further Newaj 2020 *ILJ* 843, where she indicates that NUMSA's interpretation of s 187(1)(c) of the LRA was rightfully rejected by the LAC.

<sup>11</sup> *National Union of Metalworkers of South Africa v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd)* 2021 42 *ILJ* 67 (CC) (hereafter *Aveng CC*).

<sup>12</sup> *Aveng CC* paras 37 and 66.

<sup>13</sup> *Aveng CC* paras 24, 29 and 30.

<sup>14</sup> Section 188(1)(a) of the LRA provides that a dismissal is not automatically unfair if the employer can prove that there was a fair reason for the dismissal related to the employee's conduct or capacity or the employer's operational requirements. Therefore, it is permissible to dismiss for misconduct, incapacity, or operational requirements. S 189 of the LRA essentially details the procedure that must be followed when an employer contemplates dismissing for reasons based on the employer's operational requirements.

<sup>15</sup> *Aveng CC* paras 101, 102 and 106.

<sup>16</sup> *Aveng CC* paras 101, 102 and 106.

to establish the true reason for the dismissal.<sup>17</sup> However, the selection of the approach to be followed to determine what the true reason was, was where the CC was divided.<sup>18</sup> The judgment by Mathopo AJ, with which four of the judges concurred,<sup>19</sup> supported the causation test followed in *SA Chemical Workers Union v Afrox Ltd*<sup>20</sup> (hereafter *Afrox*).<sup>21</sup> Contrarily, the judgment by Majiedt J, which was similarly endorsed by four judges,<sup>22</sup> completely disavowed reliance on the causation test.<sup>23</sup> Instead, it validated the conventional method of evaluating evidence, as seen to be applied in *Chemical Workers Industrial Union v Algorax (Pty) Ltd*<sup>24</sup> (hereafter *Algorax*).<sup>25</sup> While Jafta J was one of the judges that endorsed Majiedt's judgment, he penned his own reasons.

This case note seeks to evaluate the two different approaches followed by the CC to determine the true reason for an alleged section 187(1)(c) automatically unfair dismissal. The aim is to establish the most appropriate approach to be followed in disputes of this nature.

Determining the correct approach is a matter of importance. There is likely to be an increase in disputes of this nature now that the highest court has confirmed that section 187(1)(c) does not prohibit the dismissal of employees where the rejection of a demand impacts on an employer's operational requirements. Employers will undoubtedly not be reluctant to dismiss employees under these circumstances. However, not all dismissals effected due to employees' rejection of a demand will amount to a genuine dismissal for operational requirements. Therefore, there is room for potential abuse of the right to dismiss for operational requirements, if not properly guarded. Having certainty on the approach to be followed in determining the true reason for an alleged section 187(1)(c) dismissal would assist in rooting out misuse by employers and would serve as a safeguard to protect the values enshrined in the LRA, notably protecting employees from being unfairly dismissed.

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<sup>17</sup> *Aveng CC* paras 69 and 108.

<sup>18</sup> *Aveng CC* para 106.

<sup>19</sup> The four judges were Mogoeng CJ, Khampepe J, Madlanga J and Theron J.

<sup>20</sup> *SA Chemical Workers Union v Afrox Ltd* 1999 20 ILJ 1718 (LAC) (hereafter *Afrox*).

<sup>21</sup> *Aveng CC* paras 70, 73 and 80.

<sup>22</sup> The four judges were Jafta J, Mhlantla J, Tshiqi J, and Victor AJ.

<sup>23</sup> *Aveng CC* para 106.

<sup>24</sup> *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 24 ILJ 1917 (LAC) (hereafter *Algorax*).

<sup>25</sup> *Aveng CC* para 108.

## 2 The Constitutional Court on *Afrox* and *Algorax*

The judgment by Mathopo AJ (hereinafter referred to as the first judgment) supported the approach followed by *Aveng LAC*.<sup>26</sup> The LAC held that as a result of the amendment to section 187(1)(c),<sup>27</sup> the purpose or intention of the employer is no longer relevant.<sup>28</sup> Whether or not s 187(1)(c) is contravened depends on what the true reason for the dismissal of the employees was.<sup>29</sup>

