

UNIVERSITY OF CAPE TOWN



FACULTY OF LAW

**DISMISSAL FOR OPERATIONAL REQUIREMENTS: A CRITICAL EXAMINATION OF
THE ROLE OF THE COURTS IN MITIGATING DISMISSALS WITH SPECIFIC
REFERENCE TO THE BANKING INDUSTRY.**

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Abstract

The principal focus of the study is to investigate the role of the courts in mitigating operational requirements dismissals and consider possible interventions that can be applied to reduce their adverse effects. The role played by courts appear to be limited in the absence of legislation that requires employers to consider reskilling, redeployment and collective bargaining in mitigating operational requirements dismissals. It is well established that the significant increase in operational requirements dismissals can be attributed to the rise of the adoption of technology in the workplace. A major drawback in the existing literature is that most studies have neglected the examination of the role of the courts in mitigating dismissals, particularly in the banking industry. The study examined the regulatory framework for operational requirements dismissals by looking at the procedural and substantive fairness requirements and how the courts have handled these cases in the context of the banking industry. Deficiencies were reflected in the framework, it was observed that the provisions of s 189 are inadequate in protecting employees in faultless dismissals. What has been fleshed out from the study is that possible interventions such as collective bargaining, redeployment, and skills and training development can play an instrumental role in mitigating dismissals. The success of these interventions requires all role players such as employers, employees, and trade unions. However, without the amendment to the regulatory framework, the role of the courts remain limited. The study calls into question the effectiveness of s 189 provisions and sheds new light on how these can be amended as well as the role relevant stakeholders ought to play in the employment relationship.

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CHAPTER 1: INTRODUCTION

1. 1 Introduction

In the last two decades, the corporate world has witnessed an era of unprecedented and continuous change primarily due to advances in technology and the pressure in meeting the demands of the customer-driven market.¹ To increase profitability and operational efficiency companies have used retrenchments as a strategy to deal with the structural changes of the world of work.² The exponential growth of technology is the principal driving force behind downsizing, organizational restructuring, and retrenchments.³ The progress in technology and artificial intelligence is continuously deskilling people and eliminating most of the traditional jobs at an increasing rate.⁴

A sizeable body of scholarly literature suggests that these new technologies boost rates of productivity and economic benefits, ensuring profitability at a lower cost.⁵ To date, this fast-paced digital innovation has benefited mostly the consumers and employers.⁶ A large number of industries have incorporated technology in their operations such as banking, retail, and manufacturing.⁷ In a quest to minimize costs and maximize productivity employers retrench their employees for reasons related to structural, economic, and technology changes in the labour market.⁸ This, unfortunately, spells job losses for employees.

While the Labour Relations Act 66 of 1995 (LRA) permits employers to dismiss employees on grounds of operational requirements,⁹ the South African constitution strives to foster a society in which social justice prevails, which requires employers to proceed with caution when dismissing employees for operational requirements.¹⁰ This observation is made, in consideration of the LRA's

¹ Christian Harteis *The Impact of Digitalisation in the Workplace: An Educational Review* (2017) 28.

² Mercy Gacheri Munjuri 'A survey of the criteria used by commercial banks in Kenya to determine employees to retrench' (2011) 2 *International Journal of Business Administration* 57 at 58.

³ Ahmed Adamu Isa *Effects and Challenges of Commercial Banks' Staff Retrenchment: A Critical Study of Some Selected Banks located in Adamawa State, North-Eastern Nigeria* (PHD Thesis, POINT University, 2018) 205.

⁴ Mutumba A *Understanding the Readiness of Banking Industry Employees to Adopt Artificial Intelligence in Frontier Markets* (LLM thesis, University of Pretoria, 2018).

⁵ *Ibid* at 2. Rotman David 'How technology is destroying jobs' (2013) 16 *Technology Review* 4 at 28-35; Bessen James 'How computer automation affects Occupations: Technology, jobs, and skills 2016' *Economics Perspectives on Employment & Labour Law Journal* at 15-49.

⁶ Mutumba *op cit* note 4.

⁷ *Ibid*.

⁸ Labour Relations Act 66 of 1995.

⁹ Section 213 of the LRA.

¹⁰ Van Eck, B P S & Benjamin T. Kujinga 'Large-scale operational requirements dismissals: How effective are the remedies? A discussion of *Steenkamp & Others v Edcon LTD* 2016 (37) *ILJ* 564 (CC)' 39 *ILJ* at 76-88.

stated purpose of attaining social justice in the workplace.¹¹ A telling element of this observation is that the achievement of social justice in the employment relationship may require solid employment laws that cast a wider net of protection, particularly to vulnerable employees.¹²

Adamu and Sharma opine that the required skills in the banking sector are continuously changing and digital innovation may render banking services uncompetitive.¹³ Therefore for banks to gain an advantage in the prevailing market, it is imperative that they make use of technology. As a result, the banking industry continues to restructure its operations to remain competitive.¹⁴ In 2019 South Africa's 4 major banks indicated their intentions of restructuring their operations. It was estimated that ABSA would retrench 827 employees, Nedbank 1500, Standard Bank 1200,¹⁵ and FNB 600.¹⁶ These figures raise probing questions on the effectiveness of the South African legislative framework in ensuring that operational requirements dismissals must be effected as a measure of last resort.¹⁷ The experience in South Africa reflects the broader global trends within the industry.

1.2 Global context of the banking industry

In the last decade, the banking sector has experienced significant changes.¹⁸ It has been contended that these changes have been sharpened by the inclusion of technology in the workplace.¹⁹ The presence of digitalisation and automation has become a precursor to organisational success in the banking sector.²⁰ The industry has been identified as one of the leading giants in the adoption of

¹¹ See the Preamble of the LRA.

¹² *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (31) ILJ 1600 (LAC) para 41.

¹³ Ahmed Adamu & Kapil Dev Sharma 'Labour law and staff retrenchment in commercial banks in Nigeria: Causes and consequences' (2016) 119 *SALJ* 700 at 725.

¹⁴ PR Worx 'More retrenchments on the table for South Africa work force' available at <https://www.skillsportal.co.za/content/more-retrenchments-table-south-african-workforce>, accessed on 15 October 2020.

¹⁵ James de Villers 'Retrenchment tracker: South Africa's big corporate job losses in 2019 - so far' available at <https://www.businessinsider.co.za/total-number-of-job-losses-south-africa-retrenchment-corporate-job-losses-2019-6>, accessed on 10 July 2020.

¹⁶ Legal Brief 'Recession/digital banking the reason for FNB job cuts', available at <http://legalbrief.co.za/diary/legalbrief-workplace/story/recessiondigital-banking-the-reason-for-fnb-job-cuts/pdf/>, accessed on 10 July 2020.

¹⁷ Qama Qukula 'Almost 10,000 banking jobs will be lost this year alone, says union', available at <http://www.702.co.za/articles/361818/banking-strike-almost-10-000-jobs-will-be-lost-this-year-in-the-banking-sector-says-union-sasbo> accessed on 20 March 2020.

¹⁸ Stijn Claessens 'Global banking: Recent developments and insights from research' (2016) 21 *Review of Finance* 4 at 1513-1555.

¹⁹ *Ibid.*

²⁰ *Ibid.*

technology.²¹ What has remained a concern in these circumstances is not only the progression of technology beyond replacement of menial jobs involving repetitive tasks but replacement of the labour force as well.²²

Africa's banking market has been regarded as one of the second-fastest-growing in the global environment.²³ Some banks in South Africa and other countries in Africa have started witnessing operational improvements through the adoption of technologies to enhance user experience.²⁴ In light of these changes and developments, it is estimated that the strategic implementation of technology can potentially create 4.5 million jobs and displace 3.3 million by 2030.²⁵ These findings reflect that technology can be harnessed to reignite job creation.²⁶ A study conducted in 2019 indicated that more than 70 000 jobs were lost and this number is slightly slower than in 2015 where the number of people who lost jobs was beyond 90 000.²⁷ Approximately 80% of these figures are from European Banks.²⁸ What remains to be a major concern is that the number of job losses may be higher than the reported numbers because some banks retrench employees without disclosing it.²⁹

While these changes continue to threaten jobs and livelihoods some banks particularly in Canada have called for a re-examination of programs offered at institutions of higher learning to focus on 'human skills' that will be required in the future such as critical thinking and social perceptiveness.³⁰ This proposition, in the context of banking, emerged from a study conducted by the Royal Bank of Canada where it was discovered that these skills are key in positioning the

²¹ World Bank Group *World Development Report 2016: Digital Dividends* (2016) 70.

²² Mutumba op cit note 4 at 29.

²³ Chironga M, Cunha, L. De Grandis, H & Kuyoro, M 'Roaring to life: Growth and innovation in African retail banking' (2018) *McKinsey & Company*.

²⁴ Nomfanelo Magwentshu, Agesan Rajagopaul, Michael Chui & Alok Singh 'The future of work in South Africa: Digitalisation, productivity and job creation' (2019) *McKinsey & Company*. For instance, in most banks, the loan processing time has been reduced to 1 minute from 3 days.

²⁵ Ibid.

²⁶ Ibid. In the United States of America, the introduction of technology in the late 80s displaced more than 3.5 million jobs and more than 19 million were created.

²⁷ Dan Ennis 'Banks cut nearly 78 000 jobs in 2019, a 4 year high' available at <https://www.bankingdive.com/news/banks-job-cuts-2019-4-year-high/569695/>, accessed on 20 December 2020.

²⁸ Ibid.

²⁹ Nicholas Comfort 'Banks set for biggest job cull since 2015 as Morgan Stanley cuts' available at <https://www.bloomberg.com/news/articles/2019-12-27/banks-set-for-biggest-job-cull-since-2015-as-morgan-stanley-cuts>, accessed on 20 June 2020.

³⁰ Penny Crosman 'How artificial intelligence is reshaping jobs in banking' available at <https://www.americanbanker.com/news/how-artificial-intelligence-is-reshaping-jobs-in-banking>, accessed on 20 December 2020.

workforce for future jobs.³¹ This assertion is grounded in the appreciation that technology and digitalization may bring new job opportunities.³² This has been supplemented by scholars who opine that digital transformation in banks has reduced ‘customer footprints’ in branches at the same time leaving the number of staff members unchanged.³³ In his description of the need to have technological savviness the President of the Royal Bank of Canada David Mckay reasoned as follows:

[T]he future prosperity and success will rely on us harnessing the innovation of our entire pool. A huge part of our success will depend on how well we integrate the next generation into the workforce. Successive waves of technological advancements have rocked global economies for centuries, reconfiguring the labour force and giving rise to new economic opportunities with each wave. Modern advances, including artificial intelligence and robotics, once again have the potential to transform the economy, perhaps more rapidly and more dramatically than ever before. As past pillars of economic growth become less reliable, harnessing technology and innovation will become increasingly important in driving productivity and growth.³⁴

1.3 Problem Statement

Scholars such as Welch contend that South Africa has ‘the world’s most progressive legislation’.³⁵ While there has been significant progress in the protection of worker’s rights, job protection, and compliance in the implementation of basic conditions of employment there is still room for improvement in ensuring the implementation of measures that mitigate dismissals.

Case law is replete with examples of employees losing jobs as a result of operational requirements in the banking industry.³⁶ What is of concern in these cases is how the courts have reduced procedural and substantive requirements to a checklist that qualifies employers to effect retrenchments.³⁷ From the manner in which retrenchment cases have been adjudicated in the banking industry, it appears that their attempts are not geared in examining whether the totality of

³¹ M Rathi Meena and G Parima Larani ‘Impact of digital transformation on employment in the banking sector’ (2020) 9 *International Journal of Scientific and Technology Research* 1.

³² *Ibid.*

³³ *Ibid.*

³⁴ FrogHeart ‘The Royal Bank of Canada reports ‘humans wanted’ and some thoughts on the future of work, robots, and artificial intelligence’ available at <https://www.frogheart.ca/?p=25689>, accessed on 05 December 2020.

³⁵ R Welch ‘Rights to strike in UK and SA law: A comparison’ 19 *Bulletin* 4 (2000).

³⁶ See *Lulu Thema v ABSA Bank Limited* 2014 (13) *ILJ* 470 (LC); *SASBO v Standard Bank of South Africa* 2011 (32) *ILJ* 1236 (LC); *Lisa Joy Crowhurst v ABSA Investment Management (PTY) Limited* (‘AIMS’) (LC) unreported case no JS474 of 28 November 2003. Chapter 3 of the study draws analysis from these cases.

³⁷ John Grogan *Dismissal* 2nd ed (2017).

employer's efforts are aimed at avoiding retrenchments³⁸ instead they are playing a monitoring role.

Where work is done on mitigating retrenchments, the studies appear to focus on looking at ways to mitigate retrenchments in other sectors.³⁹ Furthermore, these studies fail to provide a holistic understanding of the role of the courts and whether the courts have been effective in dealing with operational requirements dismissals in the banking industry. Previous studies have also not established whether the courts have been effective in ensuring compliance with measures that mitigate dismissals. It is imperative that the study calls this into question because digital innovation in the banking sector is constantly deskilling employees.

In *SA Chemical Workers Union and Others v Afrox Ltd*⁴⁰ the Labour Appeal Court (LAC) summed up its approach to the law on dismissals based on operational requirements. It held that 'an employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects...'.⁴¹ In light of the above, the study takes into account that employers are obliged to be substantively and procedurally fair when retrenching employees. The need to be procedurally and substantially fair must be a priority for employers and the courts this is because employees always perceive retrenchment as a 'one-sided breach of the psychological contract with the organisation'.⁴² This begs the question of whether the progress in South Africa's employment laws is only inscribed in policy rather than practice.

1.4 Objectives of the Study

The principal focus of the study is to examine the role of the courts in mitigating operational requirements dismissals and to consider possible practices and interventions that can be applied to minimise the adverse effects and possibly strengthen the role of the courts. More specifically objectives include:

³⁸ Ibid.

³⁹ See Gail Smith 'Cutting Threats: Retrenchments and women workers in the cape clothing industry', available at https://www.jstor.org/stable/4066512?seq=1#metadata_info_tab_contents, accessed on 10 April 2020. Other studies include Leonie B. Louw *Retrenchment in the Insurance Industry: The Small Business Development Dividend* (Unpublished Mcom Thesis, University of Pretoria, 2018); Van der Westhuizen, Christie 'Trade and poverty: A case study of the South African clothing industry' (2007) 31 *Journal of Economics and Econometrics* at 109-124.

⁴⁰ *SA Chemical workers Union and Others v Afrox Ltd* 1999 (20) ILJ 406 (LAC).

⁴¹ Ibid para 41.

⁴² Ballou Nichole *The Effects of Psychological Contract Breach on Job Outcomes* (Masters' thesis, San Jose State University, 2013).

- Examining recent judgments on mitigating dismissals based on operational requirements in the banking industry.
- Providing an analysis of the effectiveness of provisions that govern operational requirements and whether they have been successful in mitigating operational requirements dismissals.
- The study will consider deficiencies of these provisions and provide recommendations on how the LRA can be amended to reduce and mitigate the impact of dismissals in the banking industry.

1.5 Research Methodology

The outlined objectives of the study will be achieved by using a non-interactive method of collecting data. The method will consider desktop sources of the historical context on dismissals based on operational requirements, case law, articles, statutes both foreign and South African as well as International Labour Organisation (ILO) instruments relating to dismissals. The historical context will inform the investigation and on the effectiveness of the LRA in ensuring the implementation of the measures that mitigate dismissals. Case law will include recent judgements of operational requirements dismissals and determine how successful have they been in protecting employees from the scourge of retrenchments in the banking sector.

1.6 Significance of the Study

In light of the retrenchments, South Africa has witnessed in the last 5 years⁴³ this study aims to strike a balance between the interests of the employer and employees by making recommendations on how the courts can interpret and approach retrenchments in the banking sector. Taking into consideration the pressing need employers have in creating new jobs and preserving existing jobs, the study will identify possible interventions that can be adopted not only in advancing economic development by preserving and protecting jobs but by improving the life and dignity of the workforce.

