

1. THE CONSTITUTION AND STATUTORY FRAMEWORK

1.1 Introduction

Since the advent of constitutional democracy, there has been a steady growth in the volume of employment and labour protection legislation.¹ The decade following the enactment of the new labour code has witnessed an avalanche of decisions of courts and arbitration awards of labour adjudicatory tribunals.² Many of them involve unfair dismissals generally,³ unfair suspensions,⁴ residual unfair labour practices,⁵ disputes over promotion hinging on affirmative action, employment equity and unfair discrimination,⁶ the recurrent

¹ See eg, Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 3 of 1983; Basic Conditions of Employment Act 75 of 1997; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Employment Equity Act 55 of 1998; Educators Employment Act 76 of 1988; Promotion of Administrative Justice 3 of 2000; Protected Disclosures Act 26 of 2000; Public Service Act (Proc 103 of 1994) Skills Development Act 97 of 1998; Skills Development Levies Act 9 of 1999; Unemployment Insurance Act 30 of 1996; The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

² See generally; Zondo, R 'The new Labour Courts and labour law: The first seven months of the new LRA' (1998) 19 *ILJ* 686; Anonymous 'Under strain ... coping so far: the first four months of the CCMA' (1997) 6(7) *CLL* 61; Brand, J. 'CCMA: achievements and challenges: lessons from the first three years' (2000) 21 *ILJ* 77; Godfrey, S. & Theron, J 'The CCMA and small business: the results of a pilot study' (2000) 21 *ILJ* 53; Wallis, M.J.D. 'The new era – How decisive is the break from the past (1999) 20 *ILJ* 902.

³ *Rantho v Premier, Free State Province & others* (2005) 26 *ILJ* 2336 (O); *Mpetsheni v Chairman, Commission Appointed in terms of Section 236(6) of the Constitution of the Republic of SA 1993 & others* (2005) 26 *ILJ* (Tk); *PSA obo Putter v Department of Agriculture* (2001) 22 *ILJ* 568 (LC); *Mabilo v Mpumalanga Provincial Government & others* (1999) 20 *ILJ* 1818 (LC); *MEC, Department of Finance, Economic Affairs & Tourism (Northern Province) v Mahumani* (2004) 25 *ILJ* 2311 (SCA); *Van Eyk v Minister of Correctional Services & others* (2005) 26 *ILJ* 1039 (E); *IMATU obo Coetzer v Stad Tygerberg* (1999) 20 *ILJ* 971 (CCMA); *v KwaZulu-Natal Health Services* (1999) 20 *ILJ* 893 (LC); *PSA obo Venter v Laka NO & others* (2005) 26 *ILJ* 2390 (LC); *Koto & another v General Public Service Sectoral Bargaining Council & others* (2005) 26 *ILJ* 481 (LC).

⁴ *Ngwenya v Premier of KwaZulu-Natal* [2001] 8 *BLLR* 924 (LC); *MEC for Tourism Affairs: Free State v Nondumo & others* (2005) 26 *ILJ* 1337 (LC); *SAPU & another v Minister of Safety & Security & another* (2005) 26 *ILJ* 524 (LC); *Marcus v Minister of Correctional Services & others* (2005) 26 *ILJ* 745 (SE).

⁵ *Department of Finance v CCMA & others* (2003) 24 *ILJ* 1969 (LAC); *POPCRU obo Baadjies and SAPS* (2003) 24 *ILJ* 254 (CCMA); *PSA/Department of Works: Limpopo* [2003] 7 *BALR* 718 (BC); *Blignaut/SAPS* [2003] 7 *BALR* (BC); *Public Servants Association obo Steenkamp/SAPS* [2003] 7 *BALR* 786 (BC); *Mbatha and Durban Institute of Technology* (2005) 26 *ILJ* 2454 (CCMA).

⁶ See eg: *Minister of Finance & another v Van Heerden* (2005) 26 *ILJ* 1593 (CC); *Gordon v Department of Health, KwaZulu-Natal* (2004) 25 *ILJ* 1431 (LC); *Cupido v Glaxo Smithkline SA (Pty) Ltd* (2005) 26 *ILJ* 868 (LC); *Visser v Minister of Justice & Constitutional Affairs & others* (2005) 26 *ILJ* 1417 (T); *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC); *Stokwe v MEC Department of Education, Eastern Cape & another* (2005) 26 *ILJ* 972 (LC). For a detailed discussion: Note 'Sovereign princess: Must affirmative action be fair?' (2004) 20(6) *EL* 11; 'Blunting the sword: The rights of designated employees' (2004) 20(2) *EL* 14; 'Justice

problem of jurisdiction,⁷ and review of arbitration proceedings.⁸ While wage and disputes⁹ on the one hand, and strikes¹⁰ on the other will always feature as perennial events in the labour-management calendar, truly important interface over several years has been business restructuring,

The critical issues raised by workplace restructuring are most cogently summed up by Clive Thompson as follows:¹¹

'A dual, counter-balanced trend appears to be emerging in the jurisprudence. On the one hand, the courts have shown that they are – with good reason – reluctant to challenge employers' business decisions on workplace change, whether they relate to the introduction of new technology, process improvement or alterations in work practices. This deference extends, with one exception, also to the consequences change such as a decision to outsource, changed terms and conditions of employment, and transfers of employees as part of a going concern.'

prevails: Pitfalls in promotion disputes' (2004) 20(3) *EL* 3; and 'No plan required: Affirmative action, equality and unfair discrimination' (2005) 21(1) *EL* 10; Note 'Affirmative action: 'shield' or 'sword'?' (2003) 12(5) *LLN* 2; Dupper, O 'In defence of affirmative action in South Africa' (2004) 121(1) *SALJ* 187; Garbers C 'Is there a right to affirmative action appointment?' (*Dudley v City of Cape Town and another*) (2004) 13(7) *CLL* 65; Schooling, H 'Affirmative action and pension policies' (2004) 14(5) *CLL* 47; Ngcukaitobi, T 'Adjudicating transformation in the Labour Courts – An edifice on the rise?' (2007) 28 *ILJ* 1436.

⁷ See eg: *Thabane v General Public Service Sectoral Bargaining Council & others* (2005) 26 *ILJ* 334 (LC); *Global Technology Business Intelligence (Pty) Ltd v CCMA & others* (2005) 26 *ILJ* 472 (LC); *Cosmos Health (Pty) Ltd v CCMA & others* (2005) 26 *ILJ* 467 (LC); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 *ILJ* 1499 (SCA). See also Pretorius SC, P 'A dual system of dismissal law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 *ILJ* 2209 (SCA) (2007) 28 *ILJ* 2172;

⁸ See generally *Carephone (Pty) Ltd v Marcus NO & others* [1998] 8 *BLLR* 872 (LC); (1998) 19 *ILJ* 1425 (LC); *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC); *Shoprite Checkers (Pty) Ltd v CCMA & others* (1998) 19 *ILJ* 892 (LC); *SACCAWU v Edgars Stores Ltd & another* [1997] 10 *BLLR* 1342 (LC); *Country Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 *BLLR* 1117 (LAC); (1998) 20 *ILJ* 1702 (LAC); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* [2002] 6 *BLLR* 493 (LAC); *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 *ILJ* 340 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2000) 21 *ILJ* 1232 (LC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO* [2001] 9 *BLLR* 1011 (LAC). For further readings: Sharpe, CW 'Reviewing CCMA arbitration awards: Towards clarity in the Labour Courts' (2000) 21 *ILJ* 2160.

⁹ See generally, Du Toit, D 'What is the future of collective bargaining (and Labour Law) in South Africa?' (2007) 28 *ILJ* 1405; Anstey, M 'National bargaining in South Africa's clothing manufacturing industry: Problems and prospects of multi-employer bargaining in an industry under siege' (2004) 25 *ILJ* 1829; Landman, A 'The duty to bargain – an old weapon pressed into service' (2004) 25 *ILJ* 39; Mischke, C 'Getting a foot in the door: Organisational rights and collective bargaining in terms of the LRA' (2004) 13(6) *CLL* 51; Steenkamp, A, Stelzner, S & Badenhorst, N 'The right to bargain collectively' (2004) 25 *ILJ* 943.

¹⁰ *Modise v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC); *PSA v Minister of Justice & Constitutional Development & others* [2001] 11 *BLLR* 1250 (LC). See also Myburgh, JF '100 years of strike law' (2004) 25 *ILJ* 962.

¹¹ 'Labour-management relations' in Cheadle *et al Current Labour Law* (2000, Juta) 35, 35. See too

On the other hand, whenever business restructuring lead to job losses the courts have become distinctly more assertive with respect to both procedure and substance. In particular, fresh willingness to scrutinize the rationality of the operational requirements dismissal decision in the context of the relevant business plan has become apparent.

As always, it bears repeating that the major forces driving change in the workplace lie outside the province of law and indeed often beyond the labour market itself. The regulatory effect of the law, while not insignificant, remains ancillary.'

In his critique of the *SA Mutual Assistance Society v Insurance & Banking Staff Association & others*¹² Prof Rycroft commences with concise yet probing observation of parallel and quite different form of corporate restructuring:¹³

'An industrial relations trend has taken root in terms of which an employer, operational reasons, seeks to introduce a restructured organisational template, and in so doing redefines the requirements and competencies for jobs in the new structure. Existing staff are then told that all existing positions have become redundant and that if they want to continue in employment with the employer, they must apply for the "new" positions. Those who fail to apply or who are not appointed, are considered to have resigned or are retrenched.'

Before moving onto the heavyweight topic of outsourcing, it is perhaps appropriate at this stage to reflect on the constitutional framework underpinning the Labour Relations Act 66 of 1995.

1.2 The constitution and statutory scheme

In any discussion of fundamental rights, the starting point is the Constitution. In that regard it is important to bear in mind that the Constitution is the supreme law such that every other law or conduct must bow to the force of this supreme instrument.¹⁴ Another point of note is that constitutional provisions establish substantive and procedural rights by way of a Bill of Rights; it creates obligations that "must be fulfilled" by organs of State.¹⁵ There are other provisions of the Constitution that impel the discussion of the

¹² [2001] BLLR 1045 (LAC). See too *Greig v Afrox Ltd* (2001) 22 ILJ 2102 (ARB), *Wolfaardt & another v Industrial Development Corp of SA Ltd* (2002) 23 ILJ 1610 (LC); *Ntshanga v SA Breweries Ltd* [2003] 8 BLLR 789 (LC); *FAWU & others v SA Breweries Ltd* (2004) 25 ILJ 1979 (LC).

¹³ 'Corporate restructuring and "Applying for your own job' (2002) 23 ILJ 678.

¹⁴ S 2, Constitution of the Republic of South Africa 1996; *Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 at para 12.

¹⁵ S 2, 1996 Constitution.

elements of constitutionalism even in pure labour law matters. Because our constitutional jurisprudence has illustrated the need to find the space in appropriate cases to move away from unduly rigid compartmentalization so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability.¹⁶ Indeed, Sachs J makes this explicit when he states that¹⁷

‘Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap and mutually reinforce each other. Though in particular factual situations the interests secured by rights might collide, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right though establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the constitutional interest involved. In this endeavour the courts will be strongly guided by the constitutional values at stake.

The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalization.

And further:¹⁸

‘The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of special legal learning. Yet enumerating themes for dedicated attention does not

¹⁶ For instance in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 83 where Yacoob J stated: ‘The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom ... The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity ... In short, I emphasize that human beings are required to be treated as human beings ...

See also *S v Makwanyane & another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 ©; 1995 (2) SACR 1 (CC) at para 80 per Chakalson P; *National Coalition for Gay & Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 206 (CC); 1998 (12) BCLR 1517 (CC); 19998 (2) SACR 556 (CC) at paras 15-32 per Ackermann J and paras 112-113 per Sachs J; *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at par as 102 and 126 per Mokgoro J.

¹⁷ Per Sachs J in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at paras 148-149.

¹⁸ *Sidumo & another* at para 150.

presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.

In this interpretive framework, Sachs J concludes that:¹⁹

[T]he Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity, The disparate textual protections are unified by the values immanent in all of them. The relationship between the separately protected rights should thus be regarded as osmotic rather than hermetic. Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved. And hybridity should be recognized for what it is, the co-existence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what human affairs naturally and inevitably join together, we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning.

The first of such obligation is that the State must respect, promote and fulfil the rights in the Bill of Rights expressly declared by the Constitution to be the “cornerstone of democracy in South Africa”.²⁰

The second is that the Constitution binds all three sphere of state (the Legislature, Executive and the Judiciary) including all organs of state.²¹ This necessarily imposes an obligation on the State to live up to the dictates of the Constitution.²² One such dictate on the part of the Courts is the specific injunction that they must develop the common law where they find it not in

¹⁹ *Sidumo & another* at para 151.

²⁰ S 7(1) & (2), 1996 Constitution.

²¹ S 8, 1996 Constitution.

²² Note that the President and Deputy President are required to take an oath before assuming office in which they swear to ‘obey, observe, uphold and maintain the Constitution and all other laws of the Republic’. Cabinet ministers, premiers of provinces, members of the executive council of provinces, members of the National Assembly, delegates to the National Council of Provinces and members of the provincial legislatures are all required to take a similar oath before assuming office in which they swear to ‘obey, observe, uphold and maintain the Constitution and all other laws of the Republic’. See s 87, s 90(3), s 95, s 129, s 131(3), s 135, s 48, s 61(6) and s 107, read with Schedule 2, items 1-5.

tune with the spirit, purport or objects of the Bill of Rights.²³ This is further strengthened by section 173 whereby in vesting the inherent powers on the superior Courts, the Constitution enjoins them to develop the common law having regard to the interests of justice.²⁴ The Bill of Rights entrenches, among others, the right to the protection of the security of the person including the right to be free from all forms of violence from either public or private sources;²⁵ the right to life;²⁶ the right to human dignity;²⁷ the right to privacy;²⁸ the right to equality before the law and the prohibition against unfair discrimination based, for example, on grounds of race, gender, sex or sexual orientation.²⁹

There are number fundamental rights pertinent to labour law. Right to freedom of association,³⁰ access to courts,³¹ and the right to have access to social security.³² Of particular importance is section 33(1) which provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair'. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was enacted to give effect to rights contained in section 33.³³ The approach to the relevance and application of PAJA and the right to fair administrative action to the sphere of employment and labour disputes by the

²³ S 39(2), 1996 Constitution.

²⁴ E.g. *Charmichele v Minister of Safety & Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Safety & Security v Hamilton* 2004 (2) SA 216 (SCA); *K v Minister of Safety & Security* (2005) 26 ILJ 681; 2005 (3) SA 179 (SCA); [2005] 3 All SA 519 (SCA) reversed by the Constitutional Court - *K v Minister of Safety & Security* 2005 (6) SA 419, (9) BCLR 835 (CC); *Grobler v Naspers Bpk* (2004) 25 ILJ 349 (C). Further reading: Pantazis, A 'Outing the law of delict' (2005) 68(2) *THRHR* 389; Roeder, CJ 'The constitutionality inspired approach to vicarious liability in case of intentional wrongful acts by the police: One small step in restoring the public's trust in the South African Police Services' (2005) 21(5) *SAJHR* 575; Fagan, A 'Rethinking wrongfulness in the law of delict' (2005) 122(1) *SALJ* 90; Leinius, B & Midgely, JR 'The impact of the Constitution on the law of delict: *Carmichele v Minister Safety and Security*' (2002) 119 *SALJ* 17; Pieterse, M 'The right to be free from public or private violence after *Carmichele*' (2002) 119 *SALJ* 27; Wicke, H 'Vicarious liability: not simply a matter of legal policy' (1998) 9(1) *Stell LR* 21; Okpaluba, C 'Government liability for acts and omissions of police officers in contemporary South African Public Law' (2007) 21(2) *Speculum Juris* 233.

²⁵ S 12(1) 1996 Constitution.

²⁶ S 11, 1996 Constitution.

²⁷ S 10, 1996 Constitution.

²⁸ S 14, 1996 Constitution.

²⁹ S 9, 1996 Constitution.

³⁰ S 18, 1996 Constitution.

³¹ S 34, 1996 Constitution.

³² S 27, 1996 Constitution.

³³ See section 33(3), 1996 Constitution.

labour court and civil court tend to be extraordinarily at odds with each other.³⁴ For Pillay J the right to administrative action entrenched in section 33 of the Constitution and bolstered by PAJA has no application to labour disputes, because 'labour law is not administrative law.'³⁵ Put simply, the common-law heritage in lines of cases, exemplified by *Zenzile*³⁶ have no application because the Labour Relations Act has been extended to virtually all employment relationships.

While Plasket J notes that the reasoning of the judges of the Labour Court that *Zenzile* is no longer good law reflects 'a parsimonious approach to fundamental rights and an austere formalism that is at odds with a proper approach to fundamental rights: they fail to give individuals the full measure of their fundamental rights'.³⁷ In other words, the protection afforded by labour law and administrative law are complementary and cumulative, not destructive of each other simply because they are different.

In its groundbreaking decision in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* the Constitutional Court settled the long mooted debate as to how arbitrating commissioners should approach an employer's sanction for misconduct by an employee. The court overturned the decision of the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others*,³⁸ which suggested that in deciding unfair dismissal

³⁴ For excellent exposition see: Van Eck, S & Jordaan-Parkin, R 'Administrative, labour and constitutional law – A jurisdictional labyrinth' (2006) 27 *ILJ* 1987; Note 'Enter the PAJA: Administrative justice in labour matters' (2004) 20(5) *EL* 12. See recent split decision of the Supreme Court on whether dismissal of public service employee involve exercise of public power in *Transnet Ltd & others v Chirwa* (2006) 27 *ILJ* 2294 (SCA).

³⁵ *Public Servants Association obo Haschke v MEC for Agriculture & others* (2004) 25 *ILJ* 1750 (LC) at par 11. See also *Western Cape Workers Association v Minister of Labour* (2005) 26 *ILJ* 2221 (LC) at paras 9 and 10; *Louw v SA Railway Corporation Ltd & another* (2005) 26 *ILJ* 1960 (W); *SA Police Union & another v National Commissioner of Police Service & another* [2006] 1 *BLLR* 42 (LC).

³⁶ See also *Administrator, Transvaal & others v Zenzile & others* 1991 (1) SA 21 (A); (1991) 12 *ILJ* 259 (A); *Administrator, Natal v Sibiyi* 1992 (4) SA 532 (A), *Administrator of the Transvaal & others v Traub & others* 1989 (4) SA 731 (A); (1989) 10 *ILJ* 823 (A).