The LAC recognised that the test for determining the true reason was laid down in *Afrox*.<sup>30</sup> Firstly, the test requires a determination of the factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is no, the second issue is one of legal causation. Here, it must be established whether the refusal was the main or dominant cause of the dismissal. The fact that *Afrox* did not specifically deal with a section 187(1)(c) automatically unfair dismissal but rather with a section 187(1)(a) automatically unfair dismissal<sup>31</sup> did not in any way affect the relevancy of the test. The LAC proceeded to apply this test to the facts of the case.<sup>32</sup>

Mathopo AJ emphasised that the determination of the reason for a dismissal is a question of fact, and the enquiry to be followed is an objective one.<sup>33</sup> He was convinced that the causation test applies, as section 187(1) 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 ... (c) a refusal by employees to accept a demand ....<sup>34</sup>

Therefore, fundamental to the enquiry is the reason for the dismissal. Where there is more than one possible reason for the dismissal, one must establish

<sup>26</sup> *Aveng CC* paras 72 and 73.

<sup>27</sup> Section 187(1)(c) of the LRA was amended in 2014. Prior to the amendment, s 187(1)(c) stated that a dismissal is automatically unfair if the reason for the dismissal is to "compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee."

<sup>28</sup> *Aveng LAC* para 61.

<sup>29</sup> *Aveng LAC* para 65.

<sup>30</sup> *Aveng LAC* para 68.

<sup>31</sup> Section 187(1)(a) of the LRA states that a dismissal is automatically unfair if the reason for the dismissal is "that the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest action* that complies with the provisions of Chapter IV".

<sup>32</sup> *Aveng LAC* paras 71-75.

<sup>33</sup> *Aveng CC* para 70.

<sup>34</sup> The LRA.

the dominant or proximate cause of the dismissal through an examination of the facts.<sup>35</sup>

Mathopo AJ explained that using the *Afrox* test is apposite as this is the test "which in essence seeks to distinguish automatically unfair dismissals from those that are not automatically unfair."<sup>36</sup> He supported the use of this test as it had been accepted and applied by the LAC in several cases in the context of section 187(1). Therefore, he found no reason why it could not equally apply in the context of a section 187(1)(c) dismissal.<sup>37</sup>

The judgment by Majiedt J (hereinafter referred to as the second judgment) relied on the so-called conventional method of evaluating evidence, which he held was followed in *Algorax*.<sup>38</sup> The *Algorax* judgment was appreciated, as it specifically dealt with section 187(1)(c) and not with one of the other listed automatically unfair dismissals. Majiedt J contended that in addressing section 187(1)(c), *Algorax* did not follow *Afrox*.<sup>39</sup>

Majiedt J rejected the *Afrox* test, as it emanated from delictual and criminal law and was seen to be imported into the arena of labour law without any basis.<sup>40</sup> He explained that:

in delict, therefore, causation entails asking whether there is a sufficiently close causal connection between the act or omission in question and the harm caused. But, on a plain reading of section 187(1)(c), there is nothing which suggests, either directly or impliedly, even on a remote basis, the application of a causation enquiry in interpreting the section.<sup>41</sup>

He emphasised that the legal concept of causation is technical and is fraught with difficulties.<sup>42</sup> In respect of factual causation he supported the sentiments expressed in *Lee v Minister of Correctional Services*, where it was held that the substitution exercise in applying the but-for test is troublesome due to its inflexibility.<sup>43</sup> In respect of legal causation he made reference to the challenges in applying the criteria used to determine legal causation as discussed in *De Klerk v Minister of Police*. Notably, the fact that public policy has a role to play and that considerations of public policy

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<sup>35</sup> *Aveng CC* paras 73 and 80.

<sup>36</sup> *Aveng CC* para 80.

<sup>37</sup> *Aveng CC* para 80.

<sup>38</sup> *Aveng CC* paras 108, 109 and 126.

<sup>39</sup> *Aveng CC* paras 108, 109 and 126.

<sup>40</sup> *Aveng CC* paras 109 and 116.

<sup>41</sup> *Aveng CC* para 116.

<sup>42</sup> *Aveng CC* paras 130-133.