Given the fast-paced digitalisation of the corporate world, it is the intention of the study to provide recommendations on how employers can integrate digitisation of the workplace at the

⁴³ The rise of job losses has been worsened by the COVID-19 pandemic. See Helen Kean & Paula Armstrong ‘A snapshot of COVID-19 related unemployment in South Africa’ available at <https://www.news24.com/fin24/opinion/analysis-a-snapshot-of-covid-19-related-unemployment-in-south-africa-20201016>, accessed on 12 December 2020.

same time preventing job losses.⁴⁴ Reference will be made to various countries that have adopted interventions such as skills and training development, collective bargaining, and redeployment to address problems that arise in operational requirements dismissals. This approach stems from an understanding that most traditional jobs will be redundant in the future and this leaves employees with no choice but to retrench their workforce.⁴⁵

At the heart of this worldview, the study recognises problems the world of work has been battling with as a result of the COVID-19 pandemic.⁴⁶ The Future of Jobs Report published by the World Economic Forum⁴⁷ recently sheds light on how the pandemic has brought a lot of uncertainties in the labour market but how it has accelerated the advent of the future of work.⁴⁸ The report observed a sharp increase in job displacements due to COVID-19.⁴⁹ These findings have been substantiated by a survey of more than 50 businesses who estimate that more than 40% of their workforce will have their jobs replaced by technologies.⁵⁰ What is more concerning is how the pandemic has challenged the traditional way of banking.⁵¹ This has been seen as anticipation towards digital banking.⁵²

Some banks in Singapore have digitalised most of their operations to limit in-person transactions.⁵³ These efforts have been supplemented by offering webinars to clients and staff members on how to operate digital platforms.⁵⁴ What might be a concerning observation is even after the pandemic digital platforms will have an enduring significance.⁵⁵ For example, a significant number of employers across the world have indicated that more than 40 % of their

⁴⁴ Preamble of the LRA op cit note 11.

⁴⁵ Adamu & Sharma op cit note 13 at 198.

⁴⁶ World Health Organisation 'Coronavirus Pandemic' available at https://www.who.int/health-topics/coronavirus#tab=tab_1, accessed on 24 December 2020. Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered Coronavirus.

⁴⁷ World Economic Forum 'Future of Jobs Report' (2020).

⁴⁸ Ibid. See also Jieun Choi, Mark A Dutz & Zainab Usman *The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All* (2020) 35.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Leor Melamedov 'COVID-19 and the banking industry: Impact and solutions' available at <https://www.lightico.com/blog/coronavirus-covid-19-and-the-banking-industry-impact-and-solutions/>, accessed on 12 December 2020. The movement from the traditional way of banking to digitalisation has been encouraged by the World Health Organisation. It is one of the measures that have been taken to curb the spread of the virus. Other measures that have been taken include promoting contactless transactions.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

the workforce could operate remotely post COVID-19.⁵⁶ In an attempt to address the growing uncertainties in what the future of work may bring, the *World Retail Banking Report* of 2019 indicated the need for an invested approach in upskilling and training employees.⁵⁷

In 2019 the ILO adopted a declaration to achieve social justice and address potential challenges that may arise in the world of work.⁵⁸ The conference acknowledged the changes that have occurred in the workplace as a result of technological innovation.⁵⁹ The ILO declared its promise to fulfil the mandate of developing a ‘human-centred approach to the future of work, which puts worker’s rights and needs, aspirations, and rights of all people at the heart of economic, social and environmental policies’.⁶⁰ This declaration should serve as a springboard for the South African legislators and policymakers because it provides guidelines to deal with challenges emanating from the introduction of technology in the world of work. The declaration further speaks to the roles workers, employers and governments have to play to ensure social justice.⁶¹

1.7 Outline of chapters

Chapter 1 sets out the introduction of the study and provides context and rationale behind operational requirements dismissals in today’s corporate world. The chapter identifies the role technology has played in contributing to faultless dismissals and the global trends within the banking industry. The significance of the study, objectives, and methodology are identified in this chapter. Chapter 2 provides an in-depth examination of the regulatory framework for operational requirements in South Africa and provides an overview of related international labour standards. This examination will discuss the substantive and procedural fairness requirements. Chapter 3 examines retrenchment cases within the banking industry. The chapter’s analysis mirrors how courts have handled operational requirements and applied various statutory provisions in implementing appropriate measures that mitigate dismissals within the banking industry. Chapter 4 provides an overview of best practices that have been applied in foreign jurisdictions to reduce job losses. The purpose of the chapter is to identify interventions that can be applied in South Africa. These interventions indicate the role various stakeholders ought to play in preventing

⁵⁶ WEF op cit 41.

⁵⁷ Capgemini Research Institute ‘World Retail Banking Report’ (2019).

⁵⁸ See International Labour Conference ‘Centenary Declaration for the Future of Work’ (2019).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

dismissals. Chapter 5 summarises the key findings of the study and offers proposals and recommendations drawn from the best practices identified.

CHAPTER 2: REGULATORY FRAMEWORK FOR RETRENCHMENTS

2.1 Introduction

This chapter provides a framework that serves as a foundation upon which case law in the context of the banking industry will be analysed. The chapter discusses the historical development of operational requirements dismissals in respect of procedural and substantive requirements and fairness. These requirements have been found to be the ‘primary tools’⁶² in examining and evaluating operational requirements dismissals, as such they must not be interpreted in isolation.⁶³ The chapter devotes much attention to the substantive requirements of dismissals. This development mirrors the criteria used by courts to determine substantive and procedural fairness of operational requirements dismissals.

Secondly, the chapter considers the relevant conventions of the ILO and their application.⁶⁴ These conventions have played an instrumental role in interpreting retrenchment law in South Africa. The first part of the chapter defines operational requirements in the context of the LRA. The discussion of operational requirements is coupled with applicable case law with a focus on jurisprudential evolution of procedural and substantive requirements in examining operational requirements.

2.2 The meaning of operational requirements in the context of the Labour Relations Act

In the context of the South African legislative framework, section 188 of the LRA permits employers to dismiss employees on grounds of operational requirements. Dismissals for operational requirements are categorised as no-fault dismissals because the employee is not the one who is responsible for the termination of the employment relationship.⁶⁵ It is for this reason that the LRA places an obligation and stringent measures⁶⁶ on employers in ensuring exploration of other possible alternatives and the process is supposed to be done fairly. While dismissals for operational requirements remain permissible it has attracted a heated debate amongst scholars

⁶² Rochelle Le Roux *Retrenchment Law in South Africa* (2017).

⁶³ Ibid. See also Tina Hokwana *Substantive Fairness in Dismissals Based on Operational Requirements* (LLM, thesis, Nelson Mandela University, 2018).

⁶⁴ The study will discuss the provisions of Termination of Employment Convention 158 of 1982 and Termination of Employment Recommendation 166 of 1982 that govern operational requirements dismissals.

⁶⁵ Schedule 8 of the Code of Good Practice on Dismissals based on Operational Requirements.

⁶⁶ Grogan op cit note 37.

more than other categories such as incapacity and misconduct,⁶⁷ courts have agreed that dismissals must not be a measure of first resort.⁶⁸

Today's corporate environment requires businesses to adapt to complex political, economic, and technological changes.⁶⁹ In light of this, section 186 of the LRA permits employers to dismiss employees on the grounds of incapacity, misconduct, and operational requirements. The LRA defines dismissal by providing six indicators.⁷⁰ These indicators elaborate on the meaning of dismissal.

1. 'An employer has terminated the contract of employment with or without notice.
2. An employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it.
3. An employer refuses to allow an employee to resume work after she took maternity leave, collective agreement, or her contract of employment.
4. An employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another.
5. An employee terminated the contract of employment with or without notice because the employer made continued employment intolerable for the employee.
6. An employee terminated the contract of employment with or without notice because the new employer, after a transfer in terms of section 197 and 197A, provided an employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer'.⁷¹

Section 213 of the LRA defines dismissals on account of operational requirements as 'economic, technological, structural or similar needs of an employer'. This definition is a reflection of a broad spectrum of reasons relating to dismissals. Schedule 8 of the Code of Good Practice on Operational Requirements refines this definition by stating that:

⁶⁷ Paul Sakwe Masumbe *Faultless Dismissal: Assessing the Substantive Fairness of Operational Requirements* (LLM Thesis, University of Western Cape, 2013).

⁶⁸ Darcy du Toit 'Business restructuring and operational requirements dismissals: Algorax and Beyond' (2005) 26 *ILJ*.

⁶⁹ P Smith & BPS van Eck 'International perspectives on South Africa's unfair dismissal law' (2010) 43 *CILSA* 46.

⁷⁰ S 186 of the LRA.

⁷¹ *Ibid*.

[I]t is difficult to define all the circumstances that might legitimately form the basis of dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.⁷²

Bosch opines that the courts have been unwilling to look deep into operational requirements⁷³ because they do not want to 'second-guess the commercial or business efficacy of the employer's decision'.⁷⁴ It may be the case that this unwillingness originates from *Hendry v Adcock Ingram*⁷⁵ where the Labour Court held that their evaluation of the employer's decision to retrench must not interfere with the decisions that may be taken legitimately for the purposes of making profits.⁷⁶

2.2.1 Economic needs

Schedule 8 of the Code provides an explanation of economic reasons as 'those reasons that relate to the financial management of the employer's enterprise'. In this case, financial management depicts a broad spectrum relating to the state of the economy and market, the profitability of the employer's business,⁷⁷ and economic activities that can stimulate instability and uncertainty in the management of the enterprise.⁷⁸ In uncertain circumstances, restructuring and retrenchment are strategies that are often employed to safeguard the future of the company.⁷⁹ The courts have generally acknowledged the financial difficulty of a business as a legitimate ground for dismissal.

⁷² See Schedule 8 of the Code op cit note 65.

⁷³ Craig Bosch 'Operational requirements dismissals and section 197 of the Labour Relations Act: Problems and possibilities' (2002) *ILJ* 23.

⁷⁴ *SACTWU v Discreto A Division of Trump and Springbok Holdings* 1998 (2) ZALAC (LAC) para 8.

⁷⁵ *Hendry v Adcock Ingram* 1998 (19) *ILJ* 85 (LC).

⁷⁶ *Ibid*. While this appears to be the position of the courts more than 2 decades ago, their position have remained unchanged. See *Mchuba v Passenger Rail Agency of South Africa* 2016 (37) *ILJ* 1923 (LC) para 13; *IBM South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (LC) unreported case no JR66/2014 of 26 February 2016 & *Forecourt Express (Pty) v South African Transport and Allied Workers Union and Others* 2007 (2) BLLR 101 (LAC) para 39. In this decision the court held that the employer has the managerial prerogative to run its business the way it deems fit however the courts have to adjudicate whether anything done in the name of business restructuring is fair.

⁷⁷ Grogan op cit note 37.

⁷⁸ Davy Rammila *Dismissal for Operational Requirements in South Africa: Redesigning the Current Legislative Framework for the Fourth Industrial Age* (LLM thesis, University of Johannesburg, 2019).

⁷⁹ Le Roux op cit note 62 at 4.

The Labour Court in *Van Rooyen & Others v Blue Financial Services (SA)*⁸⁰ described the situation as a line an employer needs to draw between ‘corporate equivalent of excessive bleeding and imminent death and to justify dismissal as a life-saving measure’.⁸¹

Of late in a matter between *National Union of Metal Workers of South Africa and Another v Aveng Trident Steel (A division of Aveng Africa Propriety Limited) and Others*⁸² the employer’s business was facing financial problems ranging from a drop in sales and profit margins.⁸³ In an attempt to maintain the profit margins of the business, the employer proposed measures such as reviewing the structures, redefining job descriptions, and reviewing employee benefits.⁸⁴ The LAC accepted this practice as a legitimate reason for dismissing employees. The court recognised the employer’s right to dismiss based on operational requirements whether for saving a business or making it more profitable⁸⁵ but cautioned that employers do not have *carte blanche* when doing this.⁸⁶ In this regard, the court placed reliance on du Toit’s argument that the central point in such dismissals is that they have to pass the fairness test.⁸⁷

In *Van Rooyen*, the respondent was unsatisfied by the unprofitability of the business.⁸⁸ The business was restructured and employees had to undergo assessments that would determine their eligibility to be appointed to the new positions.⁸⁹ The court accepted restructuring as a legitimate ground for maximizing profits, however, in this case, the dismissals were found to be procedurally unfair based on the employer’s unwillingness to identify and explore alternative employment.⁹⁰ It becomes clear that though this route is legitimate it has some risks⁹¹ and employers bear the onus of justifying the difference in terms of job content between the old and the new position.⁹²

⁸⁰ *Van Rooyen & Others v Blue Financial Services (SA) (Pty) Ltd* 2010 (31) ILJ 2735 (LC).

⁸¹ *Ibid* para 20.

⁸² *National Union of Metal Workers of South Africa and Another v Aveng Trident Steel (A division of Aveng Africa Propriety Limited) and Others* 2019 (40) ILJ 2024 (LAC).

⁸³ *Ibid*.

⁸⁴ *Ibid* para 5.

⁸⁵ *Ibid* para 69.

⁸⁶ *Ibid* para 70.

⁸⁷ du Toit op cit note 65 at 2.

⁸⁸ *Supra* note 80 para 5.

⁸⁹ *Ibid* para 7.

⁹⁰ *Ibid* para 26.

⁹¹ *Vancoillie v Santam Life Insurance Ltd* 2003 (24) ILJ 1518 (LAC).

⁹² *Ibid* para 11.

In *Kotze v Rebele Discount Liquor Group (Pty) Ltd*⁹³ the LAC recognised failing or ailing business as a sufficient reason to warrant dismissal under the ambit of the employer's economic needs. It held that the management may '...consider the causes and possible remedies, appreciate the need to take remedial steps, and identify retrenchment as a possible remedial measure'.⁹⁴ The permissibility of this approach was also echoed in *Van Rensburg v Austen Safe Co*⁹⁵ where the court held that an employee's entitlement to fair labour practices is not a ticket to indefinite employment and the employer may retrench where there is compelling evidence of financial ruin.⁹⁶

An instrumental perspective within retrenchment law has argued that courts have to proceed with caution when examining the dilemma that arises from the employer's need to increase the profitability of a business and ensuring job security.⁹⁷ This is because employees inherently detest any steps that may be taken by the employer to reduce their job security.⁹⁸ The legislation does not provide a practical and conceptually straightforward way of dealing with this dilemma but the task is upon the courts to review and examine whether the employer's conduct in the dismissals process meets the requirements of fairness.⁹⁹

2.2.2 Technological

The Code identifies technological reasons like the introduction of technology, computerisation, and advanced machinery that may render certain positions redundant.¹⁰⁰ These technologies may range from robots, digitalisation, and 3D manufacturing systems.¹⁰¹ It has been argued that technological introduction does not only impact workplace functionality but alters existing relationships.¹⁰²

⁹³ *Kotze v Rebel Discount Liquor Group (Pty) Ltd* 2000 (21) ILJ 129 (LAC).

⁹⁴ *Ibid* para 18.

⁹⁵ *Van Rensburg v Austen Safe Co* 1998 (19) ILJ 158 (LC).

⁹⁶ *Ibid*.

⁹⁷ Grogan op cit note 37 at 405.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ Schedule 8 of the Code op cit note 65.

¹⁰¹ See Global Challenge Insight Report by World Economic Forum 'The Future of Jobs' (2016).

¹⁰² Rammila op cit note 78.