³⁷ *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* (2006) 27 *ILJ* 55 (E) at para 60. See too *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* 1957 (SCA); *Dunn v Minister of Defence & others* (2005) 26 *ILJ* 2115 (T); *Despatch High School v Head of Department of Education, Eastern Cape & others* 2003 (1) SA 246 (C).

³⁸

disputes commissioners should approach the employer's sanction with a 'measure of deference', and found nothing to suggest that, in determining the fairness of a dismissal, a commissioner must approach the matter from a perspective of the employer. The commissioner is not empowered to consider the matter afresh, but must simply decide whether what the employer did was fair, and in doing so must consider all the relevant circumstances.

The court was split on the issue of whether when conducting arbitration proceedings a commissioner is performing an administrative function, The majority found that is the case, but the court found that Supreme Court of Appeal had erred in finding that PAJA 2000 applies to arbitration awards and that they are therefore subject to standard of review is that prescribed in s 145 of the LRA 1995, but this is now suffused with the constitutional standard of reasonableness provided for in s 33 of the Constitution. The ultimate question is therefore whether the decision reached by the commissioner was one that a reasonable decision maker could not reach.

1.3 Right to fair labour practices³⁹

Section 23(1) provides that everyone has the right to fair labour practices.⁴⁰ Although the right to fair labour practices extends to employees and employers alike, for employees it affords security of employment. One primary purpose of the LRA is to give effect to the fundamental right conferred by s 23 of the Constitution. The relevant part of s 1 of the LRA reads as follows:

³⁹ In the *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para [7] the Constitutional Court remarked in relation to s23 in general: "The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT23 are honoured." In *National Education Health & Allied Workers Union v University of Cape Town* 2003 (3) SA 1(CC); (2003) 24 ILJ 95 (CC) ("*NEHAWU*") the Constitutional Court recorded that our Constitution is unique in constitutionalizing the right to fair labour practices. Since the advent of our Constitution, Malawi has followed suit. See also Cheadle *et al* *South African Constitutional Law: The Bill of Rights* (2 ed LexisNexis Butterworths Durban 2005); Schooling, H 'Does an employer have a constitutional right to fair labour practices?' (2003) 13(5) *CLL* 45; Note 'Unfair resignation: Employer's right to fair labour practices' (2004) 20(1) *EL* 12.

⁴⁰ *NEHAWU* at paras 37-38.

'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary object of this Act, which are –

- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation ...
- (c) to promote - ...
- (d) The effective resolution of labour disputes.

Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. Where an employee claims that he or she has been unfairly dismissed, the dismissal dispute is submitted to compulsory arbitration in terms of s 191(5)(a), either before the CCMA, or a bargaining council. On the other hand, s 192 of the LRA, under the title 'Onus in dismissal disputes', provides that once an employee establishes the existence of the dismissal, the employer must prove that the dismissal is fair.

The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of section 138 of the LRA, a commissioner should do so fairly and quickly. First he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based.⁴¹ This involves an enquiry into whether or not there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes determination on the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, is not confined to what occurred at the internal hearing.

The elevation of the right to fair labour practices to the status of a fundamental right in the South African Constitution has afforded significantly stronger

⁴¹ Particularly important in this regard is item 7 of schedule 8 to the LRA, which reads:

'Any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard.'

protection to job security and rights associated with employment. The right to fair labour practices have been invoked in recent landslide labour law decisions. In discussing a claim of wrongful dismissal Froneman J addressed the issue of fair labour practices and in plain terms stated: ⁴²

‘Section 23(1) of the constitution provides that everyone has the right to fair labour practices. It seems to me almost uncontested that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the constitution right to fair labour practices (amongst others), the court would have been obliged, in my view to, develop the common law to give expression to this constitutional right in terms of s 39(2) of the constitution. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remain.’

And Landman J reasoned as follows:⁴³

‘Section 23(1) of the constitution provides that everyone has a right to fair labour practice. This concept is not defined in the constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so.’

In the case of *NEHAWU V UCT*⁴⁴ the Constitutional Court examined the purpose of the LRA and section 23(1) of the constitution (the right to fair labour practice). The case was based on whole evaluation of section 197 of the LRA. The university contracted with an independent contractor and retrenched some of its employees (cleaners). The employees were given an opportunity to apply to the new independent contractor for employment, and they were eventually employed but at a lower wage that they had received from the university.

The union declared a dispute on the basis that the university’s action amounted to transfer as a going concern in terms of s197 of the LRA. After the majority of the LAC had ruled that a contract of employment may not be transferred without consent from both parties NEHAWU appealed to the Constitutional Court.

⁴² *Fedlife Assurance Ltd v Wolfaardt* (2001) 21 ILJ 2407 (SCA); 2002 (1) SA 49 (SCA) at para 15.

⁴³ *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* (2003) 24 ILJ (LC) at 1726D.

⁴⁴ 2003 (3) SA 1 (CC). The right to fair labour practice was also discussed by JMC Smith J, in *SANDU and Another v Minister of Defence and Others: In re SANDU v Minister of Defence and others* 2003 (9) BCLR 1055 (T).

Considering the issue of fair labour practice Ngcobo J said:⁴⁵

'Our constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the constitution. The concept of fair labour practice is incapable of precise definition. This problem is confounded by the tension between the interests of the workers and the interests of the employer that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept ...The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning in the first instance, from the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and the application of the LRA, a statute which was enacted to give effect to section 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organization. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance...That is not to say that this court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured.'

Ngcobo J continued:⁴⁶

'The focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible these interests so as to arrive at the balance required by the concept of fair labour practices.'

The issue of fair labour practices was also discussed in *NUMSA & others v Bader Bop (Pty) Ltd*.⁴⁷ The main question in this case was whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognize its shop stewards (section 14 of the LRA). The rights conferred by section 14 were conferred upon trade unions that have as members a majority of the employees employed in the work place, and

⁴⁵ *NEHAWU supra* at paras 33-35. See also *Govender and Dennis Port (Pty) Ltd* (2005) 26 *ILJ* 2239 (CCMA) paras 12-14.

⁴⁶ *NEHAWU supra* at paras 40-41.

⁴⁷ 2003 (3) SA 513 (CC). See further, Grogan, J 'Poor relations: minority unions under the new LRA' (1996) 13(2) *EL* 27, 'Minority Unions (1) (2002) 18 (1) *EL* 4 and 'Minority Unions (2) (2002) 18 (1) *EL* 10; Giles, G. 'The trade union and its right to organise' (1996) 6(4) *Labour Law News and CCMA Reports* 5; Macun, I. 'Does size matter? The Labour Relations Act: majoritarianism and union structure' (1997) 1 *Law, Democracy & Development* 69.

NUMSA had minority members. The court touched on the right to fair labour practice and it said:⁴⁸

'In s 23, the constitution recognizes the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employers organizations to engage in collective bargaining, illustrates that the constitution contemplates that collective bargaining between employers and workers is key to a fair industrial environment....In interpreting the rights in s23, therefore, the importance of those rights in promoting a fair working environment must be understood.'

In *Simelela & others* while dealing with the issue of transfer, Francis AJ (as he then was) wrote that:⁴⁹

'In addition to fair administrative action, the state employees are afforded a constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for expressly in the Labour Relations Act, an employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices. A decision to transfer an employee without prior consultation amounts to unfair labour practice.'

It is easy to forget that the underlying purpose of labour is to serve as a countervailing force against the power of the employer.⁵⁰ In other words, the concept of preserving job security is one of the paramount aims of the LRA. This protection is afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies.⁵¹ The relationship between employer and an isolated employee and the main object of labour law is set out in the now famous dictum of Otto Kahn-Freund:⁵²

'[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'

⁴⁸ *NUMSA v Bader Bop (Pty) Ltd supra* at para 13.

⁴⁹ *Simelela & others supra* at 1703 para 56.

⁵⁰ See generally; Ewing, K 'The death of labour law' (1989) 8 *Oxford Journal of Legal Studies* 293; Thompson, C 'The changing nature of employment' (2003) 24 *ILJ* 1793; Davies, P & Freedland, M. *Labour Legislation and Public Policy* (1993).

⁵¹ Cheadle *et al* *South African Constitutional Law: The Bill of Rights* (2 ed 2005) at 18-5.

⁵² Kahn-Freund, O. *Labour and the Law* (1977) at 6;

As a result of the above, the employer being in much stronger bargaining position enables it to virtually dictate the terms and conditions of the contract of employment. Beatty explains the position of a person seeking employment as follows:⁵³

'The material and psychological constraints facing these persons [job applicants] make them so dependant on the particular employment relationships which are made available to them as to preclude their serious participation in the distribution of rights and benefits within any of those relationships.'

So protection against the invalid and unfair termination of an employment relationship has a special significance.⁵⁴ The gravity, indeed, the ramifications of dismissal for employees hardly be overstated:

'It is unarguable that dismissal, whether fair or not is usually a devastating blow for an employee. Hurt to pride, dignity and self-esteem and economic dislocation are all readily foreseeable. Alternative employment may not be easy to find, and a damaged reputation may be a grave or even fatal hindrance. Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her identity, self-worth, and emotional well-being.'⁵⁵

In *Sidumo & another v Rustenburg Mines Ltd & others*, Navsa AJ, said the following in the context of the longstanding debate as to how arbitrating commissioners should approach an employer's sanction for misconduct by an employee:⁵⁶

'The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organizations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a

⁵³ Beatty, DM 'Labour is not a commodity' in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 334.

⁵⁴ *Netherburn Engineering Ceramic v Mudau & others supra* at 1725E.

⁵⁵ Maloka TC, 'Fairness of a dismissal at the behest of the third party: *Kroeger v Visual Marketing*' (2004) 1 *Turf Law Review* 108 at 109 (citations omitted). 'In their work *A Guide to South African Labour Law* (1992) at 230 Rycroft & Jordaan state that for the retrenched worker 'at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed." Basson *et al*, *Essential Labour Law* (2002) Ch. 1 at 3, the authors say the following about employment: "...the fact remains that we need to work in order to survive. In its simplest form, we work because we need the money we earn by working, and using the money we earn, we support ourselves."

⁵⁶ *Sidumo & another* at para 74.

scrupulous even-handedness be maintained. The approach of the Supreme Court of Appeal tilts the balance against employees.'

The vulnerability of employees is underscored by the fact that dismissal has been aptly if colourfully called 'the labour relations equivalent of capital punishment'.⁵⁷ The foregoing considerations may well be most amplified at the point of termination induced by economic, technological or structural needs or similar needs of the employer.⁵⁸ In *General Food Industries Ltd v FAWU*, Nicholson JA recognizes this by noting that:⁵⁹

'The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that is imperative that – even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that *all viable steps* have been considered and taken to prevent the retrenchments or to limit these to a minimum.'

It will be noted that in reaching its landmark decision in *Hoffman v South African Airways*⁶⁰ the Constitutional Court made it clear to employers that in appropriate circumstances it will intervene to protect the right of a person to work and earn a livelihood. In this regard it is instructive to quote a passage from the judgement, which says:

⁵⁷ *BAWU v Edward Hotel* (1989) 10 ILJ 357 (IC) at 373G-H; *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe & Others* (1994) 15 ILJ 277 (LAC) at 2811; *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at para. 70. See generally Landman, A. 'Unfair dismissal: The new rules for capital punishment in the workplace (part one)' (1995) 5(5) CLL 41, 'Unfair dismissal: The new rules for capital punishment in the workplace (part two)' (1996) 5(6) CLL 51. Collins, H. *Justice in Dismissal: The law on termination of employment* (1992) at 15 writes that dismissal means that '... the worker is excluded from the workplace which is likely to constitute a significant community in his or her life. It may be through this community, for instance, that the worker derives his or her social status and self-esteem. The workplace community may also provide the principal source of friendships and social engagements.' In their work *A Guide to South African Labour Law* (1992) at 230 Rycroft & Jordaan state that for the retrenched worker 'at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed"'. For example it has been pointed out in "Termination of employment by the employer: the debate on dismissal", *Termination of Employment Digest* (Geneva, ILO) 2000 at 8: "that because of its economic and social implications, and in spite of regulation at the highest level, the termination of employment by the employer is one of the most sensitive issues in labour law today. Protection against dismissal is seen by most workers as crucial, since its absence can lead to dire economic consequences in most countries."

⁵⁸ Referring to s 189(2) and (3) Zondo JP held as follows in the *Algorax* case at para 70: 'It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to *only resort to dismissing employees from operational requirements as measure of last resort*. If that is correct, the court is entitled to intervene when it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to *as a measure of last resort*. (Emphasis added).

⁵⁹ (2004) 25 ILJ 1260 (LAC); [2004] 7 BLLR 667 (LAC) at 682J para 55. (Emphasis added).

⁶⁰ 2001 (1) SA 1 (CC).

'An order of reinstatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. *It is an expression of the general rule that where a wrong has been committed, the aggrieved person should as a general matter, and as far as possible, be placed in the same position the person would have been but for the wrong suffered.* In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.⁶¹

In *Hoffman*, the employer had refused to employ the applicant, who had passed the employer's selection and screening processes as cabin attendant, when it discovered that he was HIV positive. Having held that the denial of employment on the ground that the applicant was living with HIV impaired his dignity under section 9 of the Constitution,⁶² the next issue considered by the Court was that of appropriate relief. Ngcobo J concluded that reinstatement, that is, an order that Hoffman be appointed to the position which he was denied, was the appropriate and most practicable relief in the circumstances.

1.4 Fairness of the dismissal

The statutory claim for unfair dismissal is premised on equity. The concept of fairness pervades every facet of labour law.⁶³ The fundamental inquiry in dismissal cases under the 1995 LRA is whether the dismissal was fair. In labour law fairness, and fairness alone is the yardstick⁶⁴ - and especially in

⁶¹ Per Ngcobo J in *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at 24-25 paras [50-52] which was cited with approval by Pretorius A in *IMATU obo Xameko/Makana Municipality* [2003] 1 BALR 4 (BC) at 9E-F where the employee was unfairly refused promotion and the disputed post no longer existed the remedy of "protective promotion" was ordered. See also *Walters v Transitional Local Government Council, Port Elizabeth* (2000) 21 ILJ 2723 (LC). (Emphasis added).

⁶² The trial judge had held in *Hoffman v South African Airways* 2002 (2) SA 628 (WLD) that no breach of the plaintiff's right to equality had occurred through the corporation's policy which was the result of a careful and thorough research and was consistent with international trends and that even if the corporation's policy constituted unfair discrimination, it was justified within the meaning of section 36 of the Constitution.

⁶³ For a systematic discussion see Okpaluba, C 'The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom' 11 (1999) *The African Journal of International and Comparative Law* 392.

⁶⁴ Per Conradie JA *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC) at 1171.

dismissal law - the CCMA commissioners and adjudicator of the Labour Court and Labour Appeal Court are charged with the duty of ensuring that employers and employees act fairly towards each other.⁶⁵ Like reasonableness,⁶⁶ fairness is incapable of precise definition.

Fairness is firmly rooted in South African labour law jurisprudence. According to Navsa AJ:⁶⁷

‘The question of an approach to the enquiry into fairness is not novel. At the time that the LRA came into force, there was already an established jurisprudence in this regard. The Appellate Division dealt with this question in relation to the Labour Relations Act 28 of 1956. In *Media Workers Association of SA & others v Press Corporation of SA Ltd* 1992 (4) SA 791 (A) it was stated as follows:

‘Clearly, the court’s view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question. See *Marievale Consolidated Mines Ltd v President of the Industrial Court & others* 1986 (2) SA 485 (T) at 498J-490I; *Brassey and others The New Labour Law* at 12-13, 58-9; *Van Jaarsveld & Coetzee Suid-Afrikaanse Arbeidsreg* vol 1 at 328 ...

In my view a decision of the court ... is not a decision on a question of law in the strict sense of the term. It is passing of a moral judgement on a combination of findings of fact and opinions.’

Thus, the court is called upon as an impartial adjudicator to determine fairness.’

However, it has been pointed out that fairness does not exist in vacuum, but is part of the legal system.⁶⁸ Thus the Labour Appeal Court in *Woolworths (Pty) Ltd v Whitehead*⁶⁹ Wills JA, stated that:

‘Fairness is an elastic and organic concept. It is impossible to define with exact precision. It has to take into account of the norms and values of our society as well as its realities. Fairness, particularly in the context of the LRA, requires an evaluation that is multidimensional. One must look at it not only from the perspective of prospective employees but also from employers and

⁶⁵ Grogan, J ‘Double jeopardy: Are duplicated disciplinary inquiries allowed?’ (2000) 16(1) *Employment Law* 15, 18. See also *NUMSA v Vetsak Co-operative Ltd & Others* [1996] 6 BLLR 697 (A).

⁶⁶ For a sustained account see: Myburgh, J & Van Niekerk, A ‘Dismissal as a penalty of misconduct: The reasonable employer and other approaches’ (2000) 21 *ILJ* 2145; Cohen, T ‘The “reasonable employer” test – Creeping in through the back door?’ (2003) 15(2) *SAMLJ* 192. But see *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 *ILJ* 340 (LAC) where it was held that the reasonable employer test is not part of our law; *Rustenburg Platinum v CCMA* 2002 4 BLLR 387 (LC) where it was held that whether dismissal is an appropriate sanction in the circumstances is not to be decided according to the ‘reasonable employer test. Grogan, J ‘Death of reasonable employer: the seismology of review’ (2000) 16(2) *Employment Law* 4.

⁶⁷ *Sidumo & another* at para 63.

⁶⁸ *Per Zondo JP BMW (SA) (Pty) Ltd v Van der Walt supra* at 124H.

⁶⁹ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) at 599H-I.

the interests of society as a whole. Policy considerations play a role. There may be features in the nature of the issue which call for restraint by a court in coming to a conclusion that a particular act of discrimination is unfair.’

Zondo JP in *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*⁷⁰ articulated the concept of fairness in the following terms:

‘Sometimes it is said that a court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a businessperson may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this court is seised with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair. Accordingly, where, as in this case, the employer has chosen a solution that results in a dismissal or in dismissal of a number of employees when there is an obvious and clear way in which it could have addressed the problems without any employees losing their jobs or with fewer job losses, and the court is satisfied, after hearing the employer on such a solution, that it can work, the court should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs rather than one which causes job losses. This is especially so because resort to dismissal, especially no-fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort.’

Fairness, rather than correctness is the mandated test.⁷¹ In *NEHAWU v UCT* the Constitutional Court essentially confirmed the comparative approach to fairness as entrenched in s 23(1) of the Constitution albeit with reference to fair labour practices. The court held as follows at para 33 of the judgement:⁷²

‘Fairness is not confined to workers only. In *National Union Metalworkers of SA v Vetsak Co-operative Ltd & others* Smalberger JA held that –
“Fairness comprehends that regard must be had not only to the position and interests of the workers, but also to those of the employer, in order to make a balanced and equitable assessment.”