<sup>43</sup> *Aveng CC* para 132.

must be infused with constitutional values.<sup>44</sup> Majiedt J summed up his view by stating that "the causation test does not seem to be practical in the context of section 187(1)(c)."<sup>45</sup>

Majiedt J stressed that what section 187(1)(c) demands is simply for one to determine whether the reason for the dismissal is a refusal by employees to accept a demand in respect of a matter of mutual interest between them and their employer. This is established by applying the rules applicable to the evaluation of evidence. Essentially, the reasons advanced by the employer to justify the decision to dismiss must be evaluated to determine whether they sufficiently support the decision to dismiss.<sup>46</sup> He held that where there are two conflicting, irreconcilable versions before a court they must apply the approach laid down in *Stellenbosch Farmers Winery*.<sup>47</sup> Here, one reaches a conclusion on the disputed issues by making findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.<sup>48</sup>

The second judgment highlighted the case of *Kroukam v SA Airlink (Pty) Ltd* 2005 26 ILJ 2153 (LAC) (hereafter *Kroukam*) and its adoption of a similar approach to that in *Algorax*.<sup>49</sup> Majiedt J explained that Zondo J, writing for the minority in *Kroukam*,<sup>50</sup> made no reference to a causation test but instead conducted a traditional factual inquiry.<sup>51</sup> Davis AJA, who wrote for the majority in *Kroukam*, was said to similarly have applied the conventional approach to the evaluation of evidence, despite incorrectly referring with approval to the test set out in *Afrox*.<sup>52</sup> While Majiedt J acknowledged that the judgment of *Afrox* was followed by the LAC in addressing other forms of automatically unfair dismissals, he was of the view that these judgments were wrongly decided.<sup>53</sup>

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<sup>44</sup> *Aveng CC* para 133.

<sup>45</sup> *Aveng CC* para 134.

<sup>46</sup> *Aveng CC* paras 118, 119 and 126.

<sup>47</sup> *Aveng CC* para 119.

<sup>48</sup> *Aveng CC* para 119.

<sup>49</sup> *Aveng CC* para 127.

<sup>50</sup> *Aveng CC* para 127.

<sup>51</sup> *Aveng CC* para 127.

<sup>52</sup> *Aveng CC* para 128.

<sup>53</sup> *Aveng CC* para 129. See further para 122, where it is explained that the LAC cases that applied *Afrox* as referred to in the first judgment failed to properly engage with the plain language of the section and did not have regard to *Algorax* and *Kroukam v SA Airlink (Pty) Ltd* 2005 26 ILJ 2153 (LAC) (hereafter *Kroukam*). The LAC cases referred to in the first judgment were *TFD Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC) (hereafter *Faris*); *Long v Prism Holdings Ltd* 2012 33 ILJ 1402 (LAC)

Majiedt J supported the approach followed by the Labour Court (LC) in *National Union of Metalworkers of SA obo Members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd* 2018 39 ILJ 1625 (LC) (hereafter *Aveng LC*).<sup>54</sup> He applauded the court for making extensive reference to the evidence before it,<sup>55</sup> which he found not to be the approach followed by the LAC. The LAC, so he stated, did not refer to the evidence but merely followed *Afrox*.<sup>56</sup>

The judgment written by Jafta J (hereinafter referred to as the third judgment), argued that the causation test defies the language of section 187(1)(c).<sup>57</sup> He discussed the causation test as it applies in the law of delict, notably making a distinction between wrongful conduct and the reason or motive for the harm.<sup>58</sup> The point that he sought to make was that the application of the causation test would lead to an "absurdity" as "it would mean that by their refusal, the employees had caused their own dismissal."<sup>59</sup> The absurdity seemingly arises because in a delict one assesses whether the wrongful conduct of the defendant caused the harm suffered by the plaintiff. In the context of section 187(1)(c), the harm is the dismissal. Therefore, one is essentially assessing whether the harm was caused by the actions of the same party.

To contextualise these two approaches, a discussion of both *Afrox* and *Algorax* is required.

### 3 The causation test

The causation test first arose in *Afrox*. It was applied to determine the true reason for dismissals, not in the context of section 187(1)(c), but in respect of section 187(1)(a).<sup>60</sup> Here, the employees contended that they were dismissed for their participation in a protected strike, which constitutes an automatically unfair dismissal. Opposingly, the employer argued that the

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(hereafter *Long*); and *State Information Technology Agency (Pty) Ltd v Sekgobela* 2012 33 ILJ 2374 (LAC) (hereafter *Sekgobela*).

<sup>54</sup> *Aveng CC* para 120.

<sup>55</sup> *Aveng CC* para 120.

<sup>56</sup> *Aveng CC* para 121.

<sup>57</sup> *Aveng CC* para 148.