Prior to the adoption of the Act, the courts were preoccupied with distinguishing redundancy from retrenchment.¹⁰³ The position of the courts during this period was expounded clearly on *Hlongwane & Another v Plastic (Pty) Ltd*¹⁰⁴ where the court held that:

[O]ne should firstly distinguish between retrenchment and redundancy. Retrenchment is when the employer terminates employees' employment as they have become superfluous due to an economic downturn. The employees consequently lose their jobs but not necessarily on a permanent basis. Once there is an economic upswing they might possibly get their old jobs back. Redundancy on the other hand means that an employee becomes redundant as a result of, for example, the introduction of new machinery or technology or the restricting of the business. In case of redundancy, the employee loses his job permanently.¹⁰⁵

The requirements for dismissing employees on operational requirements became stricter particularly for employees whose redundancy was necessitated by internal factors such as the introduction of technology.¹⁰⁶ This is illustrated in *Imperial Transport Services (Pty) Ltd v Stirling*¹⁰⁷ an employee's position became redundant after the company implemented a business strategy that rendered his services unwanted. The functions entailed in his job description were re-allocated to other employees.¹⁰⁸ This re-allocation occurred without his knowledge.¹⁰⁹ The employee became concerned about his under-utilised skills, he went to seek clarity about his job description.¹¹⁰

A meeting was scheduled to discuss his job description, he was surprised to be told that the purpose of the meeting was to discuss his redundancy.¹¹¹ The court reiterated the importance of the employer's responsibility to consult when the company contemplates changes in the organisation that may result in retrenchment.¹¹² The court made a distinction between internal

¹⁰³ Masumbe op cit note 67.

¹⁰⁴ *Hlongwane & Another v Plastic (Pty)* 1990 (11) ILJ 171 (IC).

¹⁰⁵ Ibid para J to E.

¹⁰⁶ du Toit op cit 65 at 7.

¹⁰⁷ *Imperial Transport Services (Pty) Ltd v Stirling* 1999 (3) BLLR 201 (LAC) para 14.

¹⁰⁸ Ibid para 1.

¹⁰⁹ Ibid.

¹¹⁰ Ibid para 34.

¹¹¹ Ibid para 16.

¹¹² Ibid para 21.

changes such as the introduction of technology and restructuring and external changes such as economic downturns.¹¹³ The court held that:

[I]n case of a loss of a job brought by internal changes, the employer is in control of the situation and need not to make hasty decisions. Time is not as critical as it is when retrenchment is due to an economic downturn, and where any delay might severely prejudice the employer.¹¹⁴

This approach appears to be consistent with the position of the court in *Hlongwane*,¹¹⁵ where it contended that in situations where time is not a critical factor such as the introduction of new technology the employer bears the responsibility of offering alternative employment. It is now clear that technology is not a standalone reason to warrant dismissal, in most cases its introduction is a response to the economic landscape of the business.¹¹⁶

2.2.3 Structural reasons

Structural reasons have been defined by the code as ‘redundancy of posts consequent to a restructuring of employer’s enterprise’.¹¹⁷ It has been found that restructuring is driven by a need to incorporate technology and improve the enterprise’s competitive advantage.¹¹⁸ In his study, Rycroft contends that restructuring is nothing but an employer’s ‘attempt to introduce a restructured organisational template’ which often results in redefining policy and roles.¹¹⁹ Case law is replete with incidences of employees having their job descriptions refined and some losing their jobs as a result of structural changes in organisations. Restructuring has been identified as a reactionary measure companies employ to address the ‘unsatisfactory status quo in the constantly evolving market’.¹²⁰ Some of the internal reasons that may trigger restructuring involve stagnant revenues, high operating costs, and unsatisfactory gross margins.¹²¹ External reasons may involve unprecedented changes in consumer trends and a decrease in the organisation’s market share.¹²²

¹¹³ Ibid para 24.

¹¹⁴ Ibid para 24.

¹¹⁵ Supra note 95 para A.

¹¹⁶ Rammila op cit note 748.

¹¹⁷ Schedule 8 of the Code op cit 65.

¹¹⁸ Links Financial ‘Why do companies restructure?’ available at <https://www.links-financial.com/benefits-of-restructuring-a-company/> accessed on 2 August 2020.

¹¹⁹ Alan Rycroft ‘The evolving (but confusing) law on business restructuring’ (2003) 24 *ILJ* 69.

¹²⁰ Witold Kowalski ‘The process of organizational restructuring for large corporations’ available at <https://expert360.com/resources/articles/process-of-organisational-restructuring>, accessed on 31 July 2020.

¹²¹ Ibid.

¹²² Ibid.

The courts have traditionally examined the legitimacy of structural reasons in dismissing employees with a cautious eye.¹²³ The Labour Court in *SA Mutual Life Assurance Society v Insurance Banking Staff Association*¹²⁴ issued a stern warning to employers who embark on a restructuring exercise with an ulterior motive, it was held that employers must refrain from disguising a ‘classic retrenchment exercise as reorganisation or restructuring’.¹²⁵

The judgement given by the Labour Court in *Jakob Oosthuizen Wolfaardt v The Industrial Development Corporation of South Africa Ltd*¹²⁶ is more or less identical to the position of Labour Court in *SA Mutual Life Assurance Society*.¹²⁷ The employer embarked on an exercise of changing the operational structure of the organisation.¹²⁸ The company contracted a consultant to implement a new structure.¹²⁹ It was anticipated that the new structure would render all positions below the managing director/CEO redundant.¹³⁰ After the implementation of the structure approximately 86 employees lost their jobs and they were asked to apply for the new positions and most of them were not selected.¹³¹ Dismissals were found to be procedurally and substantially unfair.¹³² The court described the employer’s reason for restructuring as a ‘stratagem’.¹³³

In *Busani Khanyile & Others v Air Chefs (Pty) Ltd*¹³⁴ the employer restructured the operation of the business by outsourcing to a cleaning service. The need to outsource was not necessitated by financial difficulties but an increase in its clientele and workload.¹³⁵ The outsourcing arrangements resulted in the redundancy of the positions of employees who were tasked with cleaning.¹³⁶ The employees were to be transferred to the newly outsourced company on the same terms and conditions that applied with the erstwhile employer.¹³⁷

¹²³ See *Van Rooyen & Aveng Trident Steel & Stirling*.

¹²⁴ *SA Mutual Life Assurance Society v Insurance Banking Staff Association* 2000 (10) ZALC 92 (LC).

¹²⁵ *Ibid* para 8.

¹²⁶ *Jakob Oosthuizen Wolfaardt v The Industrial Development Corporation of South Africa Ltd* (LC) unreported case no of 1 August 2002.

¹²⁷ *SA Mutual Life Assurance Society v Insurance Banking Staff Association* (LAC) unreported case no C312/98 of 29 June 2001.

¹²⁸ *Supra* note 124 para 4.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

¹³¹ *Ibid* para 6.

¹³² *Ibid* para 41.

¹³³ *Ibid* para 25.

¹³⁴ *Busani Khanyile & Others v Air Chefs (Pty) Ltd* (LC) unreported case no JS805/04 of 4 August 2015.

¹³⁵ *Ibid* para 16.

¹³⁶ *Ibid* para 20.

¹³⁷ *Ibid* para 20.

However, the employees indicated their refusal to be transferred to the new outsourced employer.¹³⁸ And retrenchment was then effected after the employees refused to take either alternative employment or to be taken over by the new outsourced employer.¹³⁹ Dismissals were found to be procedurally and substantially fair.¹⁴⁰ The reasoning employed by the court in *Busani Khanyile & Others* bears a close resemblance with the principles in *General Food Industries Ltd v FAWU*.¹⁴¹ The LAC made a statement that while the LRA does not provide a distinction between businesses who restructure for the purposes of maximising profits and those who restructure to save an ailing business, employers are ‘...entitled to insist by an economic restructuring that a profitable centre becomes even more profitable’.¹⁴²

2.2.4 Similar needs

Employers ‘similar needs’ are considered a legitimate reason for dismissing an employee. The LRA and the Code of Good Practice on Operational Requirements do not provide clear criteria of what constitutes ‘similar needs’. A recent study by Manamela has contended that this lack of clarity has been the source of confusion not only for the employers but for the courts as well.¹⁴³ It has become trite that ‘similar needs’ constitute a broad array of issues that may impact the economic activities of the business. In *Tiger Food Brands t/a Albany Bakeries v Levy N.O and Others*¹⁴⁴ the applicant was no longer able to ensure continuity of the business as a result of the refusal of the company’s management team to accept change.¹⁴⁵ Retrenchments were anticipated based on operational requirements because he was of the view that the threats on the managerial staff constituted a structural and economic requirements.

The court stated that the problem did not fall under the ambit of structural reasons, however, it acknowledged the presence of economic and similar reasons for the retrenchments the employer anticipated.¹⁴⁶ In light of this employer’s inability to effectively manage the business due to the threats to the management team affected the economic prospects of the business but the

¹³⁸ Ibid para 33.

¹³⁹ Ibid para 38.

¹⁴⁰ Ibid para 75.

¹⁴¹ *General Food Industries Ltd v Food and Allied Workers Union* 2004 (25) ILJ 1260 (LAC) para 62.

¹⁴² Ibid para 62.

¹⁴³ Tukishi Manamela ‘When the lines are blurred – A case of misconduct, incapacity or operational requirements: Are all dismissals going operational?’ (2019) 40 *Obiter* 1 at 97-117.

¹⁴⁴ *Tiger Food Brands t/a Albany Bakeries v Levy N.O and Others* 2007 (28) ILJ 1827 (LC).

¹⁴⁵ Ibid para 4.

¹⁴⁶ Ibid para 38.

reason to retrench did not fall under the ambit of economic reasons. In this regard, the court held that ‘similar needs’ have ‘some resemblance of economic, technological and structural’.¹⁴⁷ In its interpretation of the misconduct contributing to the employers’ decision to retrench on operational requirements the Labour Court advances a cogent argument that the onus is on the employer to prove that ‘the misconduct that has caused an economic rationale for dismissal in the sense that the company’s economic viability or economic stability is under threat’.¹⁴⁸ Sufficient to say the similar needs of the employer cannot be synonymous to all reasons that may affect the viability and operation of the business instead these needs may be ring-fenced to a spectrum of issues relating to economic, technological, and structural requirements.

3.1 Substantive fairness

Section 188 of the LRA considers dismissals for operational requirements fair only if there was a fair reason to dismiss based on the employer’s operational requirements discussed above.¹⁴⁹ Schedule 8(2)(1) of the code acknowledges that the fairness of operational requirement dismissals is determined by the ‘appropriateness of dismissal as a penalty’.¹⁵⁰ The LRA and the Code do not provide specificity in terms of the requirements that must be met by employers to determine the fairness of dismissing an employee based on operational requirements. From time immemorial the courts have used different standards to adjudicate the substantive fairness of the employer’s decision to retrench.¹⁵¹

3.1.1 Statutory development of substantive fairness

Before the promulgation of the Act, dismissals were considered fair when an employer can prove the validity of the reason to dismiss.¹⁵² The courts held this position primarily because they believed they are not sufficiently competent to make decisions regarding the operation of the business.¹⁵³ In its evaluation of the test of substantive fairness the industrial court held that:

¹⁴⁷ Ibid para 32.

¹⁴⁸ *Food & Allied Workers Union & Others v Premier Foods t/a Blue Ribbon Salt River Cape Town* 2010 (31) ILJ 1654 (LC) para 86.

¹⁴⁹ Act 66 of 1995.

¹⁵⁰ See Schedule 8 (2) of the Code op cit note 65.

¹⁵¹ Riaz Itzin *Operational Requirements as a Fair Reason for Dismissals in South Africa* (LLM Thesis, University of Johannesburg, 2011).

¹⁵² *Transport & General Workers Union & Others v Council of the City of Durban & Another* 1991 (112) ILJ 256 (IC); *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd* 1991 (13) ILJ 2 (IC) & *Benjamin and Others v Plessey Tellumat SA Limited* (LC) unreported case no C54/97 of 16 February 1998.

¹⁵³ Rammila op cit note 78.

[A]t the risk of belabouring the obvious, we would like to repeat that the normal retrenchment affair consists of two steps. Initially one has the managerial decision which has to be taken bona fide (and perhaps based on commercial rationale). This will be considered a fair decision by the courts as far as it goes.¹⁵⁴

The inclusion of commercial rationale was interpreted as follows:

[T]he only prerequisite of a proper exercise of such prerogative are that it must be *bona fide* that a business rationale exists. (We are somewhat doubtful about the second requirement- after all in business frequently not always the best nor the correct decision is taken. Perhaps management has the right to be foolish as long as it is strictly bona fide in its deliberations).¹⁵⁵

The substantive fairness test employed by the courts at this stage was primarily concerned with the existence of the employer's *bona fide* reason to retrench. Commercial rationale was a requirement not to prove the fairness of dismissals but to act as a confirmation that the decision to retrench was taken in good faith.¹⁵⁶

However, in 1993, there was a subtle change in the court's interpretation of the substantive fairness test. The LAC noticed the demerits of relying on the employer's *bona fide* and commercial rationale. The court went to greater lengths and stated that:

[F]airness in this context goes further than *bona fides* and the commercial justification for the decision to retrench. It is concerned with first and foremost with the question of whether termination of employment is the only reasonable option in the circumstances.¹⁵⁷

The LAC became less inclined in considering *bona fides* and business rationale as the only basis to determine substantive fairness. It further asserted that the termination of employment must be a measure of last resort.¹⁵⁸

Post 1995 the courts exhibited a stringent approach in their interpretation of the employer's decision to retrench.¹⁵⁹ The standard of measurement in determining the substantive fairness of

¹⁵⁴ *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd* 1991 (13) ILJ 2 (IC).

¹⁵⁵ *Ibid.*

¹⁵⁶ Itzin op cit note 151.

¹⁵⁷ *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd* 1993 (14) ILJ 642 (LAC).

¹⁵⁸ *Ibid.*

¹⁵⁹ Itzin op cit note 151.

retrenchments became stricter.¹⁶⁰ The position of the courts at this stage required employers not only to rely on *bona fides* in justifying fairness but to prove that the decision was commercial rational. In *Atlantis*, the court asserted that its duty is not only to examine the *bona fides* of the employer but ‘proof by the employer on a balance of probabilities of:

- the cause of the reason of dismissal;
- the defined ‘operational requirements’ that the dismissal was based on;
- the facts upon which a finding of a substantively fair reason for the dismissals can be made’.¹⁶¹

The approach in the case reflects a concern on the reasonableness of the reason to retrench not rationality. The court went a step further and stated dismissals must be a measure of last resort even though the LRA does not place an obligation to employers in considering retrenchment to do so.¹⁶² The interpretation of the concept of fairness in dismissals was widened in *SACTWU v Discreto, A Division of Trump and Springbok Holdings*.¹⁶³ The court distinguished fairness from an employer and employee’s perspective, it held that:

[F]airness to the employer is expressed by the recognition of the employer’s ultimate competence to make a final decision on whether to retrench or not. For the employee is found in the consultation prior to the final decision on retrenchment.¹⁶⁴

While this distinction is procedural in nature it however speaks to the substantive purpose of the retrenchments.¹⁶⁵ This interpretation is synonymous with *BMD Knitting Mills (Pty) Limited v South African Clothing & Textile Workers Union (SACTWU)*¹⁶⁶ where the court viewed fairness as a ‘comparator’.¹⁶⁷

¹⁶⁰ Ibid.

¹⁶¹ Supra note 154.

¹⁶² Ibid.

¹⁶³ *SACTWU v Discreto, A Division of Trump and Springbok Holdings* 1998 (12) BLLR 1228 (LAC).

¹⁶⁴ Ibid para 8. The sentiments expressed in this passage remain relevant as evidenced by the Constitutional Court’s averment in *SACCAWU v Woolworths* 2019 (40) ILJ 87 (CC), where it held that the origins of s 189A(19) can be traced back from *Discreto* para 25.

¹⁶⁵ Ibid para 8.

¹⁶⁶ *BMD Knitting Mills (Pty) Limited v South African Clothing & Textile Workers Union* 2001 (22) ILJ 2269 (LAC).

¹⁶⁷ Ibid para 152.