Nienaber AJ, who wrote the majority judgment expressed similar view and held that –

“The fairness required in the determination of an unfair labour practice must be fairness to both employer and employee. Fairness in practice must be fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.”

⁷⁰ (2003) 24 ILJ 1917 (LAC) at para 69.

⁷¹ Per Davis AJA in *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at 710E-H; (2001) 22 ILJ 2264 (LAC) at 2269I-2270B.

⁷² at paras 38-40.

Nor is there anything, either in the language of s 23(1) or the context in which that section occurs, which supports the narrow construction contended for by counsel. On the contrary, the context suggests that the word refers to every person and it includes both natural and juristic persons. Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations, as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution would have said so ...

In my view the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.'

The general considerations of fairness may also justify, in appropriate cases, a departure from other principles generally regarded as sacrosanct in labour law.⁷³ Fairness affords a range of possible responses.⁷⁴ In this regard sympathy is not an ingredient of the test for evaluating the fairness of a

⁷³ See the remarks of Conradie JA in *SA Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at 2313C-J: "In my view too great emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle'. There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness. Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgement. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself". 'Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend on whether it is, in all circumstances, fair to do so.' per Conradie JA in *BMW (SA) (Pty) Ltd v Van der Walt supra* at 117G para 12. On consistency and progressive discipline, see the following: *Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union* (1991) 12 ILJ 806 (LAC); *NUMSA & Others v Free State Consolidated Gold Mine (Operations) Ltd* (1995) 16 ILJ 1371 (A); *SACTWU & Others v Novel Spinners (Pty) Ltd* (1999) 11 BLLR 1157 (LC); *NUM & Another v AMCOAL Colliery t/a Arnot Colliery & Another* (2000) 8 BLLR 869 (LAC); *Impala Platinum Ltd v NUM* [2000] 8 BALR 955 (IMSSA); *Monate v Anglo-Platinum – Rustenburg Platinum* [2002] 1 BALR 48 (CCMA); *SAFRAWU obo Pienaar v Rainbow Farms* [2002] 2 BALR 215 (CCMA); *Ntshinka v Telkom SA (Pty) Ltd* [2002] 7 BALR 2749 (CCMA); *NUMSA v Delta Motor Corporation* [2002] 9 BLLR 817 (LAC); *NEHAWU obo Billet v PE Technikon* [2003] 6 BALR 712 (CCMA). See also Grogan, J 'Just desserts: The limits of the parity principle' (1999) 15(3) *EL* 14, 'Parity revived: When prior warnings do not apply' (2000) 16(2) *EL* 17.

⁷⁴ Todd & Damant 'Unfair dismissal – Operational requirement' (2004) 25 *ILJ* 896 at 907 state the following: 'The court must necessarily recognize that there may be a range of possible decisions that the employer may take, some of which may be fair and some of which may be unfair. The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair'.

dismissal. In *Consani Engineering (Pty) Ltd v CCMA & others*⁷⁵ case the Labour Court reviewed and set aside a CCMA commissioner's finding that it was unfair to dismiss an impoverished employee who was apprehended while trying to remove insulation tape from his employer's property to seal his shack against wind and rain. The Labour Court observed:⁷⁶

'This case conjures the somewhat painful image of a member of the less advantaged sector of society losing his livelihood on account of a single act of irrationality ...Dismissal for such an offence may be seen as harsh in the social context in which it has occurred. Many reasonable and compassionate people would almost certainly opt for greater leniency. That said, though, such considerations alone can never be the test for determining the appropriateness of a sanction for dishonesty in unfair dismissal law.'

The court continued in the same paragraph:⁷⁷

'The employer sets the standards and has the right to determine the sanction with which non-compliance with the standard will be visited ... There is a range of possible sanctions on which one person may take a view different from another without either of them being castigated as unreasonable. If the sanction falls within a range of reasonable options, a commissioner should generally uphold the sanction; even if the sanction is not one which the commissioner herself would have imposed. Only if there is a striking disparity between the employer sanction and the one the commissioner would have should the commissioner interfere.'

The fairness of a dismissal is essentially a question of fact, and the CCMA as an industrial jury is best equipped to deal with it, using its labour relations experience and knowledge.⁷⁸ To sum up. In terms s 188(a) of the LRA, a commissioner has to determine whether a dismissal is fair or not. In terms of s 188(2), a commissioner is required to take into account the Code of Good

⁷⁵ (2004) 25 ILJ 1707 (LC).

⁷⁶ *Consani supra* at para 17.

⁷⁷ *Consani supra* at para 17.

⁷⁸ In *Engen Petroleum LT v CCMA & others* (2007) 28 ILJ 1607 (LAC); [2007] 8 BLLR 707 (LAC) at par 117 the Labour Appeal Court took somewhat different approach to the view if there was defence to the employer's sanction there would be a flood of cases to the CCMA: '[I]t reveals a failure to appreciate the full rationale behind the creation of the CCMA. It is right and proper that as many disputes as possible that are not resolved amicably in the workplace, should be referred to the CCMA or bargaining councils and other mutually agreed for conciliation and, later, arbitration, irrespective of what any one may think of the merits or demerits of such disputes. The existence of the CCMA ... helps to channel, among others, workers' grievances to where they can be ventilated without any interruption and disruption of production – at least up to a point. It is also right and proper that unions should be encouraged and not discouraged to refer dismissal disputes with employers to the CCMA for arbitration if they feel aggrieved by such dismissals. In that way, they can ventilate all issues in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or unfair. In that way, the workers would have less urge to resort to industrial action over dismissal disputes.'

Practice in consideration whether or not the reason for dismissal is a fair reason.⁷⁹ A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.

1.5 Automatically unfair reasons

Automatically unfair dismissals are dealt with in section 187. When it is actuated by one of the reasons referred to in this section, it cannot but be unfair. The specified circumstances are those in which the dismissal abridges human rights or collective bargaining standards that the legislature regards as fundamental. The High Court has concurrent jurisdiction with the Labour Court if the dismissal infringes a constitutional right.⁸⁰ Automatically unfair dismissals carry a higher level of maximum compensation than their counterparts: section 194(3).

The section protects an employee against dismissal for exercising his statutory rights regarding collective bargaining⁸¹ and collective action.⁸² It also protects him against victimisation where he or she institutes legal action against his employer in terms of the Act.⁸³ It furthermore protects him against an infringement of his contractual rights in that it brands a dismissal in order to compel him to accept a demand in respect of any matter of mutual interest as automatically unfair.⁸⁴ The section also endeavours to protect employees against dismissal on unfair discrimination grounds such as race, gender, age,

⁷⁹ Schedule 8 to the LRA contains the code in relation to dismissal. Item 1(3) declares that- '[the key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees']

⁸⁰ S 157 of the LRA 1995.

⁸¹ S 187(c).

⁸² S 187(1)(a) and (b).

⁸³ S 187(1)(d). Note also *Mackay v Absa Group & another* (1999) 12 BLLR 1317 (LC); *NUMSA obo Joseph and Hill Side Aluminium* (2004) 25 ILJ 2264 (BCA); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC). See too *Nkutha & others v Fuel Gas Installations (Pty) Ltd* [2000] 2 BLLR 178 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union & another v Glass Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC); *IMATU & others v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC).

⁸⁴ S 187(c). See *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

disability, marital status, pregnancy, intended pregnancy, or any reason related to her pregnancy.⁸⁵

Section 186(f)(8) renders a dismissal automatically unfair if the transfer or a reason connected with it is the reason or principal reason for dismissal. This provision will prohibit the dismissal of any employees “on account of a transfer covered by this section”. An addition to section 187 renders any dismissal effected in these circumstances “automatically unfair”. However, this prohibition is qualified by the same proviso that lessens protection against dismissal of employees for reasons based on operational requirements of the former or new employer, provided that the employer concerned complies with the provisions of section 189.

The preceding survey of the salient features of constitutional and statutory framework has been undertaken in order to place the inquiry into the troublesome question of workplace restructuring in context.

1.6 Corporate Restructuring: Outsourcing

Sections 189 and 197 of the LRA 1995 are key provisions for both employers and employees in a business environment characterised by corporate restructuring. Corporate restructuring has given momentum to outsourcing as businesses seek to be more profitable by streamlining their operations and focusing their attention as well as capital on their “core” functions. The outsourced function is provided more cheaply (and hopefully more efficiently)

⁸⁵ See for eg: *Collins v Volkskas Bank (Westonaria Branch)* (1994) 15 ILJ 1398 (IC); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC); [2000] 6 BLLR 640 (LAC); *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC); *Sheridan v The Original Mary-Ann's at The Colony (Pty) Ltd* (1999) 20 ILJ 2580 (LC); *Mashava v Cuzen & Wood Attorneys* (2000) 21 ILJ 402 (LC). For in depth treatment see Dupper, O ‘Maternity protection in South African: An international and comparative analysis’ (2001) 13 *Stell LR* 83 and ‘Maternity protection in South African: An international and comparative analysis’ (2001) 13 *Stell LR* 421; Smit, N & Olivier, M ‘Discrimination based on pregnancy in employment law’ (2002) *TSAR* 783; Van Jaarsveld, M ‘Parental leave: For the sake of employees and their children: A comparative study’ (2002) 14 *SAMLJ* 783.

by an outside service provider who takes responsibility for the burden of administration.⁸⁶

The concept of outsourcing has been defined as '[t]he policy of hiring outside consultants, trainers, technicians and other professionals to take over the complete function of a particular department (eg human resources) rather than employing full-time personnel. These non-core activities include catering, gardening, communications and data processing.'⁸⁷

Business restructuring is having serious consequences for worker protection under labour law, as this commonly translates into 'the traditional outsource/retrench/offer of employment with a service provider'⁸⁸ or a labour broker route'.⁸⁹ Craig Bosch sums up this dilemma nicely:⁹⁰

'The employees in the part of the businesses that are outsourced are in an unenviable position. They are redundant to the needs of their old employer as a result of its decision to outsource the activity in which they were engaged, while the work that they were doing is still available and being undertaken by the contractor. There is the possibility that an employee will be offered the

⁸⁶ Theron & Godfrey *Protecting Workers on Periphery* Institute of Development and Labour Law Monograph 1/2000 at 26-7.

⁸⁷ Barker & Holtzhausen *SA Labour Glossary* (Juta, 1997).

⁸⁸ Note for instance *SATAWU v Old Mutual Life Assurance Co Ltd* (2005) 26 ILJ 293 (LC) at para 13, where the company restructuring strategy was described as follows:

'1 A business as usual case. This scenario envisages continuation of our current thrusts which are essentially to continue to refine the nature of our services and to focus heavily on cost management.

2 A gradual outsource case: This scenario envisages outsourcing of elements of our services in a methodical way as the external service provider community develops and is able to demonstrate cost and know-how advantages over the in-house service.

3 An empowerment or privatisation case: This scenario envisages creation of a new services company and the outsourcing, with some from of contractual underpin or guarantee, of facilities services from Old Mutual to a new company. Existing staff would be transferred from Old Mutual to the new company and staff would own a meaningful share of the new company.'

While in *NEHAWU v UCT*, the University opted for a 'phased approach' to outsourcing campus protection services. This apparently allowed affected employees a choice between 'remaining with CPS [and likely ultimately being retrenched]; voluntary retrenchment; early retirement with incentives; redeployment with UCT where vacancies exist and employment by the service provider should the service provider find the employee suitable'.

⁸⁹ In *Springbok Trading (Pty) Ltd v Zondani & others* (2005) 26 ILJ 1681 (LAC) the employer decided to retrench part of its labour force and to re-engage their services through a labour broker. Their new terms of employment would be less advantageous. The employer claimed that the transfer was effected by agreement between itself and the employees' union. However, the Labour Appeal Court found, on the evidence, that no valid agreement had been established. It found it most unlikely that an experienced trade union official would not have challenged the proposed new conditions on behalf of its members. The retrenchments were accordingly unfair.

⁹⁰ 'Transfers of contract of employment in the outsourcing context' (2002) 23 ILJ 840, 841.

opportunity to work for the contractor, and that employment may be on the same or better terms and conditions than those enjoyed with their old employer. On the other hand, and this is apparently more often than the case, workers are in no position to refuse an opportunity to work for the contractor and are therefore compelled to work for that entity on terms and conditions of employment that are far less beneficial than those they previously enjoyed.'

2. RETRENCHMENTS

2.1 Dismissal for Operational Requirements

Although the LRA, 1995 provides a definition of what constitutes “operational requirements”, the definition does not provide clear guidance as to when dismissal will be justified. The question of whether or not an employee dismissal for operational reasons is fair is a factual one.⁹¹ The employer will firstly have to prove that the proffered reason is one based on operational requirements of the business.

The term “operational requirements” is defined as “requirements based on economic, technological, structural or similar needs of an employer”.⁹² “Technological reasons” refer to the introduction of new technology which leads to the redundancy of employees.⁹³ “Structural reasons” refers to post becoming redundant following a restructuring of the enterprise.⁹⁴

“Economic reasons” is an all-encompassing concept, covering all those reasons which relate to economic well-being of the enterprise. One of the

⁹¹ In *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 648C-D the Labour Appeal Court states:

‘What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstance in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.’

⁹² See s 214 of the LRA, 1995.

⁹³ Which may involve introducing technologically more advanced machinery, mechanisation or computerisation.

⁹⁴ Such restructuring is not restricted to the cutting of costs and expenditure; it may also be aimed at making profit. See for instance *Morester Bande (Pty) Ltd v NUMSA & another* (1990) 11 ILJ 687 (LAC) at 689A-B or increasing profit or even ensuring more efficient enterprise: *Seven Abel CC t/a the Crest Hotel v Hotel & Restaurant Workers Union & others* (199) 11 ILJ 504 (LAC) at 508H-1.

most common economic reasons is financial difficulties experienced by a business, for example, due to a recession. This causes employees to become redundant and necessitates their retrenchment.⁹⁵

“Economic reasons” may also include circumstances where employees do not actually become redundant, but economic considerations necessitate their dismissal. For instance, where the employee whose presence or actions negatively affects the economic well-being of the enterprise, could be fairly dismissed. This could happen where certain actions of the employee creates disharmony amongst co-workers⁹⁶ or detrimentally affect the relationship between the employer and the rest of its workforce⁹⁷ or a customer.⁹⁸

It is also accepted that a dismissal could be justified on the basis of the operational requirements of the business where an employee’s conduct had led to a breakdown of the trust relationship between him and the employer.⁹⁹ This could occur, for example, where the employer suspected the employee of breaching the duty to act in good faith¹⁰⁰ or of serious dishonesty, but did not have sufficient evidence to establish this.¹⁰¹

⁹⁵ See *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A) at 494A as to the meaning of retrenchment.

⁹⁶ The employee may, for instance be incompatible with his or co-employee or a clients of the employer. See, for eg, *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 543J where the employee ‘s uncompromising and difficult attitude as well as his racist remarks created disharmony amongst his co-workers. See also *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) at 123G-I; *Larcombe v Natal Nylon Industries (Pty) Ltd Pietermaritzburg* (1986) 7 ILJ 326 (IC); *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC); *King v Beacon Island Hotel* (1987) 8 ILJ 485 (IC); *Wright v St Mary’s Hospital* (1992) 13 ILJ 987 (IC) at 1003J and 1004A; *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 2422 (IC) at 424A-B.

⁹⁷ See, for instance, *Mazibuko & others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC) where the employer endeavoured to justify the dismissal of employees who were all members of a minority union, on the ground that their dismissal had become necessary to ensure continued productivity and industrial peace in the workplace. The court accepted that there was a commercial rationale for the employer’s decision to dismiss but held that the dismissals were not legitimate in the face of protective provisions of freedom of association of the LRA, 1956. See also *Jonker v Amalgamated Beverage Industries* (1993) 14 ILJ 199 (IC) at 208E-F.

⁹⁸ See *Mnguni v Imperial Systems (Pty) Ltd t/a Imperial Distributors* (2002) 23 ILJ 492

⁹⁹ Consider, for instance, *Rostoll & ‘n ander v Leeupoort Minerale Bron (Edms) Bpk* (1987) 8 ILJ 366 (IC) at 370H-J; *East Rand Proprietary Mines Ltd v UPUSA* (1996) 17 ILJ 1135 (LAC) at 1150A-B; *Govender v Alstom SA (Pty) Ltd t/a Electric Elements* [2003] 11 BALR 1220 (MEIBC); *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC); *Govender v Mondl Kraft-Richards Bay* (1999) 20 ILJ 2881 (LC); *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC). Grogan J, *Dismissal*, (2002) at 279-280.

¹⁰⁰ Cameron JA in *Chauke & other v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) at 1447H-I gave the classic formulation of this derivative misconduct: “This

Furthermore, business requirements could be such that changes needed to be made to existing employees' terms and conditions of employment.¹⁰² Where employees were not prepared to agree to such changes, the courts were prepared to accept that their dismissals were fair, provided that the changes were reasonable. However, an employer trying to persuade the labour court of the fairness of a dismissal on this ground could face the problem of 187(1)(c) of the LRA, 1995. In terms of section 187(1)(c), a dismissal to compel employees to accept a demand in respect of any matter of about which the parties may bargain collectively, constitutes automatically unfair dismissal.¹⁰³ Nevertheless, protection against dismissal is not absolute; in appropriate circumstances an employer may still be able to dismiss employees for operational reasons.

approach involves a derived justification, stemming from an employees' failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of derivative violation of trust and confidence.' The concept of derivative misconduct was also considered in *NUM & other and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB). See further Note 'Derivative misconduct: the offence of not informing' (2004) 20(3) EL 15; Note 'Dismissal for group misconduct' (2004) 13(7) CLL 68.

¹⁰¹ See also *FAWU v Amalgamated Beverage Industries* (1994) 15 ILJ 1057 (LAC) – there is a large group of workers assaulted a 'scab' driver, leaving him severely injured. The company was unable to prove which of those present at the workplace at the time actually perpetrated the assault. All those who had clocked in and who were thus in the vicinity of the incident when it occurred were charged with the assault. None came forward at the workplace hearings or in the Industrial Court to affirm their innocence or to volunteer any evidence about the perpetrators. The court held that on application of evidentiary principles, the failure by any of the workers concerned to give evidence, justified the inference that all those present at the workplace on that day "either participated in the assault or lent it their support."

¹⁰² See, eg, *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC) where the employer reorganised its staff requirements by changing the command structure and the job requirements of the posts in the command structure. See further *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 665 (LAC) at 658C-D where the company proposed a four-day week as a measurement to save it from going bankrupt.