<sup>58</sup> *Aveng CC* paras 146 and 147.

<sup>59</sup> *Aveng CC* para 148.

<sup>60</sup> *Afrox* para 5. S 187(1)(a) of the LRA deals with dismissals for participation in or in support of a protected strike, while s 187(1)(c) deals with dismissal for a refusal to accept a demand made by the employer.



employees were dismissed for operational requirements, as permitted in terms of the LRA.<sup>61</sup>

The court, which was faced with these two possible reasons for the dismissal, had to determine what the actual reason was. Were the employees dismissed for their participation in or support of a protected strike or were they dismissed for operational requirements?<sup>62</sup>

The court stated that the determination of the reason for the dismissal was essentially one of causation. In other words, the question to be asked to establish the reason for the dismissal was what was the cause of the dismissal? The court explained that there are two stages to determining causation; the first is factual causation and the second is legal causation. Factual causation enquires into whether participation in or support of the protected strike was a *sine qua non* (or prerequisite) for the dismissal? In other words, would the dismissal have occurred if there had been no participation or support of the strike? If the answer was yes, the dismissal would not be automatically unfair. If the answer was no, this did not lead to an immediate conclusion that the dismissal was automatically unfair. One must move onto the next stage, which is determining legal causation. Here, one is concerned with establishing whether participation or support of the strike was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. The court emphasised that the enquiry into the reason for the dismissal was an objective one in which the employer's motive for the dismissal was simply one of a number of factors to be taken into account.<sup>63</sup>

The court considered the facts of the case and concluded that while participation in the strike was the factual cause of the dismissal, it was not the legal cause. Although the continued participation in the strike contributed to the decision to dismiss, it was not the main, or proximate, or dominant cause for the dismissal. The dominant cause was the employer's operational requirements.<sup>64</sup>

The causation test was followed in subsequent automatically unfair dismissal cases. However, none of these dealt with an alleged automatically unfair dismissal in terms of section 187(1)(c).

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<sup>61</sup> *Afrox* paras 3 and 5.

<sup>62</sup> *Afrox* para 31.

<sup>63</sup> *Afrox* para 32.

<sup>64</sup> *Afrox* paras 45-48.

In *Kroukam* the court had to decide whether the true reason for dismissal was the active role played by the employee in his position as chairman of a trade union, which would amount to a violation of section 187(1)(d) of the LRA.<sup>65</sup> Alternatively, whether the employee was dismissed for misconduct relating to gross insubordination and being a disruptive influence to the orderly operation of the respondent,<sup>66</sup> which would constitute a permissible reason for dismissal. The court explained that the dispute concerned the application of the causation test, which required the employer to produce evidence to illustrate that the reason for the dismissal was not one that fell within the prohibitions of section 187(1).<sup>67</sup> After a holistic consideration of the evidence, the court concluded that the dominant cause of the appellant's dismissal was his union activities and not misconduct.<sup>68</sup>

The court in *Van der Velde v Business & Design Software (Pty) Ltd* 2006 10 BLLR 1004 (LC) (hereafter *Van Der Velde*) assessed whether the dismissal was an automatically unfair dismissal in terms of section 187(1)(g)<sup>69</sup> or whether it was a dismissal for operational requirements.<sup>70</sup> Van Niekerk AJ (as he then was) prescribed to the causation test, stating that:

when the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the Court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself.<sup>71</sup>

By applying the causation test to the evidence presented, it was found that the respondents failed to discharge the onus of establishing that the applicant was dismissed for a reason other than an automatically unfair reason in terms of section 187(1)(g).<sup>72</sup>

*Long v Prism Holdings Ltd* 2012 33 ILJ 1402 (LAC) (hereafter *Long*) contended with the same issues as in *Van der Velde*, namely whether the

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<sup>65</sup> *Kroukam* para 2. S 187(1)(d) of the LRA states that a dismissal is automatically unfair if the reason for the dismissal is that the employee took action, or indicated an intention to take action, against the employer by exercising any right conferred by the LRA or participating in any proceedings in terms of this LRA.

<sup>66</sup> *Kroukam* para 22.

<sup>67</sup> *Kroukam* paras 26-29.

<sup>68</sup> *Kroukam* para 38.

<sup>69</sup> Section 187(1)(g) of the LRA states that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in ss 197 or 197A of the LRA.