The courts became more oriented in employing a hands-on approach than the tests that relied on employer's *bona fides*. The employer's position has been described as a situation where an employer has 'its proverbial back against the wall to prove substantive fairness before terminating the employment of a portion of the workforce'.¹⁶⁸ In *Discreto* the LAC echoed similar elements:

[T]he function of the court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's decision (on an issue which it is, generally, not qualified upon to do, in different settings every day). The manner in which the court adjudges the latter is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on reasonable grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision properly taking into account what emerged during the consultation process.¹⁶⁹

Perhaps the shift to a more interventionist approach was an effort to fulfil the obligation of the LRA which is not only advance social justice but safeguarding employment as well.

In its interpretation of substantive fairness in operational requirements dismissals in *BMD Knitting Mills (Pty) Limited* the court stated that the word 'fair' introduces a comparator.¹⁷⁰ In this context, fairness is interpreted not only from the employer's perspective but for the employee as well. The court delved deeper in its interpretation, in this regard it held that:

[T]he starting point is whether there is a commercial rationale for the decision. But rather take such justification at face value, a court is entitled to examine whether a particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched.¹⁷¹

Having established the substantive requirements fairness for operational requirements the following section will discuss the procedural requirements and how they have been interpreted by the courts.

¹⁶⁸ Newaj K & S van Eck 'Unfair and operational requirements dismissals: Making sense of the 2014 Amendments' (2016) 19 *ELJ* 1.

¹⁶⁹ *Supra* note 163 para 8.

¹⁷⁰ *Supra* note para 166.

¹⁷¹ *Ibid*.

2.4 Procedural fairness

The procedural fairness requirements are set out in s 189. The primary procedural fairness requirement for employers in s 189 is that of consultation.¹⁷²

(1) ‘When an employer contemplates dismissing one or more *employees* for reasons based on the employer’s *operational requirements*, the employer must consult -

(a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation –

(i) a *workplace forum* if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose’.¹⁷³

The requirements of procedural fairness set out in LRA owe their genesis to the principles developed by the courts before 1994.¹⁷⁴ It has been contended that these requirements are grounded in the doctrine of natural justice.¹⁷⁵ In the context of labour law natural justice can be understood by looking at three requirements firstly the ‘employee should know the nature of the accusations against him, he should be given an opportunity to state his case and that the tribunal must act in good faith’.¹⁷⁶ These requirements have been identified as the foundation of the principles contained in the Code of Good Practice governing operational requirements.¹⁷⁷

¹⁷² S 189 of the LRA.

¹⁷³ Ibid.

¹⁷⁴ Tamara Cohen ‘Procedurally Fair Dismissals-Losing the Plot?’ 17 *SA Merc LJ* 32 at 35.

¹⁷⁵ Ibid. The author defines natural justice as a concept of law by which decisions reached are based on the principle of *maxims audi alteram partem*.

¹⁷⁶ *Mondi Timber Products v Tope* 1997 (18) *ILJ* 149 (LAC) at H.

¹⁷⁷ Supra note 170 at 35.

In *Atlantis Diesel*¹⁷⁸ the court stated that the term ‘contemplate’ places an obligation on an employer who senses the possibility of retrenchments, to consult with employees or their representatives, and disclose the reasons for the anticipated retrenchments. In *Siphiwe Khosana and Others v Sasol Synthetic Fuels*¹⁷⁹ the court described procedural fairness requirements as a ‘set of self-standing duties with which an employer must comply or run the risk of a retrenchment being declared invalid’.¹⁸⁰ The court’s approach above places an obligation on employers who anticipate retrenchments. While dismissals are expected to be procedurally fair, the courts have reasoned that if an employer is not at fault and did all it could, from its side during the consultation phase, the purpose of s 189 would also have been achieved.¹⁸¹

The purpose of the consultation was summed by *Afrox Limited*¹⁸² where the court held that it is the responsibility of the employer to take steps ‘in his or her initiative to take appropriate measures to avoid the dismissals, change their timing and mitigate their adverse impact’.¹⁸³ Numerous times the courts have warned employers who see the consultation phase as nothing but a ‘checklist’.¹⁸⁴ The court places an obligation on employers not only to be open-minded throughout the process but to act in good faith as well.¹⁸⁵ This was recently upheld in *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others*¹⁸⁶ where the court held that the duty to consult as envisaged by s 189(2) provides guidance on the statutory context of the interests of the parties in question.¹⁸⁷ The interest from the employer’s side is restructuring the business whereas, from an employee’s perspective, it involves job security.¹⁸⁸ Having discussed and identified the procedural requirements for operational requirements, the following section will address the international labour standards governing these dismissals.

¹⁷⁸ Supra note 174.

¹⁷⁹ *Siphiwe Khosana and Others v Sasol Synthetic Fuels* (LC) unreported case no J949/98 of 9 October 1999 para 13.

¹⁸⁰ Ibid.

¹⁸¹ *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* 1999 (20) ILJ 89 (LAC) at 9697.

¹⁸² Supra note 41.

¹⁸³ Ibid para 36.

¹⁸⁴ Grogan op cit note 37.

¹⁸⁵ Tapiwa Gandidze ‘Dismissal for operational requirements’ (2007) 11 *Law, Democracy and Development* 1 at 83-96.

¹⁸⁶ *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* 2020 (41) ILJ 555 (CC).

¹⁸⁷ Ibid para 166.

¹⁸⁸ Ibid para 55.

2.5 International labour standards in South Africa in the context of operational requirements in South Africa

Due to a significant increase in globalisation and movement of labour across international borders, ILO conventions have assumed significance and prominence in interpreting labour laws.¹⁸⁹ The ILO standards have been widely accepted as authoritative in the interpretation of employment laws.¹⁹⁰ This is because they set minimum accepted standards of employment law across the globe.¹⁹¹ The termination of employment is regulated by Convention 158 and Recommendation 166. While South Africa's position on faultless dismissals is compliant with international standards, it is posited that retrenchment law if not adjusted it may end up exacerbating problems such as inequalities at the same time hampering the achievement of LRA's stated objectives.¹⁹²

The standards set by ILO have been identified as a building block and a vehicle for achieving social justice.¹⁹³ This is in line with the purpose of the LRA.¹⁹⁴ The constitution of South Africa recognises the relevance and role of international law in the interpretation of the Bill of Rights, courts, and tribunal.¹⁹⁵ International law plays an instrumental role not only in the interpretation of the judicial but constitutional court as well.¹⁹⁶ Fourie opines that recommendations and conventions are a major source of public international law obligations in South Africa.¹⁹⁷ The courts have repeatedly confirmed the relevance and applicability of international labour law principles and conventions.¹⁹⁸

¹⁸⁹ Paul Andries Smit 'Pre dismissal Procedures in terms of ILO convention 158: South Africa and comparative perspectives' in Marius Olivier, Ockert Duper & Avinash Govindjee *The Role of Standards in Labour & Social Security Law International, Regional and National Perspectives* (2013) 267-286.

¹⁹⁰ Davy Rammila & Van Staden (2019) 'Negotiating the rules concerning the no-fault dismissals: The ILO's role in reforming South Africa' in Stefan Van Eck, Pamhidzai Bamu & Chanda Chungu (ed) *Celebrating the ILO 100 Years on Reflections on Labour Law from a Southern African Perspective* (2020) 267-293.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Maurice van Staden 'Towards a South African understanding of social justice: The international Labour Organization Perspective (2012) *Journal of South African Law* 1 at 91-105.

¹⁹⁴ Preamble of the LRA.

¹⁹⁵ Section 39 of the Constitution.

¹⁹⁶ Fourie E S 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) 11 *Potchefstroom Electronic Law Journal* 4 at 110-152.

¹⁹⁷ Ibid.

¹⁹⁸ See *NUMSA v Bader Bop* 2003 (2) BLLR 103 (CC), *SANDU v Minister of Defence* 2007 (28) ILJ 1909 (CC); *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (38) ILJ 831 (CC).

Article 4 of Convection 158 requires employers to terminate the employment relationship if there is a valid reason connected with conduct, capacity, or operational requirements.¹⁹⁹ The validity of the employer's reason has been identified as the cornerstone of the Convection.²⁰⁰ However, a concerning observation is that the LRA and the ILO do not place a responsibility on employers to safeguard employment.²⁰¹ It can be said that the regulation of operational requirements dismissals has been nothing but a 'semblance of mere formalities'.²⁰² This is because the automation of jobs eventually results in retrenchment.

2.6 Concluding remarks

This chapter has laid ground on the regulatory framework for retrenchments. The historical development discussed has reflected how the position of the courts has changed in regulating dismissals. The analysis of substantive requirements reflected that the courts have been preoccupied with the employer's need to retrench which must squarely fall within the legal definition contemplated by section 213 and Schedule 8 of the Code of Good Practice. This emphasis is based on the premise that the courts would not entertain the desire to do things differently as a legitimate ground for dismissing employees. There is a need to examine fairness from the employer and employee's perspective. The shift from an abstentionist approach to an interventionist approach reflects a pressing obligation employers have in mitigating dismissals. The ILO remains significant in the interpretation of retrenchment law even though it does not cast a wider net in protecting employees in the scourge of retrenchments.

¹⁹⁹ See Convection 158 and Recommendation 166.

²⁰⁰ Ibid.

²⁰¹ Rammila & Van Staden op cit note 190.

²⁰² Ibid.

CHAPTER 3: RETRENCHMENTS IN THE BANKING SECTOR: AN ANALYSIS OF CASE LAW

3.1 Introduction

Having established a framework for operational requirements, this chapter discusses case law in the banking industry. It will reflect how courts have handled operational requirements dismissals in the banking industry. It further draws an analysis of these judgements and comment on the success and failure of the courts to implement measures that mitigate dismissals.

More specifically, the chapter will draw its analysis from 6 cases in the banking industry. The cases were chosen from selected banks namely, ABSA Bank, Standard Bank, and Nedbank, most of the cases are from the last decade. This is because these banks have taken a leading role in restructuring their operations which has increased the number of technology-induced retrenchments. Finally, the chapter will shed a light on what the courts have considered as appropriate measures to mitigate dismissals. The discussion will reflect that the constitutional right to fair labour practices is intertwined with appropriate measures that mitigate dismissals and the provisions of s 189.²⁰³

3.2 Lulu Thema V ABSA Bank Limited

In *Lulu Thema v ABSA Bank Limited*²⁰⁴ the Labour Court was dealing with a dispute that arose when the applicant Lulu Thema was retrenched by the respondent ABSA Bank Limited.²⁰⁵ The applicant sought an order compelling the respondent to pay compensation as contemplated by the LRA.²⁰⁶ The respondent embarked on a restructuring exercise that rendered the applicant's position redundant.²⁰⁷ Three months before the applicant's dismissal she was placed on reassignment, during which she was required to search for alternative positions in the organisation or elsewhere.²⁰⁸ The applicant averred that there was no proper consultation, no attempt to reach a

²⁰³ The Constitutional Court delivered a judgement after hearing consolidated application from *Steenkamp v Edcon Limited* 2016 (37) ILJ 564 (CC) & *National Union of Mine Workers v Edcon Limited* (CC) unreported case no CCT 47/15 of 22 January 2016. The court held that the termination of employment relationship that is not in line with the requirements of s 189 A of the LRA have significant implications for the right to fair labour practices.

²⁰⁴ *Lulu Thema's* case supra note 36.

²⁰⁵ Ibid para 1.

²⁰⁶ Ibid.

²⁰⁷ Ibid para 2.

²⁰⁸ Ibid para 3.

consensus and that her dismissal was both procedurally and substantially unfair.²⁰⁹ One of the substantive unfairness reasons provided by the applicant was that she was restricted to the facilities that she could have used to apply for alternative positions, such as email, intranet, and internet.²¹⁰ The respondent made efforts to minimise retrenchments by allowing the applicant to apply for other positions within the organisation.²¹¹ The applicant applied for three positions after the restructuring process and she was found to be unsuitable for any of them.²¹² She was further advised that there were other six positions she could apply for, but she did not because these positions were not in line with her ‘career aspirations’.²¹³

In its interpretation of her refusals to apply for alternative employment the court held that:

[I]t must also be mentioned that when an employee is facing imminent retrenchment, the purpose of looking for alternatives is primarily to avoid that person losing their employment. It is in the nature of such an inquiry that the opportunities which might arise will not always be ideal or ones which the employee would have chosen. In this context, continued employment in a suitable alternative position is the primary goal of the exercise. If the available alternative is substantially commensurate with the grade of job and remuneration package previously received by the affected employee, they ought to seize the opportunity to obtain that position, even if they do not regard it as best suited to their talents or career aspirations. It will not be often that an alternative job on offer is not only similar or better to that of the redundant post, but also dovetails neatly with the employee’s longer-term career goals as well.²¹⁴

In this regard, the court appears to be in somewhat agreement that s 189(2) requirements have been met. The court placed emphasis on the suitable alternative position as a primary option employees have in these circumstances.²¹⁵ Furthermore, the court appears to be more sympathetic towards the respondent’s decision to offer alternative positions to the applicant and this may serve as a springboard not only for employers but for employees who find themselves in these

²⁰⁹ Ibid para 4.

²¹⁰ Ibid para 6.

²¹¹ Ibid para 4.

²¹² Ibid para 39.

²¹³ Ibid.

²¹⁴ Ibid para 40.

²¹⁵ Ibid.

circumstances.²¹⁶ Taking into account that retrenchment is an ‘unfortunate human challenge’²¹⁷ it seems illogical for employees to refuse alternative positions in the face of retrenchment. The court’s approach in interpreting the employee’s refusal to take the alternative offer of employment appears to be one-sided. The court does not adequately discharge its responsibility of assessing not only the reasonableness of the offer but the reasonableness of the refusal as well.²¹⁸ The court’s reluctance to question the employer’s decision to retrench has been a widely accepted practice.²¹⁹ While this approach seems logical at face value it has an inherent danger of giving employers an upper hand in assessing the fairness of operational requirements dismissals.²²⁰

In answering the question of whether one-on-one consultation occurred between the applicant and the respondent the court came to a conclusion that the main consultation took place with the union before meeting the employee, and it did not meet the requirements of s 189(3).²²¹ The one-on-one session was described as being nothing but ‘more of an explanatory session’ and this rendered the dismissals procedurally unfair.²²² Furthermore, the court held that the consultation process envisaged by s 189 is ‘a dual participatory one’.²²³ At this juncture, the court is making a declaration that when an opportunity to consult arises it is incumbent to the employee or their representative to engage.²²⁴ The employee and the employer were found to be at fault because of their unwillingness to engage in meaningful consultation.²²⁵ The former did not make any effort to engage with the bank while the latter approached the one-on-one consultation as a session to brief the employee on what was already concluded in a meeting with the union.²²⁶

²¹⁶ Ibid.

²¹⁷ Le Roux op cit note 62.

²¹⁸ Ibid.

²¹⁹ See *Discreto* case supra note 163 para 8; *Sampson v Truvelo Manufacturers (Pty) Ltd* 2019 (17) *ILJ* 81 para 17.

The courts have adopted this position because they believe that they are not sufficiently competent to tell employers decisions that could have been taken to avoid job losses.

²²⁰ N H Maenetje ‘Consultation versus negotiation in operational requirements: The COSATU proposals’ (2000) 21 *ILJ* 1526.

²²¹ Supra note 204 para 42.

²²² Ibid.

²²³ Ibid para 44.

²²⁴ Ibid 42

²²⁵ Ibid 43.

²²⁶ Ibid para 42.