¹⁰³ See generally: Thompson, C 'Bargaining, business restructuring and the operational requirements dismissal' (1999) 20 ILJ 755; 'The changing nature of employment' (2003) 24 ILJ 179 and 'Retrenchments and restructuring' in Cheadle *et al Current Labour 2004* (LexisNexis Butterworths 2004); Rycroft, A 'The evolving (but confusing) law on business restructuring' (2003) 24 ILJ 68; Theron, J 'Employment is not what is used to be' (2003) 24 ILJ 1247; Bosch, C 'Of business parts and human stock: Some reflections on section 197(1)(a) of the Labour Relations Act' (2004) 25 ILJ 1856; Cohen, T 'Dismissal to enforce changes to terms and conditions of employment – automatically unfair or operationally justifiable?' (2004) 25 ILJ 1993; Todd, C & Damant, G 'Unfair dismissal – operational requirements' (2004) 25 ILJ 896; Du Toit, D 'Business restructuring and operational requirements dismissals: *Algorax* and beyond' (2005) 26 ILJ 595.

The difficult question is when it is 'fair' for an employer, in the course of restructuring its business, to dismiss an employee for declining to accept changes in her or his terms and conditions of employment? The answer to this vexed and much-debated question reveals underlying tension created by negotiated compromise struck between business and labour at the time of the drafting of the new Labour Code.¹⁰⁴

In *NUMSA & others v Fry's Metal (Pty) Ltd*¹⁰⁵ the Supreme Court of Appeal confirmed the decision of the Labour Appeal Court in *Fry's Metal (Pty) Ltd v NUMSA & others*,¹⁰⁶ finding that only conditional dismissals intended to compel employees to accede to an employer's demands on a matter of mutual interest can constitute an automatically unfair dismissal in terms section 187(1)(c) of the LRA. The final dismissal of employees for refusing to accept a change to their terms and conditions of employment was held not to be automatically unfair.

Another category of economic reasons that may justify dismissal for operational reasons is economic harm caused by employees to the enterprise through industrial action. As economic harm through industrial action was both expected and accepted by all parties involved in collective bargaining,¹⁰⁷ the employer had to prove that the economic harm caused by industrial action was more than it could have been expected to suffer under the circumstances.¹⁰⁸ In other words, it had to prove that the economic harm had become unbearable.

¹⁰⁴ See generally, Jordaan, B 'The new LRA: Some problems and puzzles' (1995) 5(12) *LLNCR* 1; Basson, AC & Strydom, EML 'Draft negotiating document on labour relations in bill form: Some thoughts' (1995) 58(2) *THRHR* 251; Grogan, J 'Unilateral Change: How is it to be effected?' (2000) 18(4) *EL* 15 and 'Chicken or egg: Dismissals to enforce demands' (2003) 19(2) *EL* 4; Note 'Dissecting an automatically unfair dismissal from a valid operational requirements dismissal' (2004) 13(4) *LLN* 2

¹⁰⁵ (2005) 26 *ILJ* 689 (SCA). See discussion in Irvine, H 'Dismissal based operational reasons and the jurisdiction of courts- *National Union of Metalworkers and others v Fry's Metal (Pty) Ltd*' (2005) 14(9) *CLL* 81. See too *General Food Industries v FAWU* (2004) 25 *ILJ* 1260 (LAC)

¹⁰⁶ (2003) 24 *ILJ* 133 (LAC).

¹⁰⁷ In *MAN Truck & Bus (SA) (Pty) Ltd and United Motor & Allied Workers Union* (1991) 12 *ILJ* 181 (ARB) at 189H-I the arbitrator stated that, "industrial action is the exercise of collective muscle in support of collective goals".

¹⁰⁸ See, for eg, *BAWU & others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC) at 972F; *Cobra Watertech v NUMSA* (1995) 16 *ILJ* 582 (LAC) at 616F; *NUMSA v*

But the power to dismiss is lessened by the fact that dismissal of strikers who participated in a protected strike is branded an automatically unfair dismissal.¹⁰⁹ Consequently, the critical question in each case is whether the employees were dismissed for participating in a protected strike or whether they were dismissed for the operational requirements of the employer. If the reason for the dismissal is participation in a protected strike, and not the employer's operational requirements, then the dismissal will be automatically unfair in terms of s 187(1)(a) of the Act.

This was the question that came before the Labour Appeal Court in *SACCAWU & others v Afrox Ltd*. There the court concluded as follows:¹¹⁰

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation applied in other fields of law, should not be applied here ... The first step is to determine factual causation: was participation or support, of the protected strike in sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is no, that does not immediately render the dismissal automatically unfair: the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant" or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 4). I would respectfully venture to suggest that the most practical way of approaching the issue is to determine what the most probable inference is that may be drawn from the established facts as cause of the dismissal, in

Vetsak Co-operative & others (1996) 17 ILJ 455 (A); *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); (1997) 18 ILJ 439 (SCA).

¹⁰⁹ In *SACCAWU & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at para 41 Froneman DJP summed the position as follows:

'The general approach of the LRA is to immunize employees participating in a protected strike from normal delictual and contractual consequences (s 67(2)). In return an employer is not obliged to remunerate employees during a protected strike (s 67(3)) and it may employ replacement labour during a protected strike, except for designated maintenance services and during offensive lock-outs (s 76)). The outcome, or a resolution of a strike is thus normally left to the respective positions of power of the opposing parties. Dismissal only becomes weapon in exceptional circumstances, when operational requirements dictate its use (s 67(5)). Even in non-strike dismissals, employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects (s 189(3)(a)) These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reason.'

¹¹⁰ At 1726 para 32.

much the same way as the most probable or most plausible inference is drawn from circumstantial evidence in civil cases.’

The Labour Appeal Court in *General Food Industries Ltd v FAWU*¹¹¹ reversed an earlier decision of the Labour Court which found an employer’s decision to outsource certain of its work, and to reduce its workforce accordingly, to constitute an automatically unfair dismissal in terms of s 187(1)(c) of the LRA. The outsourcing took place in the context of a dispute between the parties over wage increases, the employer seeking a wage freeze in order to ensure its continued viability and the union refusing to moderate its demands. After considering the implication of the LAC decision in *Fry’s Metals (Pty) Ltd v NUMSA & others*¹¹² the court accepted that an employer is entitled to retrench in order to increase its profits and not only when its survival is under threat, and found the outsourcing decision to have been genuine and the retrenchments to be substantively fair. The employer’s decision to consult at local than at national level over the issue was held to comply with the requirements of s 189.

*Early Bird (Pty) Ltd v Food & Allied Workers Union & others*¹¹³ concerned employees who were employed in separate bargaining units but who were members of the same union. The union demanded increased wages for its members generally, and declared a dispute in respect of employees in the employer’s processing plant. The employer considered that employees in its farming division were not entitled to take part in the ensuing strike, and dismissed them. The Labour Court found that the farming division strike was not protected, and that the dismissals were not automatically unfair. They were, however, considered unfair for other reasons.

On appeal the Labour Appeal Court found the correct approach to be not whether the farming employees were entitled to take part in it. Having found that they were so entitled the court found that their dismissal was

¹¹¹ (2004) 25 ILJ 1260 (LAC).

¹¹² (2003) 24 ILJ 133 (LAC).

¹¹³ (2004) 25 ILJ 2135 (LAC). See too *SACWU & others v Afrox Ltd* (1998) 19 ILJ 62 (LC); *SACWU & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC).

automatically unfair. To the extent that they were striking in support of their own demands for increased wages, the court found that the dispute had been properly referred for conciliation, and to the extent that their strike could be said to be in support for their colleagues demands the court found that it was not necessary for the union to refer the matter again when other employees wished to join in.

The employees in *NUMSA & others v Dorbly Ltd & another*¹¹⁴ were actually taking part in a protected national strike when they were retrenched. The Labour Court was required to determine whether their retrenchment constituted a dismissal for operational requirements or whether it was automatically unfair in terms of s 187(1)(a) of the LRA. Allied to this was the question how much economic hardship an employer is required to tolerate before it is entitled to retrench striking workers. The court found the dismissal to have been genuinely grounded in operational requirements, but held that they were procedurally unfair because the employer took the decision to close down its operation before engaging in proper consultations with the union.

2.2 Relevant statutory provisions

The procedure for a fair dismissal based on the employer's operational requirements is found in s 189 of the LRA.¹¹⁵ A dismissal for operational

¹¹⁴ (2004) 25 ILJ 1300 (LC).

¹¹⁵ The section reads as follows prior to amendment in 2002:

¹ 189 dismissal based on operational requirements

- (1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operation requirements, the employer must consult –
 - (a) any person whom the employer is required to consult in terms of a collective measures-
- (2) The consulting parties must attempt to reach consensus on –
 - (a) appropriate measures-
 - (i) to avoid the dismissals;
 - (j) to minimize the number of dismissals;
 - (k) to change the timing of dismissals; and
 - (l) to mitigate the adverse effects of the dismissals;
 - (b) the method of selecting the employees to be dismissed; and
 - (c) the severance pay for the dismissed employees.
- (3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to –
 - (a) the reasons for the proposed dismissals;

requirements is no-fault dismissal, unlike dismissal for misconduct or incapacity.¹¹⁶ The Code of Good Practice: Dismissal (schedule 8 to the LRA) provides as follows:

‘Dismissals for operational requirements have be categorised as “no fault” dismissal – in other words, the employee is not responsible for the termination of employment, the effective cause of termination is one or more external or internal factors related to the employer’s business needs. For this reason, together with the human costs of retrenchment, this Act places particular obligations on an employer, most of which are directed *toward ensuring all possible alternatives to dismissal are explored* and that those employees to be dismissed are treated fairly. (Emphasis added.)

Gamble AJ summarises the point well when he notes that:¹¹⁷

‘Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to rely on fair labour practices and, where appropriate, to dismiss for operational reasons. The respective obligations under the section geared to a specific purpose, namely to achieve a joint consensus-seeking process. This section does not impose obligations only on the employer. All consulting parties have a duty to attempt to reach consensus (*Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 *ILJ* 89 (LAC)).’

Section 189 provides a list of various issues in respect of which the parties should attempt to reach consensus and information which is required to be provided in writing. While a purposive approach may be adopted, fairness is always to be regarded as the touchstone in relation to the whole process. A

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- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employer;
 - (d) the proposed method of selecting which employees to dismiss;
 - (e) the time when, or the period during which, the dismissals are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed ; and
 - (h) the possibility of the future re-employment of the employees who are dismissed ...
- (5)The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.
- (6) The employer must consider and respond to the representation made by the other consulting and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
- (7) The employer must select employees to be dismissed according to selection criteria –
- (a) that have been agreed to by the consulting parties; or
 - (b) if no criteria have been agreed, criteria that are fair and objective.’

¹¹⁶ See generally Note ‘Complicating retrenchment law: Unforeseen effects of s 189A’ (2005) 21(2) *EL* 16.

¹¹⁷ *FAWU & others v SA Breweries Ltd* (2004) 25 *ILJ* 1979 (LC) at para 35.

mechanical 'checklist' approach to determine whether s 189 has been complied with is inappropriate.¹¹⁸

2.3 Substantive fairness

In *Chemical Workers Industrial Union v Algorax (Pty) Ltd*¹¹⁹ there the Labour Appeal Court referred to an employer's obligation to avoid dismissals for operational requirements and to minimize the number of dismissals and stated 'the reason for the lawmaker to require all of these things from an employer was to place an obligation on the employer only to resort to dismissing employees for operational requirements as a measure of last resort'.

The Court has to determine whether the operational reason relied upon by the employer was genuine, and not merely a sham. Put differently, for a dismissal based on operational requirements to be substantively fair, the employer has to prove that the operational reason actually existed and that it was the real reason for the retrenchment or dismissal.¹²⁰ In *Algorax Zondo JP* stated the position as follows:¹²¹

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

¹¹⁸ *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC).

¹¹⁹ (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 1081 (LAC).

¹²⁰ The employees in *NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic Clinic* (2005) 26 ILJ 501 (LC) claimed that the employer's true reason for retrenching them and outsourcing their jobs was their membership of the union. The Labour Court found there was no evidence that the employer had tried to erode the union's power base under the guise of retrenchment, but that the employer had in fact attempted to rid itself of poorly performing employees in this manner. This was not considered a legitimate reason for dismissal unless the applicable provisions of the LRA had been complied with, and the retrenchments were pronounced unfair.

¹²¹ At para 69.

As was pointed out by the Labour Appeal Court in *Decision Surveys International (Pty) Ltd v Dlamini & others*¹²² the function of the court is not merely to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench is commercially justifiable but also to consider whether the reason advanced for the retrenchment is fair and genuine without second-guessing the business efficacy thereof. In *BMD Knitting Mills (Pty) Ltd v SACTWU*¹²³ the court questioned without finally deciding, the deferential approach adopted in *SACTWU & others v Discreto – A Division of Trump & Springbok Holdings*¹²⁴ to the issue whether a dismissal is for a fair reason. This deferential approach essentially follows the approach to judicial review of administrative action enunciated in *Carephone (Pty) Ltd v Marcus NO & others*,¹²⁵ namely that courts should afford administrative bodies a significant margin of appreciation and not evaluate the actions in terms of value judgement which the courts impose upon the activities of such bodies. Davis AJA in *BMD Knitting Mills* said the following in this regard:¹²⁶

‘I have some doubt as to whether this deferential approach which is sourced in the principle of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely “the reason for the dismissal is a fair reason”. The word “fair” introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.’

¹²² [1999] 5 BLLR 413 (LAC).

¹²³ (2001) 22 ILJ 2264 (LAC).

¹²⁴ (1998) 19 ILJ 1451 (LAC) at para 8.

¹²⁵ (1998) 19 ILJ 1425 (LAC).

¹²⁶ At 19.

Further, in the real world of work, substantive and procedural issues are intertwined. This difficulty has been acknowledged by the Labour Court¹²⁷ and Labour Appeal Court.¹²⁸ In the *Thomas v Fidelity Corporate Services (Pty) Ltd*¹²⁹ decision, the Labour Court alluded specifically to the artificiality of the distinction between substantive and procedural fairness in the case of senior employees, and suggested that the drafters of s 189A had mass retrenchments in mind when introducing this section in the LRA in 2002. In a contested retrenchment falling under s 189A of the LRA the Labour Court in *Perumal & another v Tiger Brands*¹³⁰ found that the employee was barred by s 189A(18) from contesting the procedural fairness of her dismissal. However, the court also found that the issues of procedural fairness could not neatly be severed from those of substantive fairness and took certain procedural failings into account when assessing whether the retrenchment had been substantively fair.

2.4 The Procedural fairness

In the event that an employer is able to show that the dominant or main reason(s) for the dismissal is a proper operational requirement that is not the end of the matter. The employer is also required to show that the retrenchments were procedurally fair. The Labour Court and Labour Appeal Court have on many occasions emphasised that consultation in the context of a retrenchment exercise means a 'joint problem-solving' or a 'joint consensus seeking' exercise. If an employer makes a decision to retrench employees before consultation has been completed it essentially presents employees with a *fait accompli* and that is fatal to the procedural fairness of the retrenchments.

The duty to consult imposed on an employer by s 189(1) of the LRA arises when the employer contemplates dismissals for operational reasons. The duty

¹²⁷ See *Banks & another v Coca Cola SA – A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 ILJ 2748 (LC).

¹²⁸ See *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC).

¹²⁹ (2007) 28 ILJ 424 (LC); [2007] 6 BLLR 579 (LC) at paras 9-10.

¹³⁰ (2007) 28 ILJ 2302 (LC).

obviously arises prior to a decision having been taken and at a stage when the employer is still open to being persuaded not to retrench. The legal position in this regard was set out as follows by Conradie JA in *Kotze Rebel Discount Liquor Group (Pty) Ltd*.¹³¹

‘How open or closed an employer’s mind was when he embarked on the consultation process can only afterwards be monitored by a court on whatever manifestations of the working of his mind become available. Despite his own, for the reasons set out above, pardonably strong view, an employer must remain sufficiently flexible to conduct meaningful discussion with his employees. He is therefore obliged to invite input from the employees. If he fails to do this, and fails to give a reasonable opportunity for the employees to make their contribution, he leaves himself small opportunity of arguing before a court that his mind had not been made up.’

In *Johnson & Johnson v CWIU & others*¹³² the Labour Appeal Court characterised the employer’s obligations under s 189 as follows:

‘The employer must initiate the consultation process when it contemplates dismissal for operational reasons. It must disclose relevant information to the other consulting party; it must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting; it must consider these representations, and if it does not agree with them, it must give its reasons.’

The court went on to say that these obligations¹³³ –

‘are geared to a specific purpose, namely to attempt to reach consensus on the subjects listed in s 189(2). The ultimate purpose of s 189 is thus to achieve a joint consensus seeking process. In this manner this section implicitly recognize the employer’s right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed.’

To be procedurally fair, the employer is obliged to give reasonable prior notice of the commencement of consultations which notice must also comply with the provisions of s 189(3).¹³⁴

The 2002 amendment dealing with retrenchments introduced a new mechanism for resolving disputes about procedural fairness.¹³⁵ In *NUMSA &*

¹³¹ (2000) 21 *ILJ* 129 (LAC); [1998] 12 *BLLR* 1209 (LAC) at para 1451.

¹³² (1999) 20 *ILJ* 89 (LAC) at 26.

¹³³ At 31.

¹³⁴ See also *Kotze v Rebel Discount Liquor Group (Pty) Ltd* at 133A-B; *Hendler & Hart (Pty) Ltd v NUMSA & others* (1994) 15 *ILJ* 1285 (LAC) at 1296D-E and 1297A-E.

¹³⁵ Section 189A(13) reads as follows:

‘If an employer does not comply with fair procedure, a consulting party may approach the Labour Court by way of an application for an order-

*others v SA Five Engineering & others*¹³⁶ Murphy AJ (as he then was) referred to the objectives that s 189A sought to accomplish when it was introduced by the Labour Relations Amendment Act 12 of 2002. As the court noted in that case:

‘Suffice it now to say that the intention of s 189(A)(13), read with s 189A(18), is to exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication or industrial action.’

Cases dealing with procedural fairness of dismissals based on operational requirements are legion.¹³⁷ *NEHAWU & others v University of Pretoria*¹³⁸ pertained to the requirement that an employer may not make a final decision to retrench before consulting the representative union. In this matter the court stated that an employer is unlikely to announce the possibility of retrenchment before it is itself convinced of the need to take that step, for fear of precipitating unnecessary labour unrest. An employer should not therefore be criticised for its firmly held views at the time it embarks upon a retrenchment consultation process. Its conduct can only be adjudged to be unfair if at the commencement of the consultation process it has taken an irreversible decision and it is not open to persuasion otherwise. *Wanda & others v Toyota*

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- (a) compelling the employer to comply with the fair procedure;
 - (b) interdicting or restraining the employer from dismissing an employee prior to complying with the fair procedure;
 - (c) directing the employer to reinstate an employee until it has complied with the fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.’