<sup>70</sup> *Van der Velde v Business & Design Software (Pty) Ltd* 2006 10 BLLR 1004 (LC) (hereafter *Van der Velde*) para 2.1.

<sup>71</sup> *Van der Velde* para 2.4.2.

<sup>72</sup> *Van der Velde* para 2.5.

dismissal was for operational requirements or due to the transfer of the business or a reason related thereto.<sup>73</sup> The court made reference to the test set out in *Afrox* and came to the conclusion that based on all of the evidence presented, the applicant failed to show that the probable cause of his dismissal fell within the provisions of section 187(1)(g) of the LRA. The court found that the respondent's evidence that the applicant was dismissed for operational reasons was more probable.<sup>74</sup>

In *TFD Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC) (hereafter *Faris*) the LAC had to determine whether the true reason for the dismissal was incapacity as argued by the employer, as opposed to an automatically unfair dismissal for discriminatory reasons prohibited in section 187(1)(f).<sup>75</sup> Relying on the *Afrox* test it was concluded that the dominant reason for the respondent's dismissal was her religion and not her refusal to do the required work on a Saturday.<sup>76</sup>

The causation test has become recognised as the test to be followed when the reason for the dismissal is in dispute. This occurs when the employee alleges that the dismissal was for an impermissible reason, while the employer claims that it was due to misconduct, incapacity or operational requirements.<sup>77</sup>

#### **4 Approach followed in *Algorax***

In *Algorax* the court had to deal specifically with an alleged section 187(1)(c) automatically unfair dismissal. Here, employees were dismissed following their refusal to accept a proposal to change the shift system from working a straight-day shift to a rotating shift in the packing department.<sup>78</sup>

The packing department of the employer initially operated on two shifts, a night shift and a day shift.<sup>79</sup> In order to avoid retrenchments when the bulk sales department was restructured and the cleaning department was closed down, the employees from these departments were transferred to the day shift in the packing department. This resulted in the day shift being overstaffed and the night shift being understaffed.<sup>80</sup> There were also quite

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<sup>73</sup> Long para 35.

<sup>74</sup> Long paras 35 and 36.

<sup>75</sup> *Faris* paras 23-35.

<sup>76</sup> *Faris* paras 26 and 31.

<sup>77</sup> Grogan *Dismissal* 128.

<sup>78</sup> *Algorax* para 4.

<sup>79</sup> *Algorax* para 5.

<sup>80</sup> *Algorax* para 6.

a few employees on the night shift who were contract labourers working in vacant permanent positions because it was difficult to get permanent employees who were prepared to work the night shift.<sup>81</sup>

For the respondent to remain competitive, it had to cut down on costs, which included cutting down on the number of its employees. It was decided that no retrenchments should occur.<sup>82</sup> However, the use of contract labourers had to be done away with as there was an excess number of permanent employees.<sup>83</sup> Therefore, the employer argued that the employees' refusal to work the rotating shift created genuine operational difficulties.<sup>84</sup>

As was the case in *Afrox*, the court was faced with two possible reasons for the dismissal - an impermissible reason on the one hand, and a permissible reason on the other. It is important to note that this case was decided prior to the amendment to section 187(1)(c). At that time, section 187(1)(c) was worded as follows: a dismissal is automatically unfair if the reason for the dismissal is to "compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee." As discussed below, the approach followed in *Algorax* would not be apt, based on the current wording of the section.

Zondo J enquired into the purpose of the dismissal.<sup>85</sup> Based on an evaluation of the evidence, he found that the purpose was to compel the employees to agree to the employer's demand.<sup>86</sup> This conclusion was reached because the employer's intention was not for the dismissals to be final, as they were willing to take the employees back if they acceded to the demand. Therefore, the dismissal was used as a tactic to put pressure on the employees to accept the proposal of a rotating shift.<sup>87</sup>

*Afrox* and *Algorax* differs because in *Afrox* the key factor in determining whether the dismissal was automatically unfair was ascertaining the reason for the dismissal. Was the true or main reason for the dismissal the

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<sup>81</sup> *Algorax* para 6.

<sup>82</sup> *Algorax* paras 13 and 14.

<sup>83</sup> *Algorax* para 14.

<sup>84</sup> *Algorax* para 36.

<sup>85</sup> *Algorax* para 37.

<sup>86</sup> *Algorax* para 39.

