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Business restructuring and Labour Law with specific reference to Sections 188, 189 and 197 of the Labour Relations Act 66 of 1995 as amended.

By

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1 INTRODUCTION

Business reorganisation is a categorical imperative for anybody in business. Any attempt to retain the business status quo or failure to reorganize in the face of continual environmental change is a sure path to business failure. Technological change which is the universal driving force behind what Charles Handy described as “... a vast reconfiguration of the world of work”¹ is growing exponentially. A good example of that process is Moore’s law espoused by Gordon Moore founder of INTEL which stated that the computing power of the computer chip would double every eighteen months. This now has proved to be valid over four decades and is projected to hold value for at least a further decade. Exponential growth will ensure that the rate of change will continue to accelerate. Technological change has enabled the process of globalisation to take place, which in a short while has had profound effects on the world of work. This process is going to continue – come what may.

In this process jobs will inevitably be lost but at the same time, if the process is allowed to progress relatively unhindered, other jobs will be created to cater for the needs of the evolving economy. The irony is that countries whose labour dispensation allows employers relative freedom to reconfigure employment, are those with the lowest unemployment rate. Unemployment in the US and the UK is currently 5,4% and 4,7%² respectively, whereas in Germany which is battling to introduce some flexibility in its labour regime, unemployment is 12,0%. The Netherlands, which has made a concerted effort to lessen onerous employment conditions, unemployment is 6.5% compared to neighbours Belgium and France at 12,7% and 10,1% respectively. The reasons for these disparities are complex and labour legislation is only one component. Nevertheless without the ability on the part of business to respond to environmental pressures by way of internal reorganization, growth will be adversely affected and employers will be reluctant to expand employment.

¹ C Handy *Beyond Certainty* 1996 at 23

² Unemployment figures from *The Economist* April 2 2005

In addition to having to be competitive in this changing world, South Africa has the added responsibility of restoring social justice to the workplace and at the same time moving away from the low labour absorption rates characteristic of the capital intensive investment climate prior to 1994. This is an extremely difficult task. As summarised by Cooper “South Africa is now faced with increasing pressure to become globally competitive. The need for adaptability or flexibility in the labour market has been accepted internationally as integral to the achievement of global competitiveness. At the same time this has to be balanced against the need for protection and security of the labour force”³. This dissertation will attempt to review the process in the light of these conflicting objectives.

2 HISTORIC BACKGROUND

Dismissal and the threat of dismissal is the main focus of restructuring, be it involving actual dismissal or the changes in working conditions. The case law around the area of dismissal evolved principally from the tribunals established under the Labour Relations Act 28 of 1956 and its successor, the Labour Relations Act 66 of 1995. The previous Industrial Court, the Labour Appeal Court and the Appellate Division developed an equity based approach to dismissal law which represented a radical departure from the previous contract based approach to labour law. They developed the concept of an “unfair labour practice”. Previously the courts were concerned with determining whether the employer was contractually entitled to terminate, whereas post the 1956 Act the question before the court was increasingly whether the employer acted fairly in terminating.

This was arrived at by introducing principles for administrative law and international labour law. In so doing they arrived at the notion of substantive and procedural fairness which was almost unknown in the common law of employment. Previously termination was in terms of the contract of employment and even where unlawfully terminated, damages were usually limited to the amount that would have been earned had proper notice been given. Hardly compensation for the loss of livelihood! There was no limitation placed on the employer other than to give proper notice of termination. All that has been changed by the two Labour Relations Acts and the

³ Cooper *Globalisation: Labour Law & Unemployment. The South African Case* (2000) at 233

jurisprudence arising there from. This dissertation will examine the thesis that in introducing the changes to the law, particularly subsequent to the return to a democratic dispensation that the pendulum could have swung too far in addressing the grievances of the past. If this is the case South African business could be handicapped in dealing with the momentous change process referred to above.

3 DISMISSALS FOR OPERATIONAL REQUIREMENTS – SECTION 189

“Operational requirements have always been accepted as a ground for dismissal in South African law”⁴. The ILO Convention 158 which South Africa is obliged to give effect to in terms of the present Constitution, deals with termination for economic, structural or similar reasons. This wording is incorporated in the definition section of the 1995 Act⁵. Section 185 of the Labour Relations Act gives every employee the right not to be unfairly dismissed. Section 188 goes further to say that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the employer’s operational requirements and that the dismissal was effected in accordance with a fair procedure. Section 189 essentially sets out the procedure to be followed when an employer contemplates dismissal for operational requirements.

3(a) Procedural Fairness

The procedure set out in Section 189 of the Labour Relations Act essentially follows the procedure set out by the Appellate Division in its landmark decision in the *Atlantis Diesel Engines* case⁶. This case marked the end of a long running debate as to whether or not consultation was required before or after the decision to retrench. This debate reflected a fundamental difference of opinion as to the scope and extent of the management prerogative. Section 189 resolved the issue of management prerogative regarding the consultative procedure. Nevertheless the issue of management prerogative remains as regards substantive fairness.