See also Le Roux P A K ‘Unfair retrenchment: A survey of some recent important cases’ (2001) 10 *CLL* 81; ‘The new law of retrenchment: Implications for employers arising out of pending changes to dismissal procedures under the Labour Relations Act’ (2002) 11(11) *CLL* 55, and “Bumping” in retrenchment: *Porter Motor Group v Karachi (unreported CA 3/01)* (2002) 11(8) *CLL* 74; Mischke, C ‘Restructuring and retrenchment: Pitfalls for employers’ (2001) 11(5) *CLL* 47; Du Toit, D “Reasonable expectation” of continued employment: Some ramifications surrounding the retrenchment of a single employee’ (2002) 11(5) *Labour Law News* 2 and ‘The new retrenchment law: striking against retrenchments: Flogging a dead horse’ (2002) 11(3) *LLN* 2; Van Voore, R ‘The new retrenchment procedure: Sections 189 and 189A of the LRA’ (2002) 6(1) *Law, Democracy & Development* 71.

¹³⁶ (2004) 24 *ILJ* 2358 (LC); [2005] 1 *BLLR* 53 (LC). See too *Insurance & Banking Staff Association & another v Old Mutual Services & Technology & another* (2006) 27 *ILJ* 1026 (LC).

¹³⁷ See eg *Baloyi v M & P manufacturing* (2001) 22 *ILJ* 391 (LAC); *Perumal & another v Tiger Brands* (2007) 28 *ILJ* 2303 (LC); *SA Airways v Bogopa & others* (2007) 28 *ILJ* 2718 (LAC).

¹³⁸ (2002) 23 *ILJ* 740 (LC).

*SA Marketing (A Division of Toyota SA Motors Ltd)*¹³⁹ held that it is not good faith consultation initially to adopt a firm standpoint on a consultation topic and then attempt to alter that stance later in the consultation process, without reason.

In *Curtis and Trentyre (Pty) Ltd*¹⁴⁰ the bargaining council arbitrator considered the extent of an employer's duty to consult with an individual employee before pronouncing her position redundant for operational reasons. The arbitrator considered the requirements of s 189 of the LRA and found that having failed to consult with the employee and to attempt to reach consensus on each of the provisions of that section the employer had retrenched the employee unfairly.

The Labour Appeal Court found, in *General Food Industries Ltd/ t/a Blue Ribbon Bakeries v FAWU & others*,¹⁴¹ that an employer who wished to 'downsize' one of its branches for economic reasons should have transferred affected employees to other branches, through a system of 'bumping', in order to avoid their retrenchment, and that its failure to do so rendered the retrenchment unfair. The court endorsed the principle of LIFO coupled with bumping across branches, and criticised the employer for retrenching employees at one branch while at the same time recruiting new staff at other branches. In *Motshalibane and Fischer Tube Technik (Pty) Ltd*¹⁴² the employer had an established policy that if retrenchments became necessary temporary employees should first be selected for retrenchment, before permanent employees. The bargaining council arbitrator held that this did not absolve the employer from the need to consult with such employees on selection criteria and on the other matter enumerated in s 189(2)(b) of the LRA.

¹³⁹ [2003] 2 BLLR 224 (LAC).

¹⁴⁰ (2004) 25 ILJ 1531 (BC). See also *Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA & others* (2006) 27 ILJ 915 (LAC); *Universal Product Network (Pty) Ltd v Mabaso & others* (2006) 27 ILJ 991 (LAC).

¹⁴¹ (2004) 25 ILJ 1655 (LAC).

¹⁴² (2004) 25 ILJ 1793 (BC).

In *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare Cleaning*¹⁴³ the Labour Court noted that employers who have fallen short of complying with the obligations in s 189(3) tend to diminish the value of s 189(3), relying on the dicta in *Johnson & Johnson (Pty) Ltd v CWIU*¹⁴⁴ that a mechanical check-list approach was not appropriate and that the proper approach was to ascertain whether the purpose of s 189(3) had been achieved. The court found that there could be no quarrel with the logic and rationality of a pragmatic approach of this kind. However, the dicta did not amount to licence to employers to negate what was, after all, a statutory right to information and due process in the form of meaningful consultation. The prescriptions of s 189 were clear, notorious, well understood, wisely crafted and tailored to oiling the wheels of a meaningful joint consensus-seeking process. It was the wise employer who followed them to the letter. Those employers who chose not to do so at the peril of a finding not only of procedural but also substantive unfairness.

*FAWU & others v SA Breweries Ltd*¹⁴⁵ concerned a major restructuring exercise by a large business undertaking to increase its profitability and to install it as a 'world-class manufacturer'. The process, which was undertaken in consultation with the union, involved declaring all existing positions in the organizations redundant and thereafter evaluating and training individual members of the workforce to take up positions within the new structure. Those who did not qualify would be retrenched. The Labour Court accepted that the employer's aim of increasing its profits provided a valid commercial rationale for the retrenchment exercise, but took issue with the literacy and numeracy criteria which it used to determine employees' ability to perform within the new structure, and found the selection criteria to have been unfair. In *NUM & others v Alexkor Ltd*¹⁴⁶ the Labour Court refused to condone a process of

¹⁴³ (2005) 26 *ILJ* 889 (LC).

¹⁴⁴ (1999) 20 *ILJ* 89 (LAC).

¹⁴⁵ (2004) 25 *ILJ* 1979 (LC). For discussion see: Note 'The test of time: Lessons from the SAB retrenchment' (2004) 20(6) *EL* 3; Le Roux, P A K 'Unfair retrenchments: *FAWU v SA Breweries*' (2004) 14(2) *CLL* 16; 'Dismissal based on operational requirements: New cases from the Labour Appeal Court' (2004) 13(2) *CLL* 114 and 'Challenges to retrenchment at the Labour Court' (2004) 14(6) *CLL* 16; Mthembu, M 'Dismissal for operational requirements' (2003) 15(3) *SAMLJ* 346.

¹⁴⁶ (2004) 25 *ILJ* 2034 (LC).

consultation whereby employees and their union were kept informed of the progress of the employer's rationalization proposals through a series of communiqués and found that the union had been presented with a fait accompli. The subsequent retrenchments were accordingly procedurally unfair.

In *Enterprise Foods (Pty) Ltd v Allen & others*¹⁴⁷ the Labour Court had earlier found an employer's decision to restructure its organization and to close down one of its plants, so rendering the employees redundant, to have been both substantively and procedurally unfair. The court awarded the maximum permitted compensation of 12 months' remuneration. On appeal the Labour Appeal Court found that there were objective and acceptable reasons for the restructuring, and that the retrenchments were substantively fair. However, they were held to be procedurally unfair because the employer had taken the final decision to close the plant before consulting with the employees. The award of maximum compensation was not disturbed. In *Darman & another and Joy Global (Pty) Ltd (P&H Minepro Services)*¹⁴⁸ the bargaining council arbitrator upheld the election by an individual employee in terms of s 191(12) of the LRA, as amended, to refer a dispute concerning her dismissal for operational requirements to arbitration in preference to adjudication by the Labour Court.

2.5 Alternatives to retrenchment

In *SA Airways v Bogopa & others*¹⁴⁹ the Labour Appeal Court revisited the issue of when and in what circumstances an employer which has undertaken a restructuring exercise may fairly declare that the employees' positions have become redundant and require them to apply for positions in the new structure. The court considered the extent of an employer's duty to consult with employees before declaring their positions redundant, and found that an

¹⁴⁷ (2004) 25 ILJ 1251 (LC). See also *CWIU & others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC); *Chemical Energy Paper Printing Wood & Allied Workers Union obo Gumede & others v Republican Press (Pty) Ltd* (2006) 27 ILJ 335 (LC).

¹⁴⁸ (2004) 25 ILJ 1354 (BC).

¹⁴⁹ (2007) 28 ILJ 2718 (LAC).

initial failure to consult can in certain circumstances be remedied by a later by bona fide attempt to consult and reach consensus on the way forward. Where employees refuse to consult with the employer in such circumstances their dismissal will be procedurally unfair. However, the court found that the employer had breached the parity principle by appointing certain employees immediately to restructured positions substantively unfair.

Where an employee whose position had become redundant was told to apply for another position for which she clearly did not meet the requirements, the Labour Court held in *Lakomski v TTS Tool Technic Systems (Pty) Ltd*¹⁵⁰ that she had not been offered genuine alternative employment, and that her retrenchment was unfair.

The Labour Appeal Court in *Oosthuizen v Telkom SA Ltd*¹⁵¹ considered the extent of an employer's obligation to provide alternative employment where an employee's position becomes redundant as the result of a retrenchment exercise. The court found that the employer in the case had not applied fair and objective criteria when considering the appellant's possible appointment to alternative positions for which he met the basic requirements, and that his selection for retrenchment had therefore been substantively unfair. Having found the dismissal to have been substantively unfair the majority found it unnecessary to decide whether the employer was also under a duty to consult separately with the employee, in addition to consulting with his union, because he fell outside the bargaining unit for which his union was negotiating. After considering judicial authority on the matter McCall AJA concluded that the employer was obliged to consult with the union concerning its members who were not part of the bargaining unit, but was not obliged to consult separately with the appellant.

¹⁵⁰ (2007) 28 *ILJ* 2775 (LC). For discussion: Hutchison, W 'Some factors arising out of the retrenchment of a single employee' (2002) 12(4) *CLL* 39.

¹⁵¹ (2007) 28 *ILJ* 2531 (LAC).

The Labour Court was required in *Cutts v Izinga Access (Pty) Ltd*¹⁵² to consider whether by unconditionally offering to reinstate an employee who had been unfairly retrenched the employer had in effect cured the unfairness of the dismissal. The court found that the unfairness of the retrenchment had led to a breakdown in the trust relationship, and that in those circumstances reinstatement was not appropriate remedy.

2.6 Sundry Issues: Severance

In terms of s 196 of the LRA, 1995 the employer must pay the employees who have been selected for dismissal severance pay.¹⁵³ The Act is prescriptive as far as the payment of severance pay is concerned. It sets out the manner in which it must be calculated and prescribes the minimum¹⁵⁴ to which an employee would be entitled.¹⁵⁵ In *McDonald & another and Shoprite Checkers*¹⁵⁶ the commissioner placed onus on an employee, who refused to accept his employer's offer of alternative employment in lieu of retrenchment, to prove that his refusal was reasonable. The commissioner found that he had not discharged that onus, that he had no 'reasonable expectation' that he would be retrenched, and that in the circumstances he was not entitled to any severance.

The Labour Appeal Court was required in *Irvin & Johnson Ltd v CCMA & others*¹⁵⁷ to consider whether, bearing in mind that an employee who unreasonably refuses an employer's offer of employment with another employer forfeits his or her right to severance pay. In terms of s 14(4) of the

¹⁵² (2004) 25 ILJ 1973 (LC).

¹⁵³ See s 196(1) of the LRA, 1995. This provision brings to an end the debate which has raged in both the industrial court and the labour appeal court as to whether or not employer is obliged to pay severance pay (for an overview of the different arguments, see Strydom, E & Van der Linde, K 'Severance package: A Labour Law and Income Tax Perspective' (1994) 15 ILJ 447.

¹⁵⁴ The words "at least" in s 196(1) indicate that the section prescribes the minimum severance must be paid. The parties, however, may agree on more favourable terms during consultation (see s 189(2)(c)). See also *Velen and West 'n Bell Catering Equipment* (2005) 26 ILJ 2500 (BCA); *Moremi and Coldline Food Brokers CC* (200) 28 ILJ 2867 (CCMA).

¹⁵⁵ See s 196(1).

¹⁵⁶ (2005) 26 ILJ 168 (CCMA).

¹⁵⁷ (2006) 27 ILJ 935 (LAC). See too *Roberts and False Bay Security (Pty) Ltd* (2005) 26 ILJ 1528 (CCMA); *Broll Property Group (Pty) Ltd v Du Pont & others* (2006) 27 ILJ 269 (LC).

BCEA 1997, an employee who accepts an unreasonable offer of alternative employment would remain entitled to claim severance pay. After undertaking a detailed review of the basis and purpose of the right to severance pay in South Africa, the court held that the purpose of s 41(4) is to provide an incentive to employers to obtain alternative employment for redundant employees, and that an employee who accepts such an offer is not also entitled to claim severance pay.

The arbitrator in *Wilson and Ingersoll-Rand Co SA (Pty) Ltd*¹⁵⁸ found that an employee who had accepted a generous severance package after his retrenchment could not also claim entitlement to the pension and medical aid benefits that were normally associated with retirement, simply on the grounds that these had previously been offered to other employees who had accepted early retirement as an alternative to retrenchment. In a dispute over the extent of an employee's entitlement to severance pay the employee in *Telkom (Pty) Ltd v CCMA & others*¹⁵⁹ claimed entitlement to pay based on 27 years' service, while the employer was prepared to pay only for 18 years' service. The Labour Court held that the dispute did not relate to the length of the employee's service but to the method of calculating the severance pay due, and that the CCMA therefore had jurisdiction in terms of s 41(6) of the BCEA, the CCMA could enforce the agreement at such higher rate.

In *Armien & others and Liberty Life Association of Africa Ltd*¹⁶⁰ unfairly retrenched employees were either reinstated or compensated by the Industrial Court in 1996, but the implementation of the award was delayed for nearly five years pending unsuccessful review proceedings by the employer and an appeal that was eventually withdrawn. Certain disputes thereafter arose concerning the implementation of the determination and were referred to arbitration. Some reinstated employees agreed to accept retrenchment, but claimed the right to severance pay. Others claimed back pay, and all claimed interest on the compensation awards as from the date of the Industrial Court

¹⁵⁸ (2004) 24 ILJ 2416 (BCA).

¹⁵⁹ (2005) 26 ILJ 1492 (LC).

¹⁶⁰ (2005) 26 ILJ 415 (ARB).

determination. The arbitrator ruled that in calculating years of service for the purpose of severance pay the employer must include the period during which employees should have been, but were not, reinstated in employment. Similarly, subject to certain conditions, back pay and interest must be calculated from the date of the original determination.

The next section examines steps which the legislature has taken to safeguard employment in the context of transfer of undertakings.

3. TRANSFER OF UNDERTAKING

3.1 Change of Employer

The common law took the view that every contract of employment was discrete, and for good reason that if employees might be transferred at will, they would, in the words of Lord Atkin in *Nokes v Dancaaster*,¹⁶¹ be “serfs and not servants”. In other word, the sale of business in general meant termination of the contracts of employment of existing employees and left it up to the purchaser to decide whether or not to offer them re-employment. However, this can act as a boomerang against the interests of employees in the modern circumstances of a statutory floor of employment protection rights.¹⁶²

Thus the Industrial Court recognised the need to protect employees under these circumstances by requiring fair retrenchment procedures. In *Kebeni v Cementile Products (Ciskei) (Pty) Ltd*¹⁶³ Bulbulia M further held that, in addition to timeous consultation with employees ‘safeguards should be incorporated into the agreement between [the employer and the purchaser of the business] to ensure that the interests of the workforce are adequately

¹⁶¹ [1940] AC1014, [1940] 3 All ER 599 at 556H-G.

¹⁶² According to the Explanatory Memorandum to the Draft Labour Relations Bill (1995) 16 *ILJ* 278 at 318, the common law requirement that contracts of employment had to be terminated and new ones entered into inhibited commercial transactions in cases where the new employer wanted to take over a business, employees and all. And whether or not the transferee wanted to take on the employees they would have to be retrenched and paid severance benefits etc which escalated the costs of transactions involving the transfer of undertaking.

¹⁶³ (1987) 8 *ILJ* 442 (IC).

protected' – for instance, a clause deeming all existing contracts of employment to be transferred to the purchaser.¹⁶⁴ The learned member also made reference to the British Transfer of Undertaking: Protection of Employment Regulations of 1981, which provides for automatic transfer of contracts of employment when a business is sold as a going concern.¹⁶⁵ Understandably, the Industrial Court hesitated to order a remedy with far-reaching socio-economic implications, and employees accordingly acquired no right to continued employment on a transfer of the business they worked for.

Section 197 of the LRA now creates a right of this nature.¹⁶⁶ In *NEHAWU v UCT*, the Constitutional Court explained the rationale underlying s 197 as follows:¹⁶⁷

'Its purpose is to protect the employment of the workers and to facilitate the sale of business as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimizing the tension and the resultant labour disputes that often arise from the sale of businesses and impact negatively on economic development and labour peace. In this sense, s 197 has a dual purpose, it facilitates the commercial transactions while at the same time protecting the workers against job losses.'

From a commercial point of view, therefore, s 197 transfers of business have the twin advantages of preserving jobs and avoiding the immediate necessity of paying compulsory severance benefits.¹⁶⁸ The lack of contractual link between the transferor and transferee is not a necessary pre-condition for the application of s 197.¹⁶⁹

¹⁶⁴ *Kebevi v Cementile Products (Ciskei) (Pty) Ltd* at 450B-C. Cf *FAWU v Royal Salt (Pty) Ltd* [1997] 4 BLLR 434 (CCMA).

¹⁶⁵ The regulations were adopted in conformity with European Community Directive 77/187. See Rycroft & Jordaan 241-242; Olivier, MP & Potgieter, O 'The legal regulation of employment claims in insolvency and rescue proceedings: A comparative inquiry' (1995) 16 *ILJ* 1295; Smit, Nicola 'Should transfer of undertaking be statutory regulated in South Africa?' 11(7) *CLL* 61.

¹⁶⁶ For an overview of the background to s 197, see *Schutte v Powerplus Performance (Pty) Ltd* (1999) 20 *ILJ* 655 (LC) at paras 27-42.

¹⁶⁷ *NEHAWU v UCT* para 35.

¹⁶⁸ Employees who object to such transfer are free resign either before or after transfer, but, if they do so, they may forfeit severance pay: s 41(4), BCEA. Cf *Young v Lifegro Assurance* (1987) 8 *ILJ* 795 (IC).

¹⁶⁹ *Nokeng Tsa Taemane Local Municipality & another v Metsweding District Municipality & others* (2003) 24 *ILJ* 2179 (LC).