<sup>87</sup> *Algorax* para 41. See further para 45, where it is stated that "Mr Lones-Field's evidence that the respondent did not want to dismiss the employees but only wanted them to change their minds must mean that the dismissal was being used as a tactic to put pressure on the employees to change their minds and agree to work the rotating shift." Also see para 54, where it is stated that "it is extraordinary that for over two years after the dismissal of the individual appellants the respondent kept its offer to reinstate the individual appellants if they acceded to its demand open."

employees' participation in or support of the protected strike or was it the operational needs of the employer? In *Algorax* the key factor in determining whether the dismissal was automatically unfair was the employer's intention. Was the purpose or intention of the dismissal to compel the employees to accept the demand?

In *Algorax*, while the court considered the reason for the dismissal, which was found to be the employees' refusal to work the rotating shifts, the reason did not play a role in determining whether an automatically unfair dismissal had been effected.<sup>88</sup> It was considered in determining the employees' alternate claim, namely if the dismissal was not automatically unfair, was it unfair in that there was no fair reason for it.<sup>89</sup>

It is clear that this distinction in approach between purpose or intention and reason or cause emerges only because of the manner in which section 187(1)(c) was worded at the time. Based on the wording of section 187(1)(c) Zondo J correctly directed his enquiry to determining whether the employer's intention in dismissing its employees was to compel them to accept the demand. This was based on the approach followed in *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* 2005 26 ILJ 689 (SCA).

However, irrespective of whether a court enquires into the purpose of a dismissal or the reason for a dismissal, a proper evaluation of the evidence is required.

## **5 Analysis of *Afrox* and *Algorax*: The correct approach for establishing the true reason for an alleged section 187(1)(c) dismissal**

### **5.1 Did *Algorax* discard *Afrox* and utilise a different approach?**

The second judgment places a great deal of emphasis on the *Algorax* approach in determining whether a dismissal constitutes an automatically unfair dismissal in terms of section 187(1)(c). Having discussed *Algorax*, it is apparent that the case does not discard the test set out in *Afrox*. The test in *Afrox* was not relevant to the enquiry conducted by Zondo J. Based on the wording of section 187(1)(c), the determining factor was not to ascertain what the real reason for the dismissal was, but rather what the purpose was. As explained by Zondo J, there is a clear distinction between an enquiry into

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<sup>88</sup> *Algorax* para 58.

<sup>89</sup> *Algorax* para 56.

purpose and an enquiry into reason.<sup>90</sup> This is buttressed by the explanation in *Afrox* that the employer's motive is one of a number of factors to be taken into account in determining the true reason for the dismissal.<sup>91</sup>

Considering the amended section 187(1)(c), the purpose of the dismissal is no longer the primary consideration. As stated by Grogan, one identifies an automatically unfair dismissal by looking at the reasons why the employer dismissed.<sup>92</sup> The CC unanimously agreed that when faced with two opposing grounds of dismissal in a section 187(1)(c) claim, the court must embark on an enquiry to establish the true reason for the dismissal.<sup>93</sup> Majiedt J accepted that while none of the other judgments that applied the *Afrox* test dealt with the interpretation of section 187(1)(c), the enquiry remained the same, which is establishing the true reason for the dismissal.<sup>94</sup>

Therefore, the second judgment misconstrued or confounded the enquiry undertaken in *Algorax* to determine whether a section 187(1)(c) dismissal occurred.<sup>95</sup> Zondo J did not make this determination by looking at the reason for the dismissal. He made the determination by looking at the purpose of the dismissal. Therefore, it cannot be said that *Algorax* followed a different approach to *Afrox*, as the enquiry in *Algorax* was different from the enquiry in *Afrox*. Due to the nature of the *Afrox* test as explained earlier, *Algorax* would probably have followed *Afrox* in determining the real reason for the dismissal, if section 187(1)(c) had been worded as it currently is.

## **5.2 Was *Algorax* followed in subsequent judgments?**

The assertions of the second judgment that *Kroukam* followed *Algorax* must be rejected. Davis AJA specifically referred to the application of the causation test set out in *Afrox*.<sup>96</sup> This could not have been an error on his part, as he expressly states that the court is required to determine from the evidence led what the "dominant" or most likely cause of the dismissal was.<sup>97</sup> While Zondo J did not specifically refer to the *Afrox* test, as Davis

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<sup>90</sup> *Algorax* para 58.