3.3 SASBO v Standard Bank of South Africa

In *SASBO v Standard Bank of South Africa*,²²⁷ the union brought an urgent application before the court after they were unable to agree with a number of issues with the respondent, Standard Bank.²²⁸ The issues were whether or not, the bank should proceed with individual consultation process with the 11 remaining employees.²²⁹ Secondly, the applicant averred that the timetable for operational requirements dismissals adopted by the respondent was not bilateral as envisaged by the collective agreement concluded between the parties.²³⁰ SASBO sought an order compelling the respondent to comply with provisions of the LRA's 189A and Code of Good Practice on dismissals based on operational requirements.²³¹ Furthermore, the union sought an order restraining or interdicting the bank from what has been described by the court as an 'urgent process of consultation under exceptional circumstances'.²³² More specifically SASBO sought an order compelling the bank to disclose relevant information regarding alternative measures to avoid and mitigate retrenchment as well as engaging in a meaningful joint consensus-seeking process as required by the code.²³³

During the consultation phase, the point of departure was the contents of the collective agreement (Agreement on the handling of dismissals based on operational requirements).²³⁴ The respondent claims to have acted in a manner that is in line with the collective agreement, however, SASBO opines that there was no compliance with the requirements set in s 189(3).²³⁵ In its interpretation of compliance with s 189 in terms of the consultation, the court contended that the wording of the text implies that SASBO was closely monitoring the bank's behavior without engaging directly over areas of disagreement.²³⁶ The respondent went ahead to issue letters to the employees outlining the reasons for retrenchment and its intention to consult individual employees.²³⁷ The applicant did not show any willingness to stop the bank from going ahead with

²²⁷ *SASBO's* case supra note 36.

²²⁸ *Ibid* para 7.

²²⁹ *Ibid* para 5.

²³⁰ *Ibid*.

²³¹ *Ibid* para 2.

²³² *Ibid*.

²³³ *Ibid* para 3.

²³⁴ *Ibid* para 7.

²³⁵ *Ibid*.

²³⁶ *Ibid* para 19.

²³⁷ *Ibid* para 23.

the decision to issues letters.²³⁸ This lead to the court's conclusion that 'consultation is a two-way street, if the employee party to the consultations does not assert its rights at the appropriate time, the employer cannot be entirely blamed for shortcomings in the process'.²³⁹ The court concluded that:

[T]he achievement of a joint consensus-seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under s 189(1), (3), (5), (6), and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process. It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching an agreement on the issues discussed. These different possibilities depend on the facts of each particular case. The important implication of this is that a mechanical, 'checklist' kind of approach to determine whether s 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved.²⁴⁰

The court went a step further to reassert that the purpose of s 189A (13). It held that:

[T]he true value of the kind of interdict envisaged by section 189A (13) is that it provides employees with an opportunity to make sure that retrenchment consultations are properly conducted before retrenchments are implemented. Although claims for compensation as a result of an unfair procedure are still possible, where appropriate, the options of approaching the court on an urgent basis or of threatening strike action are ways of remedying defective consultation processes at the time such interventions can make a difference to the outcome.²⁴¹

The court's position here appears to be a reminder, particularly to employees that s 189A (3) was put in place to address the defects that may arise during the consultation phase. The court further makes a distinction between the short-term purpose and long-term purpose of s 189A.²⁴²

²³⁸ Ibid para 22.

²³⁹ Ibid para 25.

²⁴⁰ *Johnson and Johnson v Chemical Workers Industrial Union* 1999 (20) ILJ 89 (LAC).

²⁴¹ Supra note 227 para 28.

²⁴² Ibid para 29.

The former acts as a preventative measure of fostering proper consultation while the latter is concerned with examining the defects of the retrenchment process.²⁴³

3.4 SASBO V Nedbank Limited

More recently in a matter between *SASBO and Nedbank Limited*,²⁴⁴ the aggrieved applicant was saddened by the bank's failure to comply with provisions of s 189A (13).²⁴⁵ The applicant averred that the respondent failed to issue a notice as contemplated by s 189 (3) of the LRA before the commencement of the consultation process.²⁴⁶ The matter came before the court after the respondent embarked on a restructuring process, which rendered the applicant's senior position redundant.²⁴⁷ The employees whose jobs became redundant were invited to apply for new positions after the restructuring process was complete.²⁴⁸ The applicant's applications were unsuccessful.²⁴⁹ The applicant was then placed on what was termed 'operational redeployment pool' which was simply a declaration that if he is unable to find a new position within two months he will receive a months' notice of termination of employment.²⁵⁰ Eventually, the applicant was retrenched.²⁵¹

In its interpretation of whether the bank complied with s 189 (3) the court places emphasis on the relationship between fair labour practices and compliance with s 189. It was held that '...provisions of s 189 and s 189A have their roots in the constitutional right to fair labour practices as contemplated by s 23 of the constitution and in particular, the right not to be unfairly deprived of employment'.²⁵² The court employed a stricter approach in its evaluation of employer's compliance with procedural fairness requirements which rendered the dismissals unfair.

²⁴³ Ibid.

²⁴⁴ *SASBO v Nedbank Limited* 2020 (41) ILJ 500 (LC).

²⁴⁵ Ibid para 1.

²⁴⁶ Ibid para 2.

²⁴⁷ Ibid para 4.

²⁴⁸ Ibid para 6.

²⁴⁹ Ibid para 7.

²⁵⁰ Ibid para 9.

²⁵¹ Ibid para 9.

²⁵² Ibid para 16.

3.5 Lisa Joy Crowhurst v ABSA Bank

In *Lisa Joy Crowhurst v ABSA Investment Management (PTY) Limited*²⁵³ the applicant Miss Crowhurst held the position of a Marketing and Promotions consultant prior to the termination of the employment relationship.²⁵⁴ From the respondent's (ABSA Investment Management) perspective it appears that the termination of the employment relationship was a bilateral decision between them and the applicant.²⁵⁵ Whereas the applicant states that the termination of the employment relationship was dismissal.²⁵⁶ The applicant further states that she was told that there was no alternative employment they could offer her within the company.²⁵⁷ She was only offered two options, remaining in respondent's employ the entire month of June and receive two weeks' severance package, secondly to leave her job immediately.²⁵⁸

Due to disagreements in what exactly transpired, the court began its interpretation by looking at whether the applicant was indeed dismissed.²⁵⁹ In this regard, the court invoked s 192 of the LRA which provides that in dismissal disputes the employee bears the responsibility of proving the existence of dismissal and the employer's responsibility is to justify the fairness of the dismissals if there is such an existence.²⁶⁰ The court concurred with the applicant. Upon rendering the existence of dismissal, the respondent stated that it was substantively and procedurally fair because the applicant 'short-circuited' the consultation process by accepting the offers given.²⁶¹ The court found the applicant's dismissal procedurally unfair.²⁶²

The reasoning employed by the court was based on the fact the respondent's retrenchment was a 'fait accompli'.²⁶³ The court held that the dismissal was nothing but a confirmation of what the employer had planned before they consulted with the employee²⁶⁴ because the consultation

²⁵³ *Lisa Joy Crowhurst's* case supra note 36.

²⁵⁴ Ibid para 1.

²⁵⁵ Ibid para 4.

²⁵⁶ Ibid para 73.

²⁵⁷ Ibid para 12.

²⁵⁸ Ibid para 10.

²⁵⁹ Ibid para 72.

²⁶⁰ Ibid.

²⁶¹ Ibid para 78.

²⁶² Ibid para 78.

²⁶³ Ibid para 76.

²⁶⁴ Ibid para 78.

was started and finalized on the same day.²⁶⁵ In this regard, the court's position appears to be consistent with Grogan's findings that the test for adequate consultation requires the employer to provide employees and their representatives an opportunity to suggest ways in which retrenchments can be mitigated or reduced.²⁶⁶

3.6 Standard Bank Limited of South Africa v Angeli Letsoalo

In *Standard Bank Limited of South Africa v Angeli Letsoalo*²⁶⁷ the appellant's position became redundant due to the employer's operational requirements which have been described as 'worsening economic climate'.²⁶⁸ Prior to the commencement of the retrenchment process, the appellant was placed on redeployment for six months.²⁶⁹ After the employer had individual consultations with the affected employees, the appellant was given an opportunity to apply for various positions.²⁷⁰ All her applications were unsuccessful and she was offered another position as an account analyst which was at a lower grade.²⁷¹ The applicant rejected the offer and was eventually retrenched. The Labour Court found the dismissal procedurally unfair on the basis that Miss Letsoalo did not completely reject the offer, but presented a 'counter-proposal'.²⁷² The issues for determination in the present case involved examining whether the rejection of an offer for alternative employment constitutes procedural unfairness.²⁷³

In its interpretation on whether proper consultation has occurred the court concluded that the inquiry requires an extensive examination of facts on two principles.²⁷⁴ It was held that:

[.]..courts will not assist employees who refuse to accept reasonable alternative positions. The second is that courts will not find against employers who provide a reasonable explanation for not accepting alternatives proposed by employees or their trade unions.²⁷⁵

²⁶⁵ Ibid.

²⁶⁶ Grogan op cit note 37 at 430.

²⁶⁷ *Standard Bank Limited of South Africa v Angeli Letsoalo* (LAC) unreported case no J17/2014 of 27 July 2016.

²⁶⁸ Ibid para 2.

²⁶⁹ Ibid para 3.

²⁷⁰ Ibid para 4.

²⁷¹ Ibid para 4.

²⁷² Ibid para 15.

²⁷³ Ibid para 1.

²⁷⁴ Ibid para 19.

²⁷⁵ Ibid para 19.

The court's disinclination in examining the employee's counter proposal and reasonable salary deduction leaves a lot to be desired. Consultation has been described as a 'two-way street', this places a duty for both parties to look into all the alternatives on the table.²⁷⁶ This has been emphasized by some scholars who opine that the test for adequate consultation is determined by whether employees or their representatives have been given an opportunity to air out their concerns and suggest ways to avoid retrenchment.²⁷⁷ The court's averments that Miss Letsoala's stance constituted 'unequivocal rejection of the offer'²⁷⁸ appears to be incongruent with principles of natural justice as identified by Grogan.²⁷⁹ The court erred in its interpretation of employees' refusal to take the offer, it does not appear why the reasonableness of the offer is assessed from the employer's point of view. The assessment of the reasonableness requires an examination of the 'reasonableness of the offer and reasonableness of the refusal'.²⁸⁰ Furthermore, the court's approach fails to take into consideration item 11 of the Code. It provides that:

[R]easonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee's refusal. In the first case, objective factors such as remuneration, status, and job security are relevant. In the second case, the employee's personal circumstances play a greater role.²⁸¹

It has been argued that one potential reason why employees would refuse alternative employment is a substantial reduction in salary.²⁸² The LAC in *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union*²⁸³ echoed a similar sentiment where it held that it would be unreasonable to reject an alternative offer in circumstances where redundancy is necessitated by economic difficulties.²⁸⁴ In the present case,

²⁷⁶ Le Roux op cit note 62.

²⁷⁷ Grogan op cit note 37.

²⁷⁸ Supra note 267 para 25.

²⁷⁹ Grogan op cit note 37. Principles of natural justice reflect the 'fundamental notion of fairness, these principles seek to ensure that such decisions are taken only after fair and equitable procedures have been followed.' See Zimbabwe Legal Information Institute 'Natural Justice' available at <https://zimlil.org/content/natural-justice>, accessed on 01 November 2020.

²⁸⁰ Le Roux op cit note 62 at 157.

²⁸¹ Item 11 of the Code of Good Practice.

²⁸² Le Roux op cit note 62 at 158.

²⁸³ *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union* 2014 (35) ILJ 140 (LAC).

²⁸⁴ Ibid.

no evidence suggests that the employer was facing any financial difficulties to warrant employees' salary reduction of more than 20 percent.²⁸⁵

3.7 SASBO v ABSA Bank

In a matter between *SASBO v ABSA Bank*,²⁸⁶ the respondent reorganised its business. The departments that were restructured were Home Loans, Vehicle, and Finance as well as the Collections department. The purpose of the restructuring was to centralise the operation and increase profits.²⁸⁷ The restructuring process was governed by the collective agreement which regulated consultation, selection criteria to be used and alternatives to be considered.²⁸⁸ The applicant's case rested on two arguments. Firstly the applicant believed that the consultation was superficial. Thus there was no substantive, consensus-seeking engagement as contemplated by 189 (3) or the collective agreement.²⁸⁹ Secondly, they argue that the consultation process was one-sided because the respondent unilaterally decided to close its offices and issued a termination of employment letters to affected employees.²⁹⁰

The thrust of the applicant's argument was that the reason for the respondent's decision to restructure was to increase profit margins therefore there was no need to proceed with 'undue haste'.²⁹¹ In this case, they placed substantial reliance on the *Van Royeen* where the court held that in circumstances where the employer restructures the businesses to increase profit the process must have reasonable timeframes.²⁹² The court held that the employer's decision to render jobs redundant precludes it from coming up with an honest way of determining a fair criteria.²⁹³ While the court acknowledged this, it still maintained that the redeployment and reassignment of individual employees were still pending.²⁹⁴ In its interpretation of the above-stated facts, the court held that the applicant failed to demonstrate what affected employees could potentially suffer if the relief is not granted.²⁹⁵ With regards to the respondent's prayers, the court held that the

²⁸⁵ Supra note 267 para 8.

²⁸⁶ *SASBO v ABSA Bank* 2011 (12) BLLR 1232 (LC).

²⁸⁷ Ibid para 1.

²⁸⁸ Ibid.

²⁸⁹ Ibid para 22.

²⁹⁰ Ibid.

²⁹¹ Ibid para 26.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid para 28.

²⁹⁵ Ibid para 31.

application cannot be upheld due to the financial constraints that may arise if the applicant was granted relief. This was because the restructured departments were already closed.²⁹⁶

In its interpretation of the role played by the union in the consultation process, the court held that the employer cannot be found guilty because the union had an opportunity to engage the union substantively about the restructuring process.²⁹⁷ The court's position cautions unions and employees that employers cannot be held accountable where a union plays a role in thwarting the consultation process.²⁹⁸ The application was dismissed and no relief was granted, the employer had to determine the course of the proceedings.²⁹⁹ The court's position leaves a lot to be desired, this is because it does not interrogate the totality of the employer's efforts in mitigating dismissals. While it is clear that the union played a role in preventing the progress of the consultation phase³⁰⁰ it was reasonably expected for the employer to consult individual employees.

Having discussed how courts have handled operational requirements disputes the following section will analyse the findings from these cases. The section will draw analysis by looking at whether the requirements of s 189 have been met and whether the court's interpretation of appropriate measures aligns with the intended purpose of the provision of s 189.

3.8 Analysis of the case law findings

Since the promulgation of the Act, the interpretation of s 189 in the context of operational requirements dismissals has evolved over the years.³⁰¹ Traditionally the courts have exhibited a substantial level of deference to the employers' right to operate and run the business as it saw fit.³⁰² This approach was criticized for its lack of concern in the 'human cost associated with retrenchments'.³⁰³ Post 1995 the yardstick of determining the fairness of operational requirements dismissals became stricter with courts requiring the cause of the dismissals and the interpretation of the facts upon which the fairness of the reason to dismiss can be made.³⁰⁴

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Ibid para 40.

³⁰⁰ Ibid para 31.

³⁰¹ Cohen op cit note 174.

³⁰² See Le Roux op cit note 62; *Atlantis Diesel* case supra note 154.

³⁰³ Le Roux op cit note 62.

³⁰⁴ Supra note 163.

However, there appears to be a shift in how the courts have been interpreting operational requirements dismissals. The cases cited above in the banking industry are a testament to the claim that the courts are no longer inclined to question the rationale of the employer's decision to retrench, and instead, they are preoccupied with evaluating the substantive and procedural requirements of operational requirements dismissals. Case law appears to be replete with incidences where the court cautions itself against 'second-guessing the commercial or business efficacy of the employer's ultimate decision'.³⁰⁵

It has become trite that an employer's unwise conduct and poor business decisions cannot be a basis to justify unfairness in dismissals.³⁰⁶ This approach appears to be rational at face value but in the context of cited cases above, it lacks merit. One component that is inherently wrong with the court's deference in the employer's decision is that it seeks to legitimise bad decisions that are taken by the employer as a justification for dismissal. While it appears logical that the court is not sufficiently competent to judge the appropriateness of the business decisions taken by employers, they must exercise this managerial prerogative fairly.³⁰⁷

In *Lisa Joy Crowhurst* the applicant was dismissed less than a year after she received skills training at the expense of the employer.³⁰⁸ The employer's decision to offer training and career courses to invest in the employee leaves a lot to be desired because the skills the employee received became redundant in less than a year. While the court acknowledged that the applicant was successful in discharging the onus of proving the unfairness of the dismissal and ordered compensation,³⁰⁹ the decision appears to be unjust given the circumstances. Given that the applicant was not informed about the alternative positions that were similar to the one she had before dismissal it would be prudent for the court to order reinstatement.³¹⁰ The court fails to discharge the rationale behind its decision to order compensation, not reinstatement which is a primary remedy for unfair dismissals as envisaged by s 193(1)(a) of the LRA.