It is useful to the discussion that follows to set out the original provisions¹⁷⁰ of s 197. They read as follows:

‘197 Transfer of contracts of employment

- (1) A contract of employment may not be transferred from one employer (referred to as “the old employer”) to another employer (referred “the new employer”) without the employee’s consent, unless –
 - (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; ...
- (2) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the new employer and each employee at the time of transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done or in relation to the new employer ...
- (3) An agreement contemplated in subsection (2) must be concluded with the appropriate person or body referred to in section 189.¹⁷¹
- (4) A transfer referred to in subsection (1) does not interrupt the employee’s continuity of employment. That employment continues with the new employer as if with the old employer.

Despite the apparently clear language of the section, certain problems of interpretation have presented themselves. As Brassey explains:¹⁷²

‘The problems of the section are to an extent linguistic – in one case, at least a phrase is used which conveys precisely the opposite of the meaning intended. To an extent, moreover, they are structural, expressions being framed in different ways when they seemingly have the same import and antitheses being set up when none exist. Mostly, however, they are conceptual. The drafters seem uncertain of the extent to which the transfer of the contract should be non-consensual and know too little about contract and insolvency law to be completely sure of the implications of their handiwork. The result is a section that yields no completely coherent meaning when construed by the conventional canons of statutory interpretation. Each

¹⁷⁰ Section 197 was amended in 2002. It is convenient to quote both subsections (1) and (2) of s 197. They read as follows:

‘(1) In this section and in section 197A-

- (a) “business” includes the whole or part of any business, trade, undertaking or service; and
- (b) “transfer” means the transfer of a business by one employer (“the old employer”) to another employer (“the new employer”) as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they have been rights and obligations between the new employer and the employee.’

¹⁷¹ In terms of s 189(1) the parties the employer should consult are any person that the employer is obliged to consult in terms of a collective agreement, if no collective agreement a workplace forum, if no workplace forum any registered trade union whose members are likely to be affected by the transfer, if no registered union then the affected employees themselves or their representative nominated for that purpose.

¹⁷² *Commentary on the Labour Relations Act* vol 3 at paraA8:86.

construction, tentatively adopted, meets an insuperable obstacle in the language and must be jettisoned until ultimately there is nothing left but the frustration of failure. The Labour Appeal Court is left, therefore, to form a view of what works best and make the language fit the conclusion, a process that may be the converse of proper statutory interpretation but cannot be avoided when wording is so utterly intractable.

The section commences by declaring, in conformity with the common law prohibition, that an employee's contract of employment may not be transferred from one employer to another absent the employee's consent. It moves on to set out instances in which the employee's contract of employment will nevertheless be transferred without his or her consent.¹⁷³ Once there is found to be a 'transfer' for the purposes of section 197, the consequences set in s 197(2)(a), 197(2)(b) and 197(4) will ensue.

In *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Herber Plastics (Pty) Ltd*¹⁷⁴ the employer party totally neglected to inform its employees that its business had been sold as a going concern and that the business was to be relocated, and chose rather to terminate their employment for operational requirements. The Labour Court found that the employer's failure to comply with its obligations in terms of s 197 rendered the retrenchment procedurally grossly unfair and awarded compensation against the seller. By contrast, the employees of a business which had been sold allegedly without their informed consent, and who claimed severance package from the seller, were held by the Labour Court in *Moore & others v Telkom SA Ltd*¹⁷⁵ to have been transferred in terms of s 197 without any need for their consent, and to have no actionable dispute against the seller, whose name the court found had been correctly removed from the list of respondents.

And in *Acraft Investments (Pty) Ltd v Furniture Bedding & Upholstery Industry Bargaining Council*,¹⁷⁶ the purchaser of a commercial property which had been sold as a going concern approached the High Court for an order declaring that it was not the employer of certain employees who had been

¹⁷³ See Wallis, M 'Section 197 is the medium: What is the message?' (2000) 21 *ILJ* 1 at 3.

¹⁷⁴ (2002) 23 *ILJ* 1044 (LC).

¹⁷⁵ (2002) 23 *ILJ* 1052 (LC).

¹⁷⁶ (2005) 26 *ILJ* 2299 (T). In *NUWA v Success Panelbeaters & Service Centre CC* [1999] 9 BLLR 970 (LC) where the new employer was ordered to comply with an Industrial Court order against the old employer to reinstate an employee.

employed by the managing agent of the property at the time of the transfer, and was therefore not responsible for their salaries and other benefits. The court found that the contract was silent on the issue and that there was clear evidence that the managing agent was and remained the lawful employer of the employees, and so was in law responsible for their salaries and related benefits.

More recently a full bench of the High Court was confronted in *Securicor (SA) (Pty) Ltd & another v Lotter & others*¹⁷⁷ with the problem whether restraint of trade agreements survived the transfer of certain business under the provisions of s 197 of the LRA 1995, and, if so, the legal consequences of such survival for the parties concerned. The court found that in order to determine whether a restraint agreement survives the transfer of a business under s 197, it needs to be determined as a matter of fact whether the restraint formed part of the goodwill of the business as a going concern in terms of the section. If this factual enquiry establishes that the restraint formed part of the transfer of the business, the employee's obligations under the restraint are owed to the new employer and the new employer is entitled to enforce the restraint against the employee. The content of the rights so ceded and the obligations so delegated do not become greater or lesser by virtue of the provisions of s 197

3.2 The question of "Transfer of Business"

Where an entire business is transferred, the categorisation of the transfer will seldom create problems. Problems can arise, however, when the transfer is only of a portion of the business.¹⁷⁸ In such cases, there is a transfer of a 'business trade or undertaking' and, if so, is it transferred 'as a going concern'. This question arose in *Schutte & others v Powerplus Performance (Pty) Ltd & another*,¹⁷⁹ in which certain functions of the business were 'outsourced'. In concluding that there had been a transfer within the meaning of the present

¹⁷⁷ (2005) 26 *ILJ* 1029 (E).

¹⁷⁸ For excellent exposition see Bosch, C 'Of business parts and human stock: Some reflections on section 197(1)(a) of the Labour Relations Act' (2004) 25 *ILJ* 1865.

¹⁷⁹ (1999) 20 *ILJ* 655 (LC).

section, the court considered the relationship between the outsourcing business and its new supplier and the terms of the 'working agreement' between them. The in-principle agreement under which the new supplier would require the workshops of the outsourcer was an important factor in the decision, as was the fact that the supplier was using same premises, the same equipment and most of the same employees to do substantially the same work. The issue, it should be clear, is not a black or white one. *Schutte* is no authority for the proposition that outsourcing will always fall within the scope of s 197.¹⁸⁰

Whether or not a transaction or series of transactions give rise to 'transfer' of a business is not a black or white one. Different approaches have emerged in European and Canadian jurisprudence. One test has been whether there is 'continuity in the work and activities carried out by employees' and whether the business 'operated for the same purpose'. The acid test, in the words of Seady AJ is whether 'the economic entity remained in existence, its operation was being taken over by the [new employer] and the same or similar activity is being continued by it.'¹⁸¹ If it is in doubt whether or not a transaction is subject to section 197, the Labour Court can order disclosure of information bearing in mind in the rights that employees may enjoy.¹⁸²

The ECJ has held that sectors where activities are based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity even though that entity does not comprise significant assets or equipment. For instance, in *Allen v Amalgamated Construction Co Ltd*¹⁸³ the ECJ held that 'the [Acquired Rights] Directive can apply to a transfer between two companies in the same corporate group which have the same ownership, management, premises and which are engaged in the same works'.¹⁸⁴ The new Directive 32/2001/EC

¹⁸⁰ *Schutte* at 671.

¹⁸¹ *Schutte* at 672C-F. This follows the approach in the leading European case of *Spijkers v Gebroeders Benedik Abbatoir CV 24/85* [1986] 2 CMLR 296 cited by Seady at para 36, and in the House of Lords decision in *Kenmir Ltd v Frizzell* [1968] 1 All ER 414 HL.

¹⁸² *Kgethe v LMK Manufacturing (Pty) Ltd* (1998) 19 ILJ 524 (LAC) at para 39.

¹⁸³ [2000] IRLR 119 (ECJ).

¹⁸⁴ *Allen v Amalgamated Construction Co Ltd* at para 21.

(Safeguarding of Employees' Rights in the Event of Transfers of Undertaking) defines an economic entity as 'an organised grouping of resources, which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. Article 1(cc) makes it clear that the directive shall apply 'to private or public undertakings engaged in economic activities whether or not they are operated for gain'.

*Schmidt v Spar-und Leihkasse der Fruheren Amter Bordesholm, Kiel und Cronshagen*¹⁸⁵ stands for the proposition that it is not a stumbling block that the entity contains only one for the purposes of the Acquired Rights Directive. In that case Ms Schmidt was employed as the only cleaner in a bank. When the bank decided to outsource the cleaning of the bank, she was dismissed. She claimed that her dismissal was contrary to legislation protecting employees in the transfer context. When the matter came before the ECJ the court held that the Acquired Rights Directive could apply in a case like this, inter alia, because its operation was not precluded by the fact that an activity was performed by a single employee. It was a decision which prompted Mr Justice Lindsay of the English Employment Tribunal (EAT) to remark that:¹⁸⁶

'*Schmidt* still stands as a reminder of how little is required to amount to something capable of being an undertaking – one cleaning lady and her organisation – once due regard is paid to the safeguarding of employees' rights, the subject matter of the Directive.'

The Australian¹⁸⁷ approach is illustrated by the decision of the High Court in *PP Consultants (Pty) Ltd v Finance Sector Union of Australia*¹⁸⁸ where the court stated that –

¹⁸⁵ [1994] IRLR 302 (ECJ). In *Dudley Bower Building Services Ltd v Lowe* at para 48 the Employment Appeal Tribunal noted that '[a]t one extreme, if the activity consists of no more than one cleaning lady and her mop, an economic entity may not exist, whereas if the task to be performed is complex and sophisticated and requires careful planning, specification and costings, it may be that an entity exists even though the work is performed by a single employee. There may well be some activities where the work of two or three employees is less complex and needs to be less structured and pre-planned from the work of a single employee. As a general rule it may be less common for one employee to constitute an entity but the fact there is only one employee cannot preclude the existence of such entity'.

¹⁸⁶ *RCO Support Services & Aintree Hospital Trust v Unison* [2000] IRLR 624 (EAT) at para 28. McMullen *Business Transfers and Employee Rights* (issue 4 2003) at 5 [104], points out that the decision of the ECJ in *Schmidt* may be open to criticism because the court did not apply its mind to the question of whether the entity to be transferred had a 'minimum level of organizational framework'.

¹⁸⁷ S 149(1) Workplace Relations Act 1996 provides:

‘because “business” is a chameleon-like word, it is not possible to formulate any general test to ascertain whether, for the purpose of s 149(1)(d) of the Act, one employer has succeeded to the business or part of business of another ...

As a general rule, the question whether a non-government employer who has succeeded to the business or part of business of that other employer will require identification or characterisation of the business or the relevant part of business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of business of the previous employer’.

The Federal Court further stated the words ‘part of a business’¹⁸⁹-

‘denote a particular bundle of activities that constitute an identifiable portion of the total activities that constitute a business. Sometimes the part will be a discrete profit centre, sometimes it will not. That does not necessarily mean that everything done in the course of conducting a business is a “part of business”’.

The question whether radiology services provided at a clinic by Medical Diagnostic Imaging Group (MDIG), which was being succeeded by Gribbles, were a business or part of a business for the purposes of s 149(1)(d),¹⁹⁰ came before a full bench of the Federal Court of Australia in *Gribbles Radiology (Pty) Ltd v Health Services Union of Australia*.¹⁹¹ The clinic provided a variety

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- (a) all parties to industrial dispute who appeared or were represented before the Commission;
 - (b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear before as parties to the industrial dispute (whether or not they appeared);
 - (c) all the parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;
 - (d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;
 - (e) all organizations and persons on whom the award is binding as a common rule; and
 - (f) all members or organizations bound by the award.

¹⁸⁸ [2000] HCA 59 (16 November 2000) at paras 14-15.

¹⁸⁹ *Finance Sector Union of Australia v PP Consultants* (1999) 91 FCR 337 at 350.

¹⁹⁰ In *North West Health Care Network v Health Services Union of Australia* [1999] FCA (2 July 1999), at para 28, R D Nicholson J stated that ‘[t]he purpose of s 149, as appears from its terms, is so extend the binding nature of awards beyond the parties who appeared or were represented before the Commission in relation to the industrial dispute. The policy objective of this provision is to make the power to settle industrial disputes effective by extending the instrument of settlement to ‘the ever changing body of persons within the area of such disturbances’ (references omitted).

¹⁹¹ [2003] FCAFC 56 (28 March 2003).

of medical and related services under one roof, but the clinic did not at any relevant time employ the radiographers who worked on the premises of the clinic. From time to time, the proprietor or manager entered into contracts with business entities that provided radiology services for the provision of those services at the clinic. The Federal Court went on to explain the difficulties that may arise in seeking to formulate a general test whether a business has been transferred in these circumstances:¹⁹²

[W]hile the provision of radiography services at the ... clinic could be viewed as an activity it was discrete activity of the business of both MDIG and Gribbles undertaken for the purpose of enabling both to carry on their entire business. It was undertaken for the purpose of enabling the entire business to generate both income and profit as a commercial activity. Both that part of the business and the business as a whole were directed towards generating profit as a commercial enterprise. Indeed, it is to be recalled that both MDIG and Gribbles ceased providing radiography services at the Clinic because it was not profitable. To suggest that a "part of a business" must itself generate a net income or profit (typically aspects, as High Court noted in *PP Consultants*, of business) does not allow for the possibility that s 149(1)(d) can, having regard to its terms, operate not only on a business but on part of a business. We do not see any basis for confining the expression "part of a business" for the purposes of the section to a discrete profit earning part or unit of a business.'

The approach of the Australian Federal Court and High Courts in *PP Consultants* and that of the Federal Court in *Gribbles* should be endorsed by our courts.

3.3 The question of a Business as a 'Going Concern'

This question, like the question of when a business etc is transferred, is one fact and will sometimes be difficult to answer. In considering the question, the court must not allow form to prevail over substance.¹⁹³ The Constitutional Court in *NEHAWU v UCT* has set out the test for transfer of a business as a going concern for the purposes of s 197. The test to determine whether there is a 'going concern' is an objective one (thus not dependent on the intentions of the parties involved in the transfer) and one which has regard to substance and not form.¹⁹⁴ Nevertheless, one is required to establish whether there is

¹⁹² *Gribbles Radiology (Pty) Ltd v Health Services Union of Australia* at para 31.

¹⁹³ *Schutte* at 1189D-E; *Kgethe & others* at 535F,

¹⁹⁴ Bosch, C 'Section 197 transfer of business as going concern: Reigning in the Labour Appeal Court – *NEHAWU v UCT* 2003 24 ILJ 95 (CC)' (2003) 24(1) *Obiter* 232.

the transfer of a business in operation 'so that the business remains the same, but in different hands'. Factors indicating whether there has been a transfer as a going concern include whether the employees were taken over by the transferee, whether customers transferred and whether the same business activity is being carried out by the transferee, This is not an exhaustive list and no single factor is elevated to be decisive factor.

In *Velen and West 'n Bell Catering Equipment*¹⁹⁵ a close corporation ceased doing business and its trading equipment and certain of its employees were absorbed into another newly formed entity. The bargaining council arbitrator found that some part of the business had been transferred as a going concern and that s 197 of the LRA therefore did apply to the transaction.

3.4 Insolvency

Prior to the 2002 amendments, the reach of the LRA 1995 halted once insolvency enters the picture.¹⁹⁶ Thereafter the law of insolvency, administered in this instance by the High Court, takes over.¹⁹⁷ However, transfers of insolvent business are now regulated by s 197A. Under these provisions, the employees of the old employer are also transferred automatically to the new employer. The only difference is that anything done before the transfer by the old employer in respect of each employee is considered to have been done by the new employer, and both the new and old employer are jointly and severally liable for the employee's claims against the old employer that arose prior to transfer.

3.5 Dismissal consequent to transfer of undertaking¹⁹⁸

¹⁹⁵ (2005) 26 *ILJ* 2500 (BCA)

¹⁹⁶ Blackie & Horwitz 'Transfers of contracts of employment as a result of mergers and acquisitions: A study of section 197 of the Labour Relations Act 66 of 1995' (1999) 20 *ILJ* 13887. See also *Hammond & others v L Suzman Distributors (Pty) Ltd* (1999) 20 *ILJ* 3010 (CCMA).

¹⁹⁷ *SAAPAWU v HL Hall & Sons (Group Services) Ltd* [1999] 2 *BLLR* 164 (LC).

¹⁹⁸ For further reading: Bosch, C 'Balancing the Act: Fairness and Transfers of Businesses' (2004) 25 *ILJ* 923 and 'Operational requirements dismissal and section 197 of the Labour relations Act: Problems and possibilities' (2002) 23 *ILJ* 641 Smit, N "Should transfer of undertaking be statutorily regulated in South Africa?" (2003) 14(2) *Stell LR* 205 and 'A chronicle of issues raised in the course of dismissals by the transferor and/or transferee in circumstances involving the transfer of an undertaking' (2005) 226 *ILJ* 1853.

Prior to the 2002 amendments, termination of employment for reason and in accordance with a fair procedure was not affected by s 197 merely because it takes place simultaneously with or pursuant to the sale of business or transfer of business.

Section 186(f)(8) renders a dismissal automatically unfair if the transfer or a reason connected with it is the reason or principal reason for dismissal.¹⁹⁹ This provision will prohibit the dismissal of any employees “on account of a transfer covered by this section”. An addition to section 187 renders any dismissal effected in these circumstances “automatically unfair”. However, this prohibition is qualified by the same proviso that lessens protection against dismissal of employees for reasons based on operational requirements of the former or new employer, provided that the employer concerned complies with the provisions of section 189.²⁰⁰

In this section we have considered the automatic transfer of employment contracts in terms of statutory regulation regarding the transfer of undertakings, the next section examines the issue of outsourcing and transfers of contracts of employment.

4. OUTSOURCING AND TRANSFER OF EMPLOYMENT CONTRACTS

4.1 An Overview

As already indicated, s 197 has given rise to a host of problems in its application and interpretation. The court and the CCMA have wrestled with the question of what will constitute a ‘transfer’ as a going concern’. Transfers of business can take many forms. One of the most problematic is “outsourcing” – the process in terms of which an enterprise “unbundles” itself

¹⁹⁹ See *Van der Velde v Business & Design Software Ltd & another* (2006) 27 ILJ 1738 (LC). See too Workman-Davies, B ‘The right of employers to dismiss employees in the context of unfair dismissal provisions of the Labour relations Act’ (2007) 28 ILJ 2133.