<sup>91</sup> *Afrox* para 32.

<sup>92</sup> Grogan *Dismissal* 128.

<sup>93</sup> *Aveng CC* paras 69 and 108.

<sup>94</sup> *Aveng CC* para 108.

<sup>95</sup> In *Aveng CC* para 125 Majiedt J says that Zondo J summarised the evidence and made a finding on the purpose of the dismissal. In para 126 he says that in order to determine the true reason for the employee's dismissal Zondo J did not follow the approach adopted in *Afrox*. From these two paragraphs it seems that he regarded purpose and reason to be synonymous and used these two terms interchangeably.

<sup>96</sup> *Kroukam* para 27.

<sup>97</sup> *Kroukam* para 29. See further Cohen 2007 *ILJ* 1465.

AJA did, a consideration of all the circumstances and evidence led him to the conclusion that the principal or dominant reason for the dismissal was the appellant's participation in union activities.<sup>98</sup> Ascertaining the dominant or main reason for the dismissal, equates to following part of the causation test set out in *Afrox*. Furthermore, this case was concerned with determining the true reason for the dismissal, which was not the case in *Algorax*. Therefore, it cannot be said that *Kroukam* followed *Algorax*. *Kroukam* in fact endorsed the *Afrox* test.

### **5.3 Does the wording of section 187(1)(c) militate against the use of *Afrox*?**

The second and third judgments express a view that considering the wording of section 187(1)(c), the use of *Afrox* is inappropriate or without any basis.<sup>99</sup> As correctly contended in the first judgment, section 187(1) states that a dismissal will be automatically unfair only if the employer's reason for dismissing is based on one of the reasons listed in section 187(1). It is therefore apt to consider what that reason is. Where there is more than one possible reason, which has been prevalent in all the cases under discussion, it is the main or dominant reason that must be established. This brings us to the *Afrox* test.

The concerns raised in the third judgment that an application of the causation test would lead to an absurdity is rejected. It is accepted that in the law of delict, factual causation is used to determine whether the harm suffered by the plaintiff resulted from or was caused by the wrongful conduct of the defendant. With this reference in mind, the third judgment looked at it from the point of view that applying the causation test to section 187(1)(c) means assessing whether the dismissal of the employees was caused by the actions of the employees in refusing to accept the demand. Therefore, this would not be in line with the causation test applied in the law of delict.

Firstly, labour law is:

a complex and intertwined body of law drawn from a number of diverse legal sources. Contract, delict, criminal law, administrative law, company law and international law are all areas of law with which labour law to a greater or lesser degree interacts.<sup>100</sup>

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<sup>98</sup> *Kroukam* para 90.

<sup>99</sup> The reasons for this are discussed in 2 above, under the heading "The Constitutional Court on *Afrox* and *Algorax*".

<sup>100</sup> Van Niekerk and Smit *Law@work* 3.

Therefore, there are principles that emanate from other sources of law that are applied in the field of labour law.<sup>101</sup> Secondly, these principles do not always take on the exact form that they have in the original source of law.<sup>102</sup>

While the causation test may not apply precisely as it would in the law of delict, the question to be asked is whether this test works in labour law. Does it make it easier to determine whether the true reason for the dismissal was the employees' refusal to accept the employer's demand? If it does, why would it be improper to utilise it?

As indicated earlier, it is not contested that in such disputes the true reason for the dismissal must be determined. Legal causation is about determining what the main or dominant reason for the dismissal is, when faced with more than one possible reason for dismissal. This is an essential test that must be performed.

Factual causation, on the other hand, is about asking whether there would have been a dismissal if it were not for the employee's refusal to accept the employer's demand. If no link can be shown between the dismissal and the refusal to accept the demand, no automatically unfair dismissal has been committed. This enquiry comes in before one looks at the main or dominant reason for the dismissal, as establishing the main or dominant reason would be a non-issue if there were no link between the dismissal and the automatically unfair reason. Therefore, this part of the enquiry plays an important role.