³⁰⁵ Ibid para 8.

³⁰⁶ Grogan op cit note 37 at 120.

³⁰⁷ Chris Todd & Graham Damant 'Unfair Dismissal – Operational Requirements' (2004) 25 *ILJ* 896.

³⁰⁸ Supra note 253 para 36.

³⁰⁹ Ibid para 83.

³¹⁰ Ibid para 18.

It must be borne in mind that the employer had indicated prior to the dismissal that there was no likelihood to find an alternative position for the employee.³¹¹ This case appears to be an illustrative example of an employer who embarks on a restructuring exercise for the purpose of getting rid of unwanted employees. Some scholars have cautioned courts from adopting this position because it leaves the task of determining the fairness of dismissals to the employer.³¹² Considering that the alternative positions that were not disclosed to the employer were similar to the position he held before, it seems logical that there was something the employer could have done to prevent dismissals such as the redesigning of job descriptions which have been accepted as a legitimate solution for avoiding retrenchments.³¹³

The discussion of fairness in operational requirements dismissals would not be complete without mentioning the principal objectives of the LRA. The Act seeks to advance labour peace, economic development, fair labour practices, and social justice.³¹⁴ Recognising the significance of distributive justice is a key component at arriving at a better understanding of fairness and social justice in retrenchments. This is because retrenchments bring a drastic impact on the worker's livelihoods.³¹⁵ Distributive justice concerns itself with 'ends achieved or the perceived fairness of the outcome of the decisions'.³¹⁶ The ethos of this definition appears to be in tandem with LRA's stated purpose.

What has been fleshed out in the above cases is that the decisions that have been taken in dismissing employees do not reflect justice from an employees' perspective and this is a testament the court's position is most likely to hamper the LRA's mission to achieve social justice. This observation is made in the context of South Africa's constitutional objective of attaining social justice.³¹⁷ This places a need for the courts to play a significant role in ensuring the progressive realisation of the employee's collective wellbeing. Rather than playing a 'monitoring role',³¹⁸ in the retrenchment process, the courts have to judge the actions of relevant parties such as the

³¹¹ Ibid para 12.

³¹² Todd & Damant op cit note 307.

³¹³ Supra note 82.

³¹⁴ See the Preamble of the LRA.

³¹⁵ Mark Harcourt, Maureen Hannay & Helen Lam 'Distributive justice, employment-at-will and just-cause dismissals' (2013) *Journal of Business Ethics* 311-325.

³¹⁶ Paul Andries Smith 'Organisational perceptions in dismissal disputes' (2012) 29 *Management Today* 1.

³¹⁷ See the Preamble of the Constitution.

³¹⁸ Grogan op cit note 37.

employees and employers in terms of how they contribute to the overall well-being of the society,³¹⁹ this is important because distributive justice has ‘community-wide implications’.³²⁰

Additionally, it is significant to note that the desire for job security does not only emanate from the need to be financially stable but it is interwoven with an individual’s craving for dignity and self-worth in the community.³²¹ Given South Africa’s high unemployment rates it is imperative that employment security remains a priority not only for the courts but for other role-players as well such as unions, employees, employers, and organisations representing employers. In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others*³²² the court emphasised that the achievement of social justice and fairness requires employers to understand that one’s work goes beyond one’s desire for financial security. In this regard the court reasoned as follows:

[L]abour is not a tradable innate object but an activity of human beings. Unlike a commodity, it cannot be bought or sold on the market without regard to the inseparable connection it has to the individual who produces it: it is integral to the person of a human being and intimately related to the skills, experience, qualifications, personality, and life of that person. It is the means through which human beings provide for themselves, their dependents, and their communities; a way through which they interact with others and assert themselves as contributing members of society; an activity through which to foster spiritual wellbeing, to enhance their abilities and to fulfil their potential. All these elements must be brought into the equation of labour relationships if social justice and fairness are to be achieved at the workplace; if social security, stability, and peace are to be maintained. Employees may be subordinate to their employers in employment relationships but that does not mean that they are lesser beings or that they do not have equal rights and freedoms as such.³²³

Before proceeding to examine interventions and practices that can be utilised to address the problems identified in this chapter, it is necessary to look at the appropriate measures to

³¹⁹ Mbazira, C ‘Appropriate, just and equitable relief in socio-economic rights litigation: the tension between corrective and distributive forms of justice’ (2008) *SALJ* 125 at 71.

³²⁰ *Ibid.*

³²¹ Gilabert, Pablo ‘Labour human rights and human dignity’ (2016) 42 *Philosophy & Social Criticism* at 171-199. The author argues that this is a pressing concern for employees living in unstable economic environment or where there is high unemployment.

³²² *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* SA 51/2008.

³²³ *Ibid* para 70. The court’s reasoning remains relevant in the South African context, see *Dyokhwe v De Kock NO and Others* 2012 (33) *ILJ* 2401 (LC) the Labour Court placed substantial reliance on this principle.

mitigate operational requirements dismissals. The following section will achieve this by examining the implications s 189 have in the interpretation of the right to fair labour practices.

3.9 Appropriate measures to minimise dismissals

The LRA gives content to the constitutional right to fair labour practices as contemplated s 23 (1) of the constitution. It has become trite that the provisions of the LRA that regulates dismissals must be construed squarely within s 23(1) because employees have a right not to be unfairly dismissed.³²⁴ The reasoning employed by the Constitutional Court's judges in *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others*³²⁵ throws light on three elements that make up fair labour practice. These include 'the scope of the right itself, the concept of a labour practice itself, the concept of labour practice and the concept of fairness'.³²⁶ The scope of the right covers the interests of both employers and employees, labour practices include security of employment and fairness deals with the right not to be unfairly dismissed.³²⁷ The court held that the examination of fair labour practices from a constitutional perspective must be brought to bear the understanding of section 189(1) in its statutory context.³²⁸ This is a way of balancing the interests of both parties.³²⁹

Section 193 (2) of the LRA places a responsibility on Labour Courts and arbitrators to compel employees to reinstate or re-employ employees who have been unfairly dismissed unless it is no longer reasonably practicable to do so.³³⁰ The need for reinstating employees was confirmed in *National Education Health and Allied Workers' Union v University of Cape Town*³³¹ where the court held that 'security of employment is the core value of the LRA'.³³² The consideration of possible alternatives to avoid dismissals has been found to be the hallmark of section 189A.³³³ To supplement this the Constitutional Court in *SACCAWU* raised a cautionary flag where it considered

³²⁴ Supra note 186 para 58.

³²⁵ Ibid para 50.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid para 53.

³²⁹ Ibid.

³³⁰ While reinstatement is not defined in the LRA, it refers to the act of putting back the employee in the same position he/she occupied prior to the dismissal. See *Equity Aviation Services v CCMA* 2008 (29) ILJ 25 67 (CC) para 36.

³³¹ *National Education Health and Allied Workers' Union v University of Cape Town* 2003 (2) BCLR 154 (CC).

³³² Ibid para 42.

³³³ Supra note 164 para 37.

the failure to exhaust possible alternatives as a breach of s 189A of the LRA.³³⁴ It has been argued that the evaluation of proper remedies requires a more stringent approach, this is because non-compliance with the provisions of the LRA regulating operational requirements dismissals poses grave challenges to the livelihoods of those affected.³³⁵

3.10 Concluding remarks

The chapter has articulated how the courts have adjudicated retrenchments within the banking sector. What has been reflected is that operational requirements dismissals within the sector are necessitated by restructuring which often happens when employers implement technological changes in the workplace to remain competitive. Provisions that require employers to offer employees alternative positions have proved to be less cogent in addressing dismissals. Secondly, the redeployment of redundant employees does not mitigate dismissals because employers are not legally obligated to do so. The following chapter will draw an analysis of possible interventions such as the use of collective bargaining, redeployment, and skills development. These interventions in foreign jurisdictions will inform the recommendations to address these gaps.

³³⁴ Ibid.

³³⁵ Van Eck & Kujinga op cit note 10.

CHAPTER 4: BEST PRACTICES TO MITIGATE THE OPERATIONAL REQUIREMENTS DISMISSALS

4.1 Introduction

This chapter explores practices and interventions in foreign jurisdictions that have been put into operation to curb the loss of jobs. The practices discussed are derived from France, Australia, the United States of America, and Singapore. The choice of these countries is justified by the existence of legal reforms and interventions that have been put into practice to reduce faultless dismissals. A cursory examination of these legal reforms and interventions reflects extensive protection they offer to employees as well as prospects of reskilling and training. The chapter provides an overview of these practices, seeking to extrapolate lessons that can be applied in South Africa. Specifically, the chapter examines the role that can be played by various social actors in preventing dismissals including the role of employers, government, industry leaders, and trade unions. To minimise the disruptions and potential job losses brought by innovation and technology the following sections will consider interventions and practices relating to collective bargaining, redeployment as well as skills development and training.

The negative impact that has been brought by technological developments and related changes in the world of work has become a lived reality not only to South African employees but around the world.³³⁶ To address these challenges it is contended that there is a need for reforms and it is not only a responsibility for employers but governments, labour market, and policymakers as well as the courts in terms of oversight and compliance.³³⁷ In this regard, the World Economic Forum has contended that employers across all industries and sectors have a responsibility to ‘formulate a comprehensive workforce strategy in order to keep up with this era of innovation’.³³⁸

4.2 Developments in collective bargaining

4.2.1 Importance of collective bargaining

It has been argued that the gains and hardships that arise from retrenchments should be left in the ‘realm of collective bargaining’.³³⁹ This is true considering that the involvement of employers or

³³⁶ World Economic Forum ‘The Future of Jobs report 2018’ (2018) *Centre for the New Economy and Society*.

³³⁷ WEF op cit note 47.

³³⁸ Ibid.

³³⁹ Clive Thompson ‘Bargaining, business restructuring and the operational requirements dismissal’ (1999) 20 *ILJ* 755 at 769. This appears to work in the presence of a strong collective culture.

employer's organisations and trade unions has been identified as a cardinal aspect in the development of the economy and negotiated outcomes that strike a balance in the interests of all parties.³⁴⁰ Some scholars have contended that collective bargaining can play an important role in mitigating dismissals because the operational requirements of a business are a question that does not require a legal answer but an economic one.³⁴¹

Collective bargaining has been identified as a key instrument in dealing with the restructuring of companies, reskilling, and wage adjustments.³⁴² Some studies have confirmed that most trade unions prefer to have operational requirement dismissals procedures stipulated in collective agreements.³⁴³ This is because it gives them power and control over the content of the guidelines.³⁴⁴ Similarly, France has widely accepted collective bargaining not only as a mechanism of regulating salaries, benefits, and working conditions but rather encouraged as a vehicle of 'establishment of job forecasting and skills'.³⁴⁵ Employment problems arising from organisational restructuring must find answers in the negotiation table between company management and unions.³⁴⁶

Collective bargaining can be classified into two categories, integrative collective bargaining, and distributive collective bargaining. Integrative bargaining concerns itself with finding a balance between the interests of the employer and employee when dealing with disputes³⁴⁷ whereas distributive bargaining occurs when 'one party's gain is a loss to another party'.³⁴⁸ Integrative bargaining has been described as a win-win bargaining table in which parties present their concerns frankly and it aims to identify a problem by considering both parties' points of view and needs.³⁴⁹ Integrative bargaining often occurs in circumstances where the organisation

³⁴⁰ Vera Glassner & Maarten Keune 'Negotiating the crisis? Collective bargaining in Europe during the economic downturn' (2010) 10 *Dialogue working paper*.

³⁴¹ Thompson op cit note 339.

³⁴² Glassner & Keune op cit 340.

³⁴³ Emmenegger, Patrick 'Maximizing institutional control: Union power and dismissal protection in Western Europe in the first half of the twentieth century' (2015) 47 *Comparative Politics* 4 at 399-418.

³⁴⁴ Ibid.

³⁴⁵ Alexander Fabre 'Negotiation of restructuring plans' (2010) *Institute of Social Sciences of Labour in the West*.

³⁴⁶ Emmenegger op cit note 343.

³⁴⁷ Paul Boyce 'Types of Collective Bargaining' available at <https://boycewire.com/collective-bargaining-definition-types-and-examples/>, accessed on 15 November 2020.

³⁴⁸ See Eugénia Da Conceição-Heldt 'Integrative and Distributive Bargaining Situations in the European Union: What Difference Does It Make?' (2006) 22 *Negotiation Journal* at 145-165. This type of collective bargaining is not encouraged because it does not level the playing field in the employment relationship.

³⁴⁹ Boyce op cit note 347.

is willing to disclose company information that falls within its prerogative such as the implementation of changes that may affect the workplace and its employees.³⁵⁰ This type of bargaining has been important particularly in job creation, boosting competitiveness, and safeguarding employment.³⁵¹ The authors point out that integrative bargaining is not only necessary in saving ailing organisations but ensuring long-term development as well.³⁵²

The practice of using collective bargaining as a mechanism of curbing job losses has become a widely applied practice, in 2000, AXA a French company embarked on a restructuring exercise to increase productivity and efficiency.³⁵³ The company rejected retrenchment as a way of dealing with the problem because of the difficulties associated with justifying retrenchment on legal terms.³⁵⁴ Therefore the company and the unions entered into an agreement where it committed itself not to retrench employees but rather promote mobility in which training and professional guidance can be fostered.³⁵⁵

4.2.2 Legal reform in France

More recently in France, the Parliament approved a reform that permits social partners such as employers and trade unions to enter into an agreement regulating wage deductions, working overtime deductions in exchange for job security.³⁵⁶ The dismissal of employees based on operational requirements in France is governed by Article L1233-3 of the Labour Code which provides that economic reasons may range from economic difficulties the employer may face or implementation of technology that may result in organisational restructuring. The Code offers flexibility for organisations to negotiate ways of consulting employee representatives on organisational strategy and its foreseeable effects on employment.³⁵⁷ It involves the planning of jobs and skills assessment.³⁵⁸ These laws were established to bring relevant stakeholders together

³⁵⁰ Roland Ahlstrand 'Integrative strategy, competitiveness and employment: A case study of the transition at the Swedish Truck Manufacturing Company Scania during economic downturn in 2008-2010' (2015) 36 *Economic and Industrial Democracy* 3 at 457-477.

³⁵¹ Ibid.

³⁵² Pierre Garaudel, Florent Noel & Garaldine Schmidt 'Overcoming the risks of restructuring through the integrative process: Two case studies in a French context' 61 *Human Relations* 9.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ OECD 'Protecting jobs, enhancing flexibility: A new look at employment protection legislation' (2013) *OECD Employment Outlook*.

³⁵⁷ Article L2254-2 of the France Labour Code.

³⁵⁸ Ibid.

in mitigating the effects of retrenchments.³⁵⁹ In this case, collective bargaining allows social partners not to wait for employment problems to arise but rather to ‘anticipate them in order to better face them’.³⁶⁰

The mechanism of preserving jobs in the face of restructuring was also tested in Robert Botsch, Venissieux site.³⁶¹ The management of the company restructured the operations of the organisation.³⁶² This meant that some of their production plants would relocate to Czech Republic.³⁶³ To avoid this and preserve jobs unions representing employees entered into an agreement with the employer that reduced the employee’s salary by 12% and a further 25% decrease in night hours as well as the elimination of bonuses and incentives.³⁶⁴

The Labour Code goes a step further to protect employees on economic and operational requirements dismissals. It provides that employers are only eligible to dismiss employees only when training and adaptation efforts have taken place.³⁶⁵ In this regard, it provides that:

[D]ismissal for economic reasons of an employee can only take place when all training and adaptation efforts have been made and the reclassification of the person concerned cannot be carried out on the available jobs, located on the national territory in the company or other companies of the group of which the company is part and of which the organization, activities or place of operation ensure the rotation of all or part of the staff.³⁶⁶

In this case, it is incumbent upon the judges of the court to be satisfied that efforts have been made to reclassify the affected employees. This has been found to be a substantial obligation employers have to perform before the dismissal takes place.³⁶⁷

³⁵⁹ Fabre op cit 345.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid. These agreements are often referred to as ‘employment preservation agreements’.