²⁰⁰ See eg, *Western Cape Workers Association v Halgang Properties CC* (2001) 22 ILJ 1421 (LC).

by contracting with other entities to perform some of the tasks previously performed in-house.²⁰¹ Grogan provides a contemporary insight into difficult questions of fair employment practice that underpin outsourcing of services.²⁰²

‘Pulling in an independent service provider is attractive to employers because it transfers the headaches as well as the employees to an outside entity. That option presents two problems, however. The first is that the sub-contractor may not want to take on any or some of the workers who have been providing the service concerned. This leaves the employer with the problem of retrenching them. And gives rise to the second question: may the employer do so, or is the sub-contractor bound to employ the workers for purposes of the contract?’

These vexed questions introduced by outsourcing in the application of the already troublesome section 197, are central to the discussion.

4.2 Outsourcing as a “Transfer”

The leading case in relation to outsourcing is that of *NEHAWU v UCT & others*.²⁰³ It will be recalled that the university elected to ‘disestablish’ the posts of a number of its employees who worked in various ‘non-core activities’ such as gardening, cleaning, sports ground maintenance and related activities after a decision had been taken to outsource those activities. The affected employees were handed notices of termination of their employment and were invited to apply for certain, limited vacancies at the university and for positions with preferred service providers to whom non-core activities had been outsourced. The applicants approached the Labour Court, *inter alia*, for a declarator that the outsourcing of the non-core activities in question constituted a transfer of a going concern for the purposes of s 197 and that the contract of the employees had therefore been automatically transferred to the service providers and that the notices of dismissal issued to employees were invalid in terms of s 197(2)(a). Mlambo J found that the transaction in question did not constitute a s 197 transfer.

²⁰¹ Wallis, M J D ‘Is outsourcing in? An Ongoing Concern’ (2006) 27 *ILJ* 1.

²⁰² ‘Outsourcing services: The effect of the new section 197’ (2005) *EL* 3 at 3

²⁰³ (2000) 21 *ILJ* 2018 (LC).

Mlambo J commented as follows regarding difficulties associated with equating outsourcing to the transfer of business.²⁰⁴

'In the case of a sale of transfer the business or part thereof changes hands permanently and the transferring or selling entity receives a consideration for the business that is transferred. The situation is different when it comes to outsourcing. The outsourcing party retains some control over the outsourced services, for example, the standard of performance or service delivery must meet certain criteria set by the outsourcing party. At the end of the contract the outsourcing party could decide to perform the services itself and not invite further tenders ... It appears therefore that the fact that in a legal transfer or sale the fact [sic] that there is a permanent transfer of a business or part thereof must mean that in an outsourcing what is transferred is nothing more than the opportunity to perform the so-called services'.

It is submitted that a purposive interpretation of s 197 would have been appropriate in view of the fact that the provision which gives effect to the right to fair labour practices in s 23(1) of the Constitution. This right is guaranteed to 'everyone'. The correct approach to the interpretation and application of s 197 is to adopt the view articulated by the commissioner in *Hugo v Shandelier Hotel Group CC (In Liquidation) & others*²⁰⁵ who felt that in the light of the constitutional dictates in s 213(1) '... stands to reason that the legislature intended to protect all employees who are affected by the transfer of a business, where the wording of s 197 is capable of such an interpretation'. What has been said elsewhere²⁰⁶ may, with respect, be repeated here with equal effect: The Labour Appeal Court has emphasised that the LRA must be interpreted (purposively) against the background and object of the Bill of Rights. On this basis it is submitted that s 197's worker protection function and the guarantee of fair labour practices to 'everyone' in the Constitution seem to require a generous interpretation of the scope of s 197.

²⁰⁴ At 816D-F. See also at 816H-J. The judge may have been influenced by in his choice of terminology by the European Acquired Rights Directive. The directive (which was misquoted in the judgement at 814I) provides in article 1(1) that the directive will apply 'to the transfer of an undertaking ... as a result of a *legal transfer* or merger' (emphasis added). The use of the word 'legal' in the directive is ambiguous. Be that as it may, it appears to have been used by Mlambo J to refer to conventional, permanent transactions in the nature of a sale'.

²⁰⁵ (2000) 21 ILJ 1884 (CCMA).

²⁰⁶ *Business South Africa v COSATU & another* (1997) 18 ILJ 474 (LAC); *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC); *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209 (LAC). See further s 39(2) of the Constitution and s 1 of the LRA which states that the purpose of the LRA requires that the Act be interpreted in compliance with the Constitution.

The same approach was invoked in the decisions of the European Court of Justice (ECJ) in terms of the Acquired Rights Directive (where there is some qualification of the word 'transfer') with a far more liberal in their approach to what falls within the relevant legislation than the view advocated in *NEHAWU v UCT*. The ECJ has held that there need to have been a 'legal transfer or merger'. On the contrary, the court has expressed the view that 'it is of no importance to know whether the ownership of the undertaking has been transferred'.²⁰⁷ On the important question whether Acquired Rights Directive has application in outsourcing context, the ECJ has answered such question in the affirmative. Thus in *Schmidt v Spar-und Leihkasse der Fruheren Amter Bordesholm Kiel und Cronshagen*,²⁰⁸ where the cleaning of a building had been outsourced, the ECJ held that the directive covered 'situations ... in which an undertaking entrusts by contract to another the responsibility for carrying out cleaning operations which it previously performed itself'.

Clearly, however, the court in the *UCT* case professed disquiet over the fact that in such cases of outsourcing the transferor generally retains control of the entity that is transferred. Outsourcing exercises will only fall within the scope of s 197 'where the outsourcing party relinquishes control and relinquishes the power to dictate standards over the outsourced services'.²⁰⁹ The effect of such an approach is to exclude many outsourced arrangements from the scope of 197. One the leit motif of outsourcing is that the outsourcer is in a position to bring in a specialist service provider and to ensure quality of service via the terms of the outsourcing contract (so-called 'management by contract') and the threat of no-renewal of that contract if such services are not adequately performed.²¹⁰

The artificiality of the meaning attached to a s 197 'transfer' by Mlambo J is well illustrated by the British Employment Appeal Tribunal decision in *Birch &*

²⁰⁷ *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1989] IRLR 161 (ECJ) at 317.

²⁰⁸ [1994] IRLR 302 (ECJ) at para 20.

²⁰⁹ At 816l.

²¹⁰ See Grogan, J 'Outsourcing workers: A fresh look at section 197' (2000) 16(5) *EL* 15 at 24.

others v Nuneaton & Bedworth Borough Council,²¹¹ where it was held that there may be a transfer for the purpose of the relevant regulations even though the outsourcer retains a ‘very considerable degree of control’ over the manner in which the contractor provides services under the contract with the outsourcer. In fact, it was held that the outsourcer’s retention of control served to confirm that the outsourced entity had been transferred into different hands.

4.2.1 SAMWU & others Rand Airport Management Co (Pty) Ltd & others

The recently amended provisions of section 197 of the LRA received consideration in *SAMWU & others Rand Airport Management Co (Pty) Ltd & others*,²¹² in which the applicants sought a declaration that Rand Airport’s proposal to outsource certain of its non-core functions would constitute the sale of business as a going concern. As part of cost reduction exercise, Rand Airport identified contractors to whom gardening and security functions would be outsourced. Simultaneously, it gave the affected workers notice of its intention to retrench them in circumstances where there was no guarantee of employment, continued or otherwise, with either of the service providers that it had identified.

Landman J found that in the case of the security function, no contract had been concluded at the time the application has been launched, and that the relief sought by was therefore premature. The court declined to grant a declarator where the parties to the proposed outsourcing had not concluded on the matter.

In relation to the gardening services, Landman J drew the following factual conclusions:

- ❖ The gardening function formed part of the company’s maintenance services;

²¹¹ [1995] IRLR 518 at 523. Wallis, M ‘Section 197 is the medium: What is the message’ (2000) 21 *ILJ* 1at 4.

²¹² (2002) 23 *ILJ* 2304 (LC). For discussion see Van Niekerk, A ‘Breached skeletons resurrected and vibrant horses corralled – SA Municipal Workers Union v Rand Airport Management Company (Pty) Ltd and Others and the outsourcing of services’ (2005) 26 *ILJ* 661.

- ❖ The maintenance services were not a core activity;
- ❖ The gardening functions outsourced included cutting grass; pruning and trimming trees, weeding, landscaping, watering and cleaning;
- ❖ The company and the service provider did not intend that the affected employees be transferred;
- ❖ The gardening function was to be outsourced for a limited period; and
- ❖ The gardening services had no separate management structure, no own goals, no customers and no goodwill: ‘it is merely an activity’.

On this basis, the court concluded that the gardening services did not constitute an ‘entity’ for purposes of s 197 and the section was accordingly not applicable to the transaction. Landman J found that s 197, as amended, is designed to protect the interests of employees where the old employer would otherwise have dismissed them for operational requirements, and that the protection is only conferred where the transfer is of a functioning business which has a prospect of continuing. It does not extend to a mere transfer of assets or of the capacity to render service. The court noted that even if it was wrong on that point, there had been no transfer of a going concern within the meaning previously assigned to that phrase by the LAC, and by which it was bound.²¹³

4.2.2 The Labour Court Appeal Judgement

The LAC noted that the transfer of any contracts of employment from the company to the service providers depend on whether there had been a transfer of business from the company. Considerable reliance was placed on the amended definitions introduced into s 197(1) in 2002. According to the amendments, ‘business’ is defined to include ‘the whole or a part of any business, trade, undertaking or service’. ‘Transfer’ is defined to mean ‘the transfer of a business by one employer (the old employer) to another

²¹³ *NEHAWU v University of Cape & others* (2002) 23 ILJ 206 (LAC) in which the court held *inter alia* that there could be no transfer as a going concern without the transfer of all or most of the employees.

employer (the new employer) as a going concern'. The Act does not provide a definition of a 'going concern'.

In relation to critical question whether outsourcing agreements had in fact been concluded and whether the relevant services had been transferred from the company to the respective service providers. On the facts, the court held that in the case of the security function, no agreement had been concluded, nor had any employees been transferred. In the case of the gardening function, although an outsourcing agreement had been concluded, it had not yet been implemented.

On this basis, the court upheld the appeal to the extent that it ordered that the outsourcing agreement would, on signature and implementation, be agreements to which s 197 would apply.

The LAC took a bold step by adopting a definition of 'business' for purposes of s197, which means that outsourcing transactions would be covered by s 197. Most non-core functions comprise services in one form or another, or are at least service related functions within the dictionary definition applied by the court. If, as in this case, a grouping of relatively unskilled employees and the work they perform comprises a business for the purposes of s 197, it is difficult to conceive of an economic entity that is not capable of transfer in terms of the section.

4.2.3 Outsourcing of Employees to a Labour Broker

In *NUMSA v Staman Automatic CC & another*²¹⁴ the Labour Court was approached for an interdict preventing an employer from transferring employment contracts by way of s 197 of the LRA. Staman Automatic CC (the employer) produced turned components for the electronic, automotive, construction, appliance and furniture industries. The employer sought to 'outsource its employees' without their consent and without having consulted

²¹⁴ (2003) 24 ILJ 2162 (LC).

them. It envisaged that this could be done in a hassle-free manner by utilizing s 197 to transfer certain of its employees to a temporary employment service (TES). To that end the employer and TES agreed that the employees worked in a 'service', which formed part of the employer's business and would be transferred (along with the employees) as a going concern. The 'service' in question was defined in the agreement as the 'services provided by the individuals as identified in the annexure A and B of the agreement to Staman in its cam auto lathes section, the second operation, the CAC machinery centres and the CAC automatic lathes section which is inclusive of general assistance'. The work that the employees did was closely connected to the machines they used to produce the turned products. The court found that there was no 'service' that could be transferred in terms of s 197. The reasons for that conclusion as appears to be as follows:

- (a) The work performed by the employees was closely connected to the machines they used and those machines were not going to be transferred.
- (b) The services of the employees did not constitute an economic entity that would retain its identity after the purported transfer. The nature of the services provided by TES was very different to those of performed by the employer.
- (c) The employer and TES sought 'to define the employees by reference to their employment status and not as a stable economic entity.'²¹⁵

The court's approach was to examine what was to be transferred and assess whether that amounted to a 'business'. In the present case the employers purported to be engaged in the transfer of part of the transferor's business whereas in reality all that was being transferred was the transferor's employees or, more specifically, their services. Properly construed, those could not, on their own constitute parts of a business for the purposes of s 197.

²¹⁵ *NUMSA v Staman Automatic CC & another* at 2170.

One needs to recall the decision of the French Supreme Court de Cassation in *Societe Perrier Vittel France v Comite d'establissement de la source Perrier de Vergeze*,²¹⁶ referred to by the Labour Court in *SAMWU v Rand Airport Management Co (Pty) Ltd.*²¹⁷ There the French Supreme Court was engaged in applying s L122-12 of the French Labour Code that reads as follows:

'If an employer modifies the structure of his business or his company (as, for instance, in the case of a sale, taking over a business, succession, modification of the business), all the contracts of employment existing at the date of the transfer of business will also be transferred [to the new employer]. This means that the individual status of the employees working in transferred business can not be modified by the company that takes over the transferred business.'

Societe Perrier Vittel had decided to outsource the manufacturing and repair of the pallets it utilised. It argued that these constituted an autonomous economic activity' and the transfer was thus covered by s L122-12. This was because a particular unit of the company performed the activities concerned (for which two directors were appointed), and 37 employees. The employees worked in separate buildings and used tools specific to their activity. The employer in this case (like the employers in *Staman*) apparently wished to use L122-12 to transfer its employees to a new employer against their will. The Supreme Court expressed the view that an autonomous economic entity was constituted by '(i) an organised unit in which there are people as well as personal estate [sic], properties, stocks ... (ii) which can make it possible [sic] to run business ("economic entity") for a specific goal'. The court felt that there had to be a 'self-governing entity'. In this case it found that there was no real autonomy because the units did not have specific employees (they could work for other units of the employer's business) or tools; nor did it have its own goals but rather shared those of the company. The unit was not organised in a way that reflected its autonomy from the rest of the business.

In *NUMSA obo Matlala & others and Active Distributors*²¹⁸ the employer party transferred its administration and IR functions to a labour broker and claimed that it had transferred its labour force at the same time. The bargaining

²¹⁶ 20 IRLR 157.

²¹⁷ (2002) 23 ILJ 2304 (LC); [2002] 12 BLLR 1220 (LC).

²¹⁸ (2006) 27 ILJ 633 (BC).

council arbitrator found that the employees, whose duties had nothing to do with administration or HR, could validly refuse to transfer their services to the broker, and that the employer's refusal to accept their continued services amounted to unfair dismissal.

4.2.4 Empowerment vehicle

The Labour Court in *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd*²¹⁹ was required to pronounce on the fairness of an out-sourcing exercise in which the employer initially proposed to contract out in non-core activities through the formation of an empowerment vehicle involving management and staff, which it was hoped would obviate job losses. The plan was to form an independent company to run the non-core activities and to transfer affected employees to the new company. When employees' union rejected the proposal the employer reverted to a conventional out-sourcing and retrenchment process in which a number of possible options to mitigate retrenchments were extensively canvassed. Some employees were retrenched and others took early retirement. In a wide ranging judgement the court considered the implications of transfers in terms of s 197 of the LRA, the extent of the requirements for consultation under s 189, and the effect of the changes introduced by the 2002 amendments to the LRA, particularly the provisions of s 189A(19)(b).

The court held that the employer had shown a valid reason for its outsourcing proposals, and that the dismissal of the retrenched employees was fair. Employees who had opted for early retirement had not been dismissed, and so had no standing before the court.

4.3 Second Generation Contracting-out Transactions

²¹⁹ (2005) 26 ILJ 293 (LC).

Another strand to the vexed issue of application of s 197 relates to 'second generation' transfers. On this important issue, Le Roux, P A K elaborates:²²⁰

'[T]he potential impact of s 197 on outsourcing is wider than the initial outsourcing agreement. What is the legal position if the old employer, for one of a variety of potential reasons, decides to make use of another contractor when the first outsourcing contract comes to an end? Does this change of contractors, often referred to as "second generation outsourcing", also constitute transfer of a business as a going concern? If so, this would mean that the relevant employees of the first contractor are automatically transferred to the second contractor.'

Such transfers, for instance, will usually take place when the contractor to whom a particular function has been outsourced loses the contract to another contractor, which then provides the same services to the outsourcer. This might happen, for example, at the end of the term of the first contract at which stage the outsourced function is put out to tender.

In the *UCT* case Mlambo J touched on the issue of second generation transfers in his analysis of the difficulties associated with viewing outsourcing as a s 197 transfer. He stated the problem in the following terms:²²¹

'It remains the prerogative of the outsourcing party to decide who gets the contract to perform the outsourced services. If the outsourcing is a transfer of a business in terms of s 197 I do not see how the contractor who loses the contract can transfer its employees to the successful contractor as it has no say in who gets the contract. That say remains vested in the outsourcing party. Conversely, I do not see how the outsourcing party can force the successful contractor to take over the employees of the outgoing contractor.'

Bosch disposes of the problems mooted by Mlambo J as follows:²²²

'Firstly, there is no need to enquire into 'how' the contractor losing the contract can transfer its employees to the successful contractor. That will be facilitated by virtue of s 197 should there have been a transfer for the purposes of that section. Secondly, it is not necessary for the outsourcing party to 'force' the successful contractor. That, too, will occur by virtue of s 197.'

In the case of second generation transfers the transfer will not have been effected by the old employer (the unsuccessful contractor), but rather by the outsourcer. A successful contractor might, for instance, take over most or all

²²⁰ 'Outsourcing and the transfer of employees to another employer: What happens in the "second generation" transfer?' (2005) 14(2) *CLL*111 at 112.

²²¹ At 816G-H.

²²² 'Transfers of contract of employment in the outsourcing context' (2002) 23 *ILJ* 840at 846.

of the employees of the outgoing contractor as well its premises, assets, etc, and the business might be carried on exactly as before. Moreover, retention employment lies at the heart of s 197²²³ and giving effect to employees' right to fair labour practices. With this in mind a better approach to second generation transfers might be simply to apply the usual test for a transfer as a going concern to second generation transfers. There is a transfer of something from the old employer (the unsuccessful contractor) where anything goes over from the incumbent contractor to the new contractor, be it in the form of employees, assets, etc. The basic problem with such an approach is that, while there might be a transfer of something 'by' the old employer, whatever is transferred from one contractor to the other cannot be viewed as transfer of a business as a *going concern*. It must be remembered a business is transferred as a going concern when the old employer places the new employer in a position to commence service provision, and in the case of outsourcing that is an act of the outsourcer.