Davis AJA in *Kroukam* explained that in an alleged section 187(1) dismissal, the employee has an evidential burden to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. Thereafter, the responsibility shifts to the employer to produce evidence to show that the reason for the dismissal was not an impermissible reason envisaged in section 187.<sup>103</sup> The court subsequently

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<sup>101</sup> The principle of legitimate expectation comes from administrative law. See *Administrator of the Transvaal v Traub* 1989 10 ILJ 823 (A) 841C-I. Similarly, the *audi alteram partem* principle emerges from administrative law, but is applied in other areas of law, as well as labour law. See Burns 1991 SAPL 282, where the *audi alteram partem* principle in the administrative law context is discussed. In *Mdwaba v Nonxuba* 2018 ZAGPJHC 44 (9 March 2018) paras 1,2 and 6 the principle is discussed in the context of a civil case.

<sup>102</sup> Olivier 1996 ILJ 1028 explains that the principle of legitimate expectation that arises from administrative law could be used only to assert a right to be heard prior to a decision being taken. In other words, it could be used only to enforce procedural fairness. However, the principle as it applies in the LRA envisages both procedural and substantive protection.

<sup>103</sup> *Kroukam* para 28.



considers the evidence led to determine the dominant or most likely cause of the dismissal.<sup>104</sup> This approach was endorsed by *Aveng LC*<sup>105</sup> and was cited with approval in the second judgment.<sup>106</sup> There is undoubtedly synergy between the burden of proof as set out in *Kroukam* and the causation test set out in *Afrox*.

#### **5.4 Does following *Afrox* imply that evidence is not evaluated?**

The second judgment seems to be of the view that if one uses *Afrox* then there is no evaluation or no proper evaluation of evidence.<sup>107</sup> This cannot be correct. The first judgment explains in no uncertain terms that the determination of the reason for a dismissal is a question of fact. Where there is more than one possible reason for the dismissal, the dominant reason must be established through an examination of the facts.<sup>108</sup> The facts cannot be established other than through the leading of evidence and the subsequent evaluation of that evidence.

Even though the second judgment contends that the LAC did not consider the evidence, Majiedt J expressly stated that the LAC "after considering all the facts" found that the dominant reason for dismissal was the operational requirements of the employer.<sup>109</sup> In the other cases that followed *Afrox*, there was due consideration of the evidence led.<sup>110</sup>

It is trite that a court cannot arrive at a decision about what the main or dominant reason for a dismissal is without having due regard for the evidence presented. This applies whether the enquiry is called the determination of legal causation or whether it is simply termed the determination of the true reason for dismissal. This will require the court to look at the credibility and reliability of witnesses, as well as the probabilities. Therefore, the application of the causation test does not eliminate a proper evaluation of the evidence.

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<sup>104</sup> *Kroukam* para 29.

<sup>105</sup> *Aveng LC* para 65.

<sup>106</sup> *Aveng CC* paras 120 and 121.

<sup>107</sup> *Aveng CC* para 126 states that "the reason or reasons advanced by the employer for that decision to dismiss, must be subjected to the evaluation usually undertaken to assess evidence, as Zondo JP did in *Algorax*."

<sup>108</sup> *Aveng CC* paras 70, 73 and 80.

<sup>109</sup> *Aveng CC* para 121. See further *Aveng LAC* paras 4-29.

<sup>110</sup> See *Long* paras 35 and 36; *Sekgobela* paras 16-18 and 33; and *Faris* paras 2-23.

## 6 Conclusion

The approach followed by the first judgment, which endorsed the causation test set out in *Afrox*, is found to be correct. It is commonplace that the determination of whether an automatically unfair dismissal in terms of section 187(1)(c) has been committed requires one to establish whether the employees' refusal to accept the employers demand was the true reason for the dismissal. The causation test is directed at establishing just this. Once a link has been shown between the dismissal and the impermissible reason, the test requires that the evidence be evaluated to establish what is the main or dominant reason for the dismissal.

None of the reasons advanced by the second and third judgments for rejecting the test warrants its displacement. Ultimately, the assistance provided by the causation test in this area of labour law outweighs the reasons for its rejection.

The findings from this analysis should bring a level of certainty to this area of the law by convincing courts of the continued role, importance and application of the *Afrox* test. This test plays an important role in rooting out unscrupulous dismissals under the guise of operational requirements. The application of this test in all cases of this nature will aid the achievement of a primary objective of the LRA, which is rooting out unfair dismissals.

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*State Information Technology Agency (Pty) Ltd v Sekgobela* 2012 33 ILJ 2374 (LAC)

*TFD Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC)

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### **Legislation**

*Labour Relations Act* 66 of 1995

### **List of Abbreviations**

CC	Constitutional Court
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal
SAPL	South African Public Law