³⁶⁵ Article L1233-4 of the French Labour Code.

³⁶⁶ Ibid. Article L321-4-1.

³⁶⁷ Jean-Yves Kebouch ‘Anticipation of restructuring put to the test of labour law’ (2007) *Travail et Emploi*.

4.3 Redeployment

4.3.1 *The position in South Africa*

It has become evident in the previous chapter that employers have identified redeployment of redundant employees as a way of avoiding job losses.³⁶⁸ However, what is inherently problematic about the use of redeployment in South Africa is that it has become a ‘stratagem’ to disguise a practice of getting rid of employees as retrenchment.³⁶⁹ This is because employers have been redeploying employees in positions where they are less qualified.³⁷⁰ In some cases, they are told to apply for existing positions within the company or the positions that become available after restructuring. Yet again they do not get any preferential treatment in the selection process.

4.3.2 *Developments and legal reform in Australia*

In Australia, the Fair Work Act of 2009 was promulgated and one of the pressing concerns it addresses involves compelling employers to find alternative positions for redundant employees.³⁷¹ Under the Act, dismissal of an employee on account of employee’s operational requirements may amount to unfair dismissal in circumstances where a redundancy does not meet the definition of ‘genuine redundancy’.³⁷² Section 389 of the Act provides that employer’s dismissals may fall under the ambit of ‘genuine redundancy’ in circumstances where it would have been reasonable for the employee to be redeployed within the employer’s organisation or an organisation associated with its entity.³⁷³ A number of scholars believe that the promulgation of this Act was a step towards ‘balancing job security and managerial prerogative’.³⁷⁴

In *Ulan Coal Mines v Honeysett*³⁷⁵ the Full Bench held that the primary question posed by s 389(2) is whether redeployment was reasonable at the time of the dismissal. The question requires an evaluation of relevant factors such as qualifications, skills, remuneration, location, employee’s residence, experience, and the nature of the job.³⁷⁶ In responding to this question it was held that

³⁶⁸ See *Nedbank Limited* case supra note 244 & *Angeli Letsolo* case supra note 267.

³⁶⁹ *Standard Bank of South Africa* case supra note 227.

³⁷⁰ See *Standard Bank of South Africa* case ibid & *Nedbank Limited* case supra note 244.

³⁷¹ Section 389 of the Fair Work Act of 2009.

³⁷² See section 389 of the Fair Work Act of 2009; Kelsey Davis *A Critical Analysis of Genuine Redundancy Cases under the Fair Work Act of 2009* (Honours thesis, Australian National University, 2014).

³⁷³ Peter Sheldon & Louise Thornthwaite ‘Employer and employer association matters in Australia in 2012’ 55 *Journal of Industrial Relations* 3 at 397-414.

³⁷⁴ Ibid. This is also one of the Fair Work Act’s stated objectives.

³⁷⁵ *Ulan Coal Mines LTD v Honeysett* (2010) 199 IR 363.

³⁷⁶ Ibid.

redeployment would be reasonable where the employee could acquire the required skills for the new position with minimal training.³⁷⁷

Furthermore, the Full Bench's decision in *Skimmer Ors v Asciano Services LTD Pacific National Bulk*³⁷⁸ outlines some factors that have to be taken into account when examining whether an employer did what is considered 'reasonable in the circumstances'. The case involved drivers whose jobs became redundant and were subsequently dismissed.³⁷⁹ The Full Bench held that the dismissal of employees did not meet the requirements of s 389(2) because the employer had employees who were doing the same jobs with the same responsibilities in his employ.³⁸⁰

4.4 Training and skills development

Training and skills development have been identified as central pillars of employability not only for job seekers but for existing workforce as well.³⁸¹ Development of skills is a strategic vehicle in addressing the demands that may arise from new technologies.³⁸² In the United States, both the government and the private sector have played a significant role in training workers through various initiatives.³⁸³ These initiatives have been focused on providing 'employment-focused programs' which are developed in collaboration with various players in the industry such as employers and unions.³⁸⁴ While training directly benefits employees, studies have proved that organisations always recapture the costs of training employees.³⁸⁵ This often happens through high work engagement, worker productivity, and efficiency.³⁸⁶

The United States case study appears to be a textbook example of how different social partners have stretched resources in an attempt to address redundancy amongst employees. Skills development in the United States is governed by the Workforce Investment Act of 1998.³⁸⁷ The

³⁷⁷ Ibid.

³⁷⁸ *Skimmer Ors v Asciano Services LTD Pacific National Bulk* (2017) FWC 574.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ International Labour Conference 'Conclusions on skills for improved productivity, employment growth and development' (2008).

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Mark Muro, Robert Maxim & Jacob Whiton 'Automation and artificial intelligence: How machines are affecting people and places' (2019) *Brookings*.

³⁸⁶ Ibid.

³⁸⁷ David Bradely 'The Workforce Investment Act and the One-stop delivery system' (2013) *Paper prepared for members and committees of Congressional Research Service*.

Act is a primary tool that promotes workforce development through education and training to increase prospects of getting better opportunities in the labour market.³⁸⁸ A grant system was created in which funding is disbursed to partnerships that are created between employers and training providers.³⁸⁹ The authors believe that the establishment of the grant systems has facilitated access to skills development which remains a key component in assisting employees transition from traditional jobs to meet the demands of today's world of work.³⁹⁰

In Singapore, a portal named 'My Skills Future Portal' was established by the government to offer workers resources that can help them understand the labour market and training opportunities.³⁹¹ The portal was established to instill not only a learning culture but also to prepare workers for future jobs particularly those at risk of retrenchments.³⁹² Employers and industry players including employer organisations and trade union associations play a key role in the identification of skills gaps and the development of the program's initiatives.³⁹³ This often happens at the industry level where employers participate in an 'Industry Transformation Maps and Skills Framework' which provides information on certain skills required in specific occupations.³⁹⁴ Studies have confirmed that since the establishment of 'MySkills Future Portal' approximately 500 000 employees and more than 12 000 employers have benefited in 2018.³⁹⁵

It has been contended that trade unions can play an important role in developing training mechanisms and fostering a culture of learning in their members.³⁹⁶ At sectoral level, it has been argued that unions have a role to play in the identification of skills and training and communicate opportunities to workers.³⁹⁷ In some instances, unions have embarked on an exercise of setting up learning committees in their structures to promote skills development.³⁹⁸ This engagement of

³⁸⁸ Ibid.

³⁸⁹ Greenstone M & Looney A 'Building America's job skills with effective workforce programs: A training strategy to raise wages and increase work opportunities' (2011) *Brookings Institution*.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Michael Fung 'Developing a Robust System for Upskilling and Reskilling Workforce: Lessons from the Skills Future Movement in Singapore' in Brajesh Panth and Rupert Maclean *Anticipating and Preparing for Emerging Skills and Jobs: Key Lessons, Issues, Concerns and Prospects* (2020).

³⁹⁴ Ibid. Industry Transformation Maps and Skills Framework is a collective effort by stakeholders such as unions, companies and government agencies.

³⁹⁵ Ibid.

³⁹⁶ Greenstone & Looney op cit note 389.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

unions has been found to be a key ingredient in skills identification and development which in turn stimulates significant levels of employer investment.³⁹⁹

In Singapore, the National Trade Union Congress⁴⁰⁰ established institutions under its jurisdiction such as SkillsFuture Singapore Agency and the Workforce Singapore Agency which play a major role in the identification of skills and development of training programs. In some countries, an extra layer of protection has been added in circumstances where employees are dismissed due to retrenchments. For instance, the Labour Code precludes employers from dismissing employees for economic reasons unless an employer has provided training to place the employee within the company.⁴⁰¹

4.5 Conclusion

The chapter has reflected on the extent to which that collective bargaining, redeployment, and training and skills development can play an integral role in mitigating faultless dismissals. The success of these interventions requires relevant stakeholders such as employers, employees, unions, and the government to work together. The lessons extrapolated from this chapter will inform the recommendations in the following chapter.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid. This is a national confederation of trade unions in Singapore.

⁴⁰¹ See the French Labour Code of 2017 as amended.

CHAPTER 5: CONCLUSION, KEY FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This chapter will highlight the key findings, provide recommendations based on the findings, and will conclude the study. Specifically, the section will throw light on what the study uncovered in the regulatory framework for operational requirements, banking industry case law, and as well as best practices and interventions. As explained in the introduction the chapter will provide recommendations in respect to s 189 of the LRA.

5.2 Study overview

This dissertation in chapters 2 and 3 has provided an analysis of the effectiveness of the provisions of s 189 in mitigating dismissals, and how the courts have adjudicated operational requirements dismissals. In chapter 4 developments and best practices in preventing operational requirements dismissals are considered. The formulation of policies and strategies to address challenges that arise in operational requirements dismissals remains a priority for relevant stakeholders in the world of work.⁴⁰²

Technology induced job retrenchments have become a lived reality for employees.⁴⁰³ This sad reality has been exacerbated by COVID-19 which has accelerated the arrival of technology driven changes.⁴⁰⁴ Given the value technologies and robots present, it is imperative that employees, employers, and trade unions must draft an invested approach in dealing with retrenchments.⁴⁰⁵

5.3 Statutory findings

What has to be stressed is that the test for determining fairness regarding substantive and procedural requirements has evolved over time, as the LRA does not set out detailed guidelines and it has been left out to the courts.⁴⁰⁶ The test for both requirements has resulted in a shift from an abstentionist approach to an interventionist approach. What has been fleshed out from the regulatory framework for retrenchments is that the evaluation of the totality of an employer's

⁴⁰² Garaudel op cit note 352.

⁴⁰³ WEF op cit note 336.

⁴⁰⁴ Choi op cit note 48.

⁴⁰⁵ WEF op cit note 336.

⁴⁰⁶ Hokwana op cit note 63.

efforts in mitigating dismissals remains a cardinal aspect in the assessment of both substantive and procedural requirements.⁴⁰⁷

5.4 Banking sector case law findings

A concerning observation is how the courts have accepted the provision of alternative positions, without further scrutiny, as a way of mitigating operational requirements dismissals. The inherent danger of this practice is that the court does not adequately discharge its responsibility of assessing the reasonableness of the offers given to employees. The principles contained in the judgements considered in chapter 3 reflect a plethora of problems that may arise since the fairness of operational requirements dismissals is left at the hands of the employer.⁴⁰⁸ Secondly, the provision of alternative positions has largely been used as a ‘stratagem’, this is because this practice occurs in circumstances where an employer is told to apply for a position that he/she does not qualify for.⁴⁰⁹

While the yardstick for determining fairness has become stricter in the last few years, there is still room for improvement in aligning the position of the courts and employers with the LRA’s stated objectives. There appears to be a gap between the attainment of social justice as envisaged by the preamble of the LRA and the formulation of legislative interventions to address related problems. The achievement of social justice in the context of retrenchments remains an elusive dream. This is true considering that retrenchment not only poses a threat to the livelihoods livelihood threatening challenges to affected employees but also the fact that job security is closely linked to an individual’s desire for dignity and self-worth.⁴¹⁰

5.5 Key findings in best practices

What the study reveals is that development in skills and training, collective bargaining, redeployment as well as strong employment protection legislation are key instruments in mitigating retrenchments. The interventions and practices identified in the study are by no means a panacea for all the labour market ills that arise from faultless dismissals however they serve as a springboard towards the realisation that solutions can come from a collective effort. The call by

⁴⁰⁷ Grogan op cit note 37.

⁴⁰⁸ Maenetje op cit note 220.

⁴⁰⁹ Supra note 227.

⁴¹⁰ Supra note 322 para 70.

the World Economic Forum to formulate a strategy to keep up with the changes of today's workplace must remain a priority of the agenda.⁴¹¹

5.6 Recommendations

In respect of the consultation process envisaged by s 189 (1), the study proposes that it must occur at least 24 months before the introduction of technology takes place, particularly in circumstances where the motive to retrench is profit. At the same time, it is recommended that the S 189 must place an obligation on employers and employees to collectively bargain and determine ways to deal with operational requirements dismissals. These observations are made in realisation that restructuring and introduction of technology in the workplace is often necessitated by internal changes. In such circumstances fairness dictates that employers are in a position to contemplate changes and they can take measures to prevent widespread job losses. As stated earlier, the courts have established the rule that in operational requirements dismissals driven by the desire to make profit there is no need for employers to make hasty decisions because time is not a critical factor.

In light of seeking alternative employment for redundant employees, the study proposes that s 189 (2)(a) must be amended, specifically to require employers to redeploy employees within the organisation or elsewhere before they terminate the employment relationship. This proposal is grounded in the appreciation that redeployment has been used by employees to conceal their lack of commitment to finding alternative positions for redundant employees. However, the recommendation does not suggest that employees must be given a ticket to indefinite employment but rather recognises the significance of social justice in retrenchments.

Having examined the historical development of substantive fairness and the inadequacy of the LRA to cast a wider net in protecting employees who are dismissed on operational requirements it is recommended that an obligation must be placed on employers to offer training and skills development. While there might be a financial burden for employers to execute this obligation adequately, the study proposes that relevant stakeholders such as employers, employees, and trade unions play a role in financing the development of skills and training as envisaged by the interventions that were cited in chapter 4.

⁴¹¹ WEF op cit note 336.

5.7 Final remarks There is a need for interventions that can help employees manage transitions from traditional jobs and position themselves for the digital world. The study's intention to interrogate the provisions of the LRA, how the courts have handled operational requirements dismissals, and particularly s 189 reflected that the current legislative framework does not cast adequate protection for job security. If the provisions of the LRA remain the only recourse redundant employees have, there is likely to be a rise in tech-induced retrenchments not only in the banking industry but in other sectors of the economy as well. This will hamper the Act's achievement of its stated objectives such as social justice. While some jobs will be disrupted the introduction of technology in the workplace must be embraced as a catalyst to reskill and reposition employees at the same time enabling them to be a better workforce.⁴¹²

⁴¹² Magwentshu et al op cit note 24.

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statuses

Labour Relations Act 66 of 1995.

French Labour Code.

French Labour Code of 2017 as amended.

Fair Work Act of 2009.

Workforce Investment Act of 1998

Cases

South African:

Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others 2020 (41) ILJ 555 (CC).

Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others 2017 (38) ILJ 831 (CC).

Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union 2014 (35) ILJ 140 (LAC).

Benjamin and Others v Plessey Tellumat SA Limited (LC) unreported case no C54/97 of 16 February 1998.

BMD Knitting Mills (Pty) Limited v South African Clothing & Textile Workers Union 2001 (22) ILJ 2269 (LAC).

Busani Khanyile & Others v Air Chefs (Pty) Ltd (LC) unreported case no JS805/04 of 4 August 2015.

Dyokhwe v De Kock NO and Others 2012 (33) ILJ 2401 (LC).

Equity Aviation Services v CCMA 2008 (29) ILJ 25 67 (CC).

Food & Allied Workers Union & Others v Premier Foods t/a Blue Ribbon Salt River Cape Town 2010 (31) ILJ 1654 (LC).

Forecourt Express (Pty) v South African Transport and Allied Workers Union and Others 2007 (2) BLLR 101 (LAC).

General Food Industries Ltd v Food and Allied Workers Union (LAC) unreported case no CA11/200 of 11 May 2002.

Hendry v Adcock Ingram 1998 (19) ILJ 85 (LC).

Hlongwane & Another v Plastic (Pty) 1990 (11) ILJ 171 (IC).

IBM South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (LC) unreported case no JR66/2014 of 26 February 2016.