A different argument to bring second generation outsourcing within the purview of s 197 could point out that the section leaves the courts a wide discretion to decide which transactions constitute a 'transfer'. It is notable that the Labour Court has insisted that when considering the applicability of s 197 regard must be had to the substance and not the form of the transaction in question and the business climate in which the court is making its decision.²²⁴ Thus, a series of transactions might be seen as a single 'transfer' or transferring act by the old employer comprising various stages (s 197 does not refer to 'a' transfer, but merely speaks of a business or part thereof being 'transferred' from the old to the new employer). In the cases of second generation transfers there is arguably a transfer that occurs in two stages, the

²²³ In *Foodgro, A Division of Leisurenet Ltd v Keil* (1999) 20 ILJ 2521 (LAC) at 879E the Labour Appeal Court stated 'that the provisions of s 197 are primarily aimed at the further protection of employees is ... quite apparent'. See also *Schutte & others v Powerplus Performance (Pty) Ltd & another* (1999) 20 ILJ 655 (LC) at 664.

²²⁴ *Schutte & others v Powerplus Performance (Pty) Ltd & another* (1999) 20 ILJ 655 (LC) at 557.

first from the unsuccessful contractor to the outsourcer, and then a second transfer to the new contractor.²²⁵

The two-phase transaction intrinsic to second-generation contracting-out does indeed constitute a 'transfer' as contemplated by s 197 of the LRA. As in European law, the mode or method of transfer is less important.²²⁶ The crux of the determination is whether what is transferred is 'a business in operation so that the business remains the same but in different hands'.²²⁷ Whether such has is matter of fact to be determined objectively in the light of the circumstances of each transaction. In this respect the Constitutional Court observed:²²⁸

'A number of factors will be relevant to the question whether a transfer of business as a going concern has occurred, such as the transfer or otherwise of assets both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation.'

4.3.1 *COSAWU & others v Zikhethale Trade (Pty) Ltd & another*²²⁹

The issue for determination by the Labour Court in *COSAWU v Zikhethale Trade (Pty) Ltd & another*²³⁰ was whether a second generation contracting-out involving a change in the provider of an outsourced service constituted a

²²⁵ It is noteworthy that the British regulations dealing with the transfer of undertakings provide specifically that such transfers may be effected by a series of two or more transactions (see TUPE reg 3(4)). Therefore, the Court of Appeal in *Bines v Initial HealthCare Services Ltd & another* [1994] IRLR 336 (CA) found that the first phase of the transfer in a second generation transfer in that case was the handing back to the outsourcer of the cleaning services by the unsuccessful contractor with the second phase being the granting of the cleaning services contract to the new contractor.

²²⁶ *Sanchez Hidalgo v Association de Services Aser C-173/96; Zieman v Zieman GmbH C-247/94* [1999] IRLR 136 (ECJ) at 138.

²²⁷ *NEHAWU v UCT & others* (2003) 24 ILJ 95 (CC) at 119E.

²²⁸ *NEHAWU v UCT & others* (2003) 24 ILJ 95 (CC) at 119G-120B.

²²⁹ For discussion see Grogan, J 'Second-generation outsourcing: The reach of section 197' (2005) *EL* 10; Le Roux, P A K at 114-116 'Outsourcing and the transfer of employees to another employer: What happens in the "second generation" transfer?' (2005) 14(2) *CLL* 111 at 114-116.

²³⁰ (2005) 26 ILJ 1056 (LC). The Labour Appeal Court in *Zikhethale Trade (Pty) Ltd v COSAWU & others* (2007) 28 ILJ 2742 (LAC) held that the original employer had a substantial and legal interest in subsequent Labour Court proceedings, and should have been joined as a party to the dispute..

transfer of business within the meaning of s 197 of the LRA 1995.²³¹ Second-generation contracting-out, such as in this case, typically occurs in circumstances where a company has outsourced services to a contractor and, when the initial contract comes to an end, put the opportunity to provide the service out to tender, whereupon the original contractor is unsuccessful in its bid to secure the contract for an additional term.

The court agreed with the proposition that s 197(1)(b) might be better interpreted to apply to transfers 'from' one employer to another, as opposed to only those effected 'by' the old employer. On his part, Murphy AJ held:²³²

'Likewise, I am persuaded that a less literal and more purposive approach is justified in the context of s 197. As stated earlier, the section is intended to protect employees whose security of employment and rights are in jeopardy as a result of business transfers. A mechanical application of the literal meaning of the word 'by' in s 197(1)(b) would lead to the anomaly that workers transferred as part of first generation scheme would not be, when both are equally needful and deserving of the protection. The possibility for abuse and circumvention of the statutory protections by unscrupulous employers is easy to imagine. As is in this case, the danger exists that the employees might not only lose their continuity of employment but also their severance benefits, for the reason that the old employer having lost its business to the new employer lacks the means to pay its debts. Accordingly, I am in agreement with *Todd et al Business Transfers and Employment Rights in South Africa* (Butterworths 2004) at 27, that s 197(1)(b) might be better interpreted to apply to transfers 'from' one employer. A pragmatic interpretation of this kind allows a finding that a business in actual fact can be transferred by the old employer in such circumstances but that the transfer occurs in two phases: in the first the business is handed back to the outsourcer and in the second it is awarded to the new employer. Importantly this interpretation will be in conformity with the prescriptions of s 39(2) of the Constitution obliging courts when interpreting legislation to promote the spirit, purport and objectives of the Bill of Rights. By affording the same protection to employees affected by first and second generation contracting-out arrangements, courts will promote the spirit and advance the purport of equal treatment and fair labour practices.'

²³¹ Bosch, C 'Transfers of contract of employment in the outsourcing context' (2002) 23 *ILJ* 840 at 847-848 has correctly pointed out that,

'The proposed amendments to s 197 do nothing remedy this problem. The reference to transfer 'by the old employer' remains. It is highly undesirable that second generation transfers are conferred blanket immunity from the application of s 197. Those are also transaction in which employees need the protections that the section offers. If it was the intention of the legislature that employees should receive at the protection conferred by s 197 in such circumstances then it has apparently failed to achieve its objective. The final amendments to s 197 should make it applicable at the every least to transfers 'from' the old employer to the new employer and should expressly include transfers consisting of more than one transaction.'

²³² *COSAWU v Zikhethale Trade (Pty) Ltd & another* at para 29.

Upon reflection the court found that it no fair labour policy could allow termination of employment to be visited upon employees simply for playing the wrong hand in a competitive tendering process. Having set out forcefully his position on the issue second-generation contracting-out arrangements, he went on discuss the grounds for declaring that Zikhethele was the employer of Cape Town employees.²³³

[T]here are significant features present that indicate there has been a transfer of business as a going concern from Khulisa to Zikhethele. My conclusion is informed in part by the history of outsourcing that has taken place since 200, the unhappy events leading to the failure of the black economic empowerment initiative in the Cape Harbour and the unsuccessful bid by a faction of the Cape Town employees. The incorporeal service provider contract originating in FPT has found its way through various corporate arrangements until it reached Zikhethele in almost identical form. The rights and duties involved have undergone metamorphosis to a degree, but contractually the same job need to be done by the same employees at the same locale using the same operational methods. Viewing the situation first and foremost from an employment perspective, it is of utmost importance that by far the majority of employees of Khulisa have been taken over by Zikhethele. Added to that, Mfundisi has a controlling stake and is the managing director of both the new and the old employer. The premises, fittings and equipment employed by Khulisa are now at the disposal of Zikhethele. At least some of the suppliers of the two companies appear to be the same and there is no doubt at all that FPT is the main client with the terminal and stevedoring services contract being that substantial incorporeal asset. The reality is that without that asset Khulisa can no longer pay its debts and has been forced into liquidation. That Zikhethele is in pursuit of new client is of little significance, especially in view of the fact that such clients were in any event most likely in Mfundisi's sights as managing director of Khulisa.

The message in *COSAWU v Zikhethele Trade (Pty) Ltd & another* was loud and clear. In the first place, the wording of section 197, more especially the use of the word "by", does not preclude a second-generation outsourcing from falling within its scope. In the second place, is that such an outsourcing can, but need, not constitute transfer of a part of a business as a going concern. This has far-reaching implications for tenderers. Consider the following passage by Le Roux:²³⁴

It is also worth pointing out that this interpretation of s 197 puts a potential "new contractor" at significant risk. When it seeks to enter into a contract with the entity to whom the services will be provided it will usually have to provide an indication of fees it will charge for providing outsourced services. This will, in turn, largely depend on the costs that it will incur in providing the service,

²³³ *COSAWU v Zikhethele Trade (Pty) Ltd & another* at para 36.

²³⁴ 'Outsourcing and the transfer of employees to another employer: What happens in the "second generation" transfer?' (2005) 14(2) *CLL*111 at 115-116.

including labour costs. If s 197 applies, these labour costs will primarily be determined by the terms and conditions of employees employed by the old contractor. These costs may be difficult to determine as they lie within the knowledge of the old contractor. Whether the old contractor will be willing to give details in this regard is debatable, to say the least. This would especially be the case if the old contractor is also tendering for the new contract. Indeed, if the old contractor is also the tenderer the decision to provide this information it could arguably attract the attention of the competition authorities established in terms of the Competition Act 89 of 1998. The new contractor would also have difficulty in establishing precisely what liabilities it would be inheriting in terms of s 197(2)(c) (dealing with alleged unfair dismissals and alleged unfair labour practices) and s 197(7) (dealing with terms and conditions of employment). The opportunity for the new contractor to seek information through due diligence exercises and to obtain indemnities from the old contractor, as would be the case in going concern sale of a business, would be severely limited.

The new contractor would also have problems in entering into any agreement with the employee representatives in terms of s 197(6) which would permit it to amend terms and conditions of employment. It would not necessarily have access to the employee representatives prior to the new contract being awarded and agreement after the transfer would be difficult to reach as the negotiating power would be wholly in favour of the employees. Ignorance could also expose the new contractor to a potential claim of unfair dismissal in terms of s 186(1)(f).'

4.4 Contemporary Comparative Jurisprudence

The European law and practice on the topic is especially instructive. In *Dines v Initial Services*,²³⁵ the UK Court of Appeal was seised with the facts resembling those of *COSAWU v Zikhethale Trade (Pty) Ltd & another*. The applicants in that case were employees of Initial Services which undertook cleaning work at a hospital pursuant to a fixed term outsourcing contract. As a result of competitive tendering, when the contract expired the new contract went to a new service provider Pall Mall. Overturning the decision of the Employment Appeal Tribunal, the Court of Appeal held that there had been a transfer of an undertaking. The fact that another company takes over the provision of certain services as a result of competitive tendering does not mean that the first business or undertaking necessarily comes to an end. The Court of Appeal accepted that the transfer of the undertaking had taken place in two phases: the first being the handing back of the cleaning services to the

²³⁵ [1994] IRLR 336.

hospital authority and the second phase being the grant to Pall Mall of the cleaning services on the day after the original contractor terminated, which were operated by essentially the same labour force.

The European Court on similar but by no means identical facts reached a different conclusion in *Ayşe Suzen*.²³⁶ The applicant was a school cleaner whose employer's school cleaning contract came to an end. Other contractors were appointed and she was dismissed. She sought a declaration that her dismissal was ineffective on grounds that she had been automatically transferred in terms of EEC Directive 77/187. The court held that whilst the lack of any contractual link between alleged transferor and alleged transferee may point to the absence of a transfer within the meaning of the directive it is certainly not conclusive. The court concluded that in these circumstances:²³⁷

'The mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support a conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it.

The mere loss of a sales contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the Directive. In those circumstances the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.'

The European Court then concluded that there would be no transfer of business 'if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract'.

The UK Court of Appeal considered and applied *Ayşe Suzen* in *Bretts v Brintel Helicopters Ltd*²³⁸ also finding that what was transferred was of a limited nature. In that case Brintel Helicopters provided helicopter services to

²³⁶ [1997] IRLR 255.

²³⁷ *Ayşe Suzen* at 67.

²³⁸ [1997] IRLR 361 (CA).

and from oil rigs in the North Sea for Shell (UK). This was done through three separate contracts, covering different sectors. When the contracts expired they were put out to tender. KLM successfully tendered for the contract run out of Beccles in Norfolk. None of Brintel's employees based at Beccles were taken on by KLM, nor did it take over any equipment and ultimately conducted its operation out of Norwich Airport rather than from the base previously used in Beccles. The only assets transferred to KLM consisted of the right to land on oil rigs and the use of oil rig facilities. A transfer of such a limited part of the undertaking could not lead to the conclusion, the court felt, that the Brintel Beccles undertaking was transferred so that it retained its identity in the hands of KLM. The absence of any employees actually transferring did not stand against there being a transfer. The crucial features pointing towards the maintenance of a stable entity were the facts that:²³⁹

- (a) the service is being provided for the same person;
- (b) the destinations are the same;
- (c) the journeys, give or take a few kilometres, are the same;
- (d) the same or similar personnel and goods are being carried;
- (e) the mode of transport is the same, albeit with different aircraft and pilots

This distinguished it from the situation in *Dines* which involved a labour-intensive undertaking in which the staff combined to engage in a particular activity which continued or resumed with substantially the same staff after the transfer, so that the undertaking transferred retained its identity in the hands of the transferee.

In short, the European courts tell us this in relation to second-generation contracting-out that the absence of a contractual link between the old and new employer is not decisive, hence a two-phased transaction can indeed constitute a transfer. Secondly, the decisive criterion for determining whether there has been a transfer of an undertaking (read business) is whether, after the alleged transfer, the undertaking is continued or resumed in the different

²³⁹ at para 34.

hands of the transferee. In order to determine whether there has been a retention of identity it is necessary to examine all the facts relating to both their cumulative effect, looking at the substance, not at the form, of the arrangements. The emphasis is on a comparison between the actual activities of and actual employment situation in an undertaking before and after the alleged transfer. This was a broad view, propounded *inter alia*, in *Kelman v Care Contract Services*.²⁴⁰ Mummery J's conclusion in *Kelman* offer a salutary guideline. He said:²⁴¹

'The theme running through all the recent cases is the necessity of viewing the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer.'

What seems decisive is the transfer of responsibility for the operation of the undertaking. The ECJ requires that for the Acquired Rights Directive to be applicable the transfer in question must²⁴² –

'relate to a stable economic entity ... The term "entity" thus refers to an organised grouping of persons and of assets enabling an economic activity which pursues a specific objective to be exercised ... Whilst such an entity must be sufficiently structured and autonomous it will not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production amount to an economic entity.'

Lord Widgery formulated the test for a going concern in *Kenmir v Frizzell*²⁴³ as follows:

'In deciding whether a transaction amounted to the transfer of business, regard must be had to its substance rather than its form and consideration must be given to the whole of the circumstance, weighing the factors that point in one direction against those that point in another. In the end the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption. Many factors may be relevant though few will be

²⁴⁰ [1995] ICR 260.

²⁴¹ *Kelman v Care Contract Services* at 273.

²⁴² *Hernandez v Vidal SA v Perez C-127/96*; *Santner v Hoechst AG X-229/96*; *Montana v Claro Sol SA C-74/97* [1999] IRLR 132 (ECJ) at 134. See also discussion in *Whitewater Leisure Ltd v Barnes* [2000] ICR 1049 (EAT).

²⁴³ [1968] 1 All ER 414 (HL).

conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer. But the converse is not necessarily true because a transfer may be complete even though the transferee does not choose to avail himself of all the rights he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer but the absence of such an assignment is not conclusive if the transferor has effectively deprived himself of the power to compete. The absence of the assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.²⁴⁴

Our courts have made it crystal clear that avenues in comparative jurisprudence are pertinent in charting a course in interpreting s 197.²⁴⁵ They have, in particular, drawn extensively on certain European jurisprudence. That is unsurprising since the jurisprudence formed the basis for 197 of the LRA.

5. SUMMARY AND CONCLUSIONS

The transfer of an undertaking as a going concern has been identified as a scenario that requires that employees' rights need to be safeguarded in particular. Employees should, therefore, not be dismissed simply because of a transfer. At European Community level, such a dismissal is also not allowed. However, dismissals for operational requirements, in the narrow sense, are still possible. It has been submitted that the legal effect of a pre-transfer dismissal as well as of a post-transfer dismissal should be sufficiently drastic, such as causing the dismissal to be automatically unfair and ineffective. In doing so, the goal of transfer provisions is acknowledged and the protective effect of transfer provisions is not made voluntary and dependent on the transferor and the transferee's acceptance of such provisions. A pre-transfer dismissal should, therefore, not prevent the transferral of the employment contract to the transferee.

²⁴⁴ See the similar views in the South African cases of *Manning v Metro Nissan, A Division of Venture Motor Holdings & another* (1998) 19 ILJ 1181 (LC) at 1189 and *General Motors SA v Besta Auto Component Manufacturing (Pty) Ltd & another* 1982 (2) SA 653 (SE).

²⁴⁵ *NEHAWU v UCT* (2003) 24 ILJ 95 (CC) at 116-117; *Transport Fleet Management Maintenance (Pty) Ltd & another v NUMSA & others* (2004) 25 ILJ 104 (LAC); [2003] 10 BLLR 975 (LAC) at 980; *Foodgro (A Division of Leisurenet Ltd) v Keil* at 881-882; *Schutte & others v Powerplus & another* (1999) 20 ILJ 655 (LC) at 665; *Ndima & others v Waverley Blankets Ltd* (1999) 20 ILJ 1563 (LC); [1999] 6 BLLR 577 (LC) at 586-587.

The preceding discussion has demonstrated that application of s 197 give rise to expansive and intractable problems of application and interpretation. For instance, courts have to wrestle the issue of what constitutes “business” for the purposes of s 197, and particularly when an entity is part of a business, trade, undertaking or service. It is also important to be able to determine whether an employee is employed in or assigned to the part of a business that forms the subject matter of the transfer. There is useful guidance and insight to be drawn from developments in other comparative jurisdictions.

The core submission of this study is that in interpreting and applying section 197, South Africa should not lose sight of the underlying purpose of statutory regulation of transfer of undertakings in safeguarding employment in the event of transfer of business. This entails that the scope of section 197 should not be narrowly tailored. The courts are going to have to decide in which situations the protections of section 197 should be properly available to employees. Since the advent of protective labour legislation, it is recognised that employees are in a vulnerable position during corporate restructuring. The proper protection of employee rights may require the courts to construe s 197 more widely than narrowly. Indeed, they are required to ensure that ‘everyone’ enjoys the benefit of the constitutional right to fair labour practices guaranteed in s 23 of the Constitution. If the provisions of s 197 are properly utilised, it should not have the effect of constraining employers or inhibiting business transfers, as it contains a number of mechanisms that enable parties to ensure that it operates in a manner that is in the best interests of employers and employees.

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