Imperial Transport Services (Pty) Ltd v Stirling 1999 (3) BLLR 201 (LAC).

Jakob Oosthuizen Wolfaardt v The Industrial Development Corporation of South Africa Ltd (LC) unreported case no of 1 August 2002.

Johnson and Johnson v Chemical Workers Industrial Union 1999 (20) ILJ 89 (LAC).

Kotze v Rebel Discount Liquor Group (Pty) Ltd 2000 (21) ILJ 129 (LAC).

Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (31) ILJ 1600 (LAC).

Lisa Joy Crowhurst v ABSA Investment Management (PTY) Limited ('AIMS') (LC) unreported case no JS474 of 28 November 2003.

Lulu Thema v ABSA Bank Limited 2014 (13) ILJ 470 (LC).

Mchuba v Passenger Rail Agency of South Africa 2016 (37) ILJ 1923 (LC).

Mondi Timber Products v Tope 1997 (18) ILJ 149 (LAC).

National Education Health and Allied Workers' Union v University of Cape Town 2003 (2) BCLR 154 (CC).

National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd 1991 (13) ILJ 2 (IC).

National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd 1993 (14) ILJ 642 (LAC).

National Union of Metal Workers of South Africa and Another v Aveng Trident Steel (A division of Aveng Africa Propriety Limited) and Others 2019 (40) ILJ 2024 (LAC).

National Union of Mine Workers v Edcon Limited (CC) unreported case no CCT 47/15 of 22 January 2016.

NUMSA v Bader Bop 2003 (2) BLLR 103 (CC).

SANDU v Minister of Defence 2007 (28) ILJ 1909 (CC).

SA Mutual Life Assurance Society v Insurance Banking Staff Association 2000 (10) ZALC 92 (LC).

SACCAWU v Woolworths 2019 (40) *ILJ* 87 (CC).

SACTWU v Discreto, A Division of Trump and Springbok Holdings 1998 (12) *BLLR* 1228 (LAC).

Sampson v Truvelo Manufacturers (Pty) Ltd 2019 (17) *ILJ* 81 (LC).

SASBO v ABSA Bank 2011 (12) *BLLR* 1232 (LC).

SASBO v Nedbank Limited 2020 (41) *ILJ* 500 (LC).

SASBO v Standard Bank of South Africa 2011 (32) *ILJ* 1236 (LC).

Siphiwe Khosana and Others v Sasol Synthetic Fuels (LC) unreported case no J949/98 of 9 October 1999.

Standard Bank Limited of South Africa v Angeli Letsoalo (LAC) unreported case no J17/2014 of 27 July 2016.

Steenkamp v Edcon Limited 2016 (37) *ILJ* 564 (CC).

Tiger Food Brands t/a Albany Bakeries v Levy N.O and Others 2007 (121) *ILJ* (LC).

Transport & General Workers Union & Others v Council of the City of Durban & Another 1991 (112) *ILJ* 256 (IC).

Van Rensburg v Austen Safe Co 1998 (19) *ILJ* 158 (LC).

Van Rooyen & Others v Blue Financial Services (SA) (Pty) Ltd 2010 (31) *ILJ* 2735 (LC).

Vancoillie v Santam Life Insurance Ltd 2003 (24) *ILJ* 1518 (LAC).

Foreign:

Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others SA 51/2008 (Namibian).

Skimmer Ors v Asciano Services LTD Pacific National Bulk (2017) *FWC* 574 (Australia).

Ulan Coal Mines LTD v Honeysett (2010) 199 *IR* 363 (Australia).

Convections

Termination of Employment Convection 158 of 1982.

Recommendations

Termination of Employment Recommendation 166 of 1982.

Secondary Sources

- Ahmed Adamu & Kapil Dev Sharma 'Labour law and staff retrenchment in commercial banks in Nigeria: Causes and consequences' (2016) 119 *SALJ* 700.
- Ahmed Adamu Isa *Effects and Challenges of Commercial Banks' Staff Retrenchment: A Critical Study of some Selected Banks located in Adamawa State, North Eastern Nigeria* (PHD Thesis, POINT University, 2018).
- Alan Rycroft 'The evolving (but confusing) law on business restructuring' (2003) 24 *ILJ* 69.
- Alexander Fabre 'Negotiation of restructuring plans' (2010) *Institute of Social Sciences of Labour in the West*.
- Ballou Nichole *The Effects of Psychological Contract Breach on Job Outcomes* (Masters' thesis, San Jose State University, 2013).
- Bessen, James 'How computer automation affects Occupations: Technology, jobs, and skills 2016' *Economics Perspectives on Employment & Labour Law Journal*.
- Brajesh Panth & Rupert Maclean *Anticipating and Preparing for Emerging Skills and Jobs: Key Lessons, Issues, Concerns and Prospects* (2020) Springer, Singapore.
- Capgemini Research Institute 'World Retail Banking Report' (2019).
- Chironga M, Cunha, L. De Grandis, H & Kuyoro, M 'Roaring to life: Growth and innovation in African retail banking' (2018) *McKinsey & Company*.
- Chris Todd & Graham Damant 'Unfair Dismissal – Operational Requirements' (2004) 25 *ILJ* 896.
- Christian Harteis *The Impact of Digitalisation in the Workplace: An Educational Review* (2017) Springer International Publishing.
- Craig Bosch 'Operational requirements dismissals and section 197 of the Labour Relations Act: Problems and possibilities' (2002) *ILJ* 23.
- Dan Ennis 'Banks cut nearly 78 000 jobs in 2019, a 4 year high' available at <https://www.bankingdive.com/news/banks-job-cuts-2019-4-year-high/569695/>, accessed on 20 December 2020.
- Darcy du Toit 'Business restructuring and operational requirements dismissals: Algorax and Beyond' (2005) 26 *ILJ*.
- David Bradely 'The Workforce Investment Act and the One-stop delivery system' (2013) *Paper Prepared for Members and Committees of Congressional Research Service*.

- Davy Rammila *Dismissal for Operational Requirements in South Africa: Redesigning the Current Legislative Framework for the Fourth Industrial Age* (LLM thesis, University of Johannesburg, 2019).
- Emmenegger, Patrick ‘Maximizing institutional control: Union power and dismissal protection in Western Europe in the first half of the twentieth century’ (2015) 47 *Comparative Politics* 4.
- Eugénia Da Conceição-Heldt ‘Integrative and Distributive Bargaining Situations in the European Union: What Difference Does It Make?’ (2006) 22 *Negotiation Journal*.
- Fourie E S ‘Non-standard workers: the South African context, international law and regulation by the European Union’ (2008) 11 *Potchefstroom Electronic Law Journal* 4.
- FrogHeart ‘The Royal Bank of Canada reports ‘humans wanted’ and some thoughts on the future of work, robots, and artificial intelligence’ available at <https://www.frogheart.ca/?p=25689>, accessed on 05 December 2020.
- Gail Smith ‘Cutting Threats: Retrenchments and women workers in the cape clothing industry’, available at https://www.jstor.org/stable/4066512?seq=1#metadata_info_tab_contents, accessed on 10 April 2020.
- Gilabert, Pablo. ‘Labour human rights and human dignity’ (2016) 42 *Philosophy & Social Criticism*.
- Greenstone M & Looney A ‘Building America’s job skills with effective workforce programs: A training strategy to raise wages and increase work opportunities’ (2011) *Brookings Institution*.
- Helen Kean and Paula Armstrong ‘A snapshot of COVID-19 related unemployment in South Africa’ available at <https://www.news24.com/fin24/opinion/analysis-a-snapshot-of-covid-19-related-unemployment-in-south-africa-20201016>, accessed on 12 December 2020.
- International Labour Conference ‘Centenary Declaration for the Future of Work’ (2019).
- International Labour Conference ‘Conclusions on skills for improved productivity, employment growth and development’ (2008).
- James de Villiers ‘Retrenchment tracker: South Africa’s big corporate job losses in 2019 - so far’ available at <https://www.businessinsider.co.za/total-number-of-job-losses-south-africa-retrenchment-corporate-job-losses-2019-6>, accessed on 10 July 2020.

Jean-Yves Kebouch 'Anticipation of restructuring put to the test of labour law' (2007) *Travail et Emploi*.

Jieun Choi, Mark A Dutz and Zainab Usman *The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All* (2020) World Bank Publications.

John Grogan *Dismissal 2nd ed* (2017) Juta and Company Johannesburg.

Kelsey Davis *A Critical Analysis of Genuine Redundancy Cases under the Fair Work Act of 2009* (Honours thesis, Australian National University, 2014).

Legal Brief 'Recession/digital banking the reason for FNB job cuts', available at <http://legalbrief.co.za/diary/legalbrief-workplace/story/recessiondigital-banking-the-reason-for-fnb-job-cuts/pdf/>, accessed on 10 July 2020.

Leonie B. Louw *Retrenchment in the Insurance Industry: The Small Business Development Dividend* (Unpublished Mcom Thesis, University of Pretoria, 2018).

Leor Melamedov 'COVID-19 and the banking industry: Impact and solutions' available at <https://www.lightico.com/blog/coronavirus-covid-19-and-the-banking-industry-impact-and-solutions/>, accessed on 12 December 2020.

Links Financial 'Why do companies restructure?' available at <https://www.links-financial.com/benefits-of-restructuring-a-company/> accessed on 2 August 2020.

M Rathi Meena & G Parima Iarani 'Impact of digital transformation on employment in banking sector' (2020) 9 *International Journal of Scientific and Technology Research* 1.

Mark Harcourt, Maureen Hannay and Helen Lam 'Distributive justice, employment-at-will and just-cause dismissals' (2013) *Journal of Business Ethics*.

Mark Muro, Robert Maxim & Jacob Whiton 'Automation and artificial intelligence: How machines are affecting people and places' (2019) *Brookings*.

Maurice van Staden 'Towards a South African understanding of social justice: The international Labour Organization Perspective (2012) *Journal of South African Law* 1.

Marius Olivier, Ockert Duper & Avinash Govindjee *The Role of Standards in Labour & Social Security Law International, Regional and National Perspectives* (2013) 267-286.

Mbazira, C 'Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) *SALJ* 125.

- Mecy Gacheri Munjuri 'A survey of the criteria used by commercial banks in Kenya to determine employees to retrench' (2011) 2 *International Journal of Business Administration* 57.
- Mutumba A *Understanding the Readiness of Banking Industry Employees to Adopt Artificial Intelligence in Frontier Markets* (LLM thesis, University of Pretoria, 2018).
- N H Maenetje 'Consultation versus negotiation in operational requirements: The COSATU proposals' (2000) 21 *ILJ* 1526.
- Newaj K and S van Eck 'Unfair and operational requirements dismissals: Making sense of the 2014 Amendments' (2016) 19 *ELJ* 1.
- Nicholas Comfort 'Banks set for biggest job cull since 2015 as Morgan Stanley cuts' available at <https://www.bloomberg.com/news/articles/2019-12-27/banks-set-for-biggest-job-cull-since-2015-as-morgan-stanley-cuts>, accessed on 20 June 2020.
- Nomfanelo Magwentshu, Agesan Rajagopaul, Michael Chui & Alok Singh 'The future of work in South Africa: Digitalisation, productivity and job creation' (2019) *McKinsey & Company*.
- OECD 'Protecting jobs, enhancing flexibility: A new look at employment protection legislation' (2013) *OECD Employment Outlook*.
- P Smith and BPS van Eck 'International perspectives on South Africa's unfair dismissal law' (2010) 43 *CILSA* 46.
- Paul Andries Smith 'Organisational perceptions in dismissal disputes' (2012) 29 *Management Today* 1.
- Paul Boyce 'Types of Collective Bargaining' available at <https://boycewire.com/collective-bargaining-definition-types-and-examples/>, accessed on 15 November 2020.
- Paul Sakwe Masumbe *Faultless Dismissal: Assessing the Substantive Fairness of Operational Requirements* (LLM Thesis, University of Western Cape, 2013).
- Penny Crosman 'How artificial intelligence is reshaping jobs in banking' available at <https://www.americanbanker.com/news/how-artificial-intelligence-is-reshaping-jobs-in-banking>, accessed on 20 December 2020.
- Peter Sheldon and Louise Thornthwaite 'Employer and employer association matters in Australia in 2012' 55 *Journal of Industrial Relations* 3.

Pierre Garaudel, Florent Noel and Garaldine Schmidt ‘Overcoming the risks of restructuring through the integrative process: Two case studies in a French context’ 61 *Human Relations* 9.

PR Worx ‘More retrenchments on the table for South Africa work force’ available at <https://www.skillsportal.co.za/content/more-retrenchments-table-south-african-workforce>, accessed on 15 October 2020.

Qama Qukula ‘Almost 10,000 banking jobs will be lost this year alone, says union’, available at <http://www.702.co.za/articles/361818/banking-strike-almost-10-000-jobs-will-be-lost-this-year-in-the-banking-sector-says-union-sasbo> on 20 March 2020.

R Welch ‘Rights to strike in UK and SA law: A comparison’ 19 *Bulletin* 4 (2000).

Riaz Itzin *Operational Requirements as a Fair Reason for Dismissals in South Africa* (LLM Thesis, University of Johannesburg, 2011).

Rochelle Le Roux *Retrenchment Law in South Africa* (2017) Lexis Nexis, Durban.

Roland Ahlstrand ‘Integrative strategy, competitiveness and employment: A case study of the transition at the Swedish Truck Manufacturing Company Scania during economic downturn in 2008-2010’ (2015) 36 *Economic and Industrial Democracy* 3.

Rotman David ‘How technology is destroying jobs’ (2013) 16 *Technology Review* 4.

Stinj Claessens ‘Global banking: Recent developments and insights from research’ (2016) 21 *Review of Finance* 4.

Stefan Van Eck, Pamhidzai Bamu & Chanda Chungu (ed) *Celebrating the ILO 100 Years on Reflections on Labour Law from a Southern African Perspective* (2020) Juta and Company, Johannesburg.

Tamara Cohen ‘Procedurally Fair Dismissals-Losing the Plot?’ 17 *SA Merc LJ* 32.

Tapiwa Gandidze ‘Dismissal for operational requirements’ (2007) 11 *Law, Democracy and Development* 1.

Clive Thompson ‘Bargaining, Business Restructuring and the Operational Requirements Dismissal’ (1999) 20 *ILJ* 755.

Tina Hokwana *Substantive Fairness in Dismissals Based on Operational Requirements* (LLM, thesis, Nelson Mandela University, 2018).

Tukishi Manamela ‘When the lines are blurred – A case of misconduct, incapacity or operational requirements: Are all dismissals going operational?’ (2019) 40 *Obiter* 1.

- Van der Westhuizen, Christie 'Trade and poverty: A case study of the South African clothing industry' (2007) 31 *Journal of Economics and Econometrics*.
- Van Eck, B. P. S., and Benjamin T. Kujinga 'Large-scale operational requirements dismissals: How effective are the remedies? A discussion of *Steenkamp & Others v Edcon LTD* 2016 (37) *ILJ* 564 (CC)' 39 *ILJ*.
- Vera Glassner and Maarten Keune 'Negotiating the crisis? Collective bargaining in Europe during the economic downturn' (2010) 10 *Dialogue Working Paper*.
- Witold Kowalski 'The process of organizational restructuring for large corporations' available at <https://expert360.com/resources/articles/process-of-organisational-restructuring>, accessed on 31 July 2020.
- World Bank Group *World Development Report 2016: Digital Dividends* (2016) World Bank Publications.
- World Economic Forum 'Future of Jobs Report' (2020).
- World Economic Forum 'The Future of Jobs' (2016).
- World Economic Forum 'The Future of Jobs report 2018' (2018) *Centre for the New Economy and Society*.
- World Health Organisation 'Coronavirus Pandemic' available at https://www.who.int/health-topics/coronavirus#tab=tab_1, accessed on 24 December 2020. Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered coronavirus.
- Zimbabwe Legal Information Institute 'Natural Justice' available at <https://zimlii.org/content/natural-justice>, accessed on 01 November 2020.