⁴ Grogan *Dismissal* (2002) at 216

⁵ Section 213 LRA

⁶ *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247(AD)

Section 189 defines who must be consulted when dismissals are contemplated, it defines the subject matter of consultation and the area where consensus should be reached. It enjoins employers and employee representatives to reach consensus in the measures to avoid dismissals, minimise dismissals, change the timing of dismissals and to mitigate the adverse effects of dismissals. It also indicates that consensus on the method of selection of employees and their severance pay be reached. To enable this process to take place the employer is mandated to disclose all material facts related to the proposed dismissal. The procedural requirements for a fair retrenchment, except for the 2002 amendment via 189A, appear to be settled and accepted by most parties concerned. With the enactment of amendments to the Labour Relations Act in 2002,⁷ the legislature has created a two track procedure for retrenchments. Small employers below the thresholds set out in Section 189A would adhere to Section 189. Above the thresholds two additional requirements are introduced. Firstly, in order to encourage the parties to utilise outside facilitation, this section sets minimum time periods for the consultation to take place. In the case of a facilitator being appointed, the minimum time period for consultation is 60 days and in the case of a facilitator not being appointed, then the minimum period is 30 days. Secondly, the section gives the trade union access to the Labour Court to resolve matters of procedure as long as the referral is within 30 days of the date of dismissal. Any complaint regarding procedural fairness must be dealt with in this manner and cannot be raised as an issue in any subsequent proceeding of court. This amendment adds further certainty to the issue of procedure regarding an operational requirement dismissal.

3(b) Substantive Fairness

As mentioned above Section 188 requires that a dismissal for operational requirements be based on a fair reason. Here the ground is far less solid than in the case of the procedural fairness. The difference being that the court is drawn into what is essentially an economic decision. “There is often not even in principle a clear right or wrong answer to the question whether a business change is necessary to the point

⁷ Act 12 of 2002

of justifying a dismissal. A business line call is at stake”⁸. Thompson goes on to say that the courts instinctively avoid being drawn into the economic merits of a decision and give the employers a hefty margin of grace regarding these issues. A good example of the above was the *Atlantis Diesel Engines*⁹ case. The Industrial Court conceded that the decision to retrench was exclusively a management prerogative. “The only prerequisites for a proper exercise of such prerogative are that it must be bona fide and that a business rationale must exist”¹⁰. The court even conceded that management could be foolish as being as it was “strictly bona fide in its deliberations”. Furthermore it added “and perhaps based on commercial rationale”¹¹. This view was rejected by the Labour Appeal Court¹². “However we respectfully differ from (the) suggestion that the decision to retrench could be fair simply because it is bona fide and made in a businesslike manner. The approach suggests that the court function is merely to determine whether or not the decision had been correct. What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than the bona fides and the commercial justification of the decision to retrench. It is concerned, first and foremost with the question whether termination of employment is the only reasonable option in the circumstances”.

Moreover it is submitted that taking fairness to the “only reasonable option in the circumstances” is a bridge too far. As Thompson’s¹³ comment on this decision puts it, if the decision is based on a demonstrably sensible business analysis that has been tested between the parties, is not unreasonable and not disproportionate between the benefits accruing to the business and the losses accruing to the employee, it should be acceptable. Fairness surely requires that there is equity on both sides in terms of the outcome.

⁸ C Thompson *Bargaining, Business Restructuring and the Operational Requirements Dismissal* (1999) 20 *ILJ* at 769

⁹ *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 3 *ILJ* 405 (IC)

¹⁰ at 408A

¹¹ at 409C

¹² *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) at 648C

¹³ at 770

In the *Discreto* case,¹⁴ the court saw its function in scrutinizing the consultative process, not to second guess the commercial or business logic of the employer but to ensure that the decision arrived at was genuine and not merely a sham. It would do this by ensuring that the proper consultative process had taken place. If that were the case then it would evaluate the ultimate decision by the employer on the basis whether it was operationally and commercially justifiable on rational grounds.

Importantly, in the light of the *ADE* decision, the court did not see its role as deciding whether it was the best decision under the circumstances but only whether it was a rational decision arising from what had emerged in the consultative process. This is definitely not as far as the *ADE* decision which was to decide whether it was “the only reasonable option in the circumstances”. The latter requires much further probing into the business process for which the court admitted was not qualified and represents, in my view, an unwarranted intrusion into the prerogative of management.

In the case of *BMD Knitting Mills*¹⁵, the Judge reviewed the judicial remarks in the *Discreto* case above in the light of the specific fairness injunction in Section 188(1) of the 1995 Labour Relations Act. (The *Discreto* case was based on the fairness requirements of the 1956 Labour Relations Act) The Judge was of the opinion that the *Discreto* approach was too deferential¹⁶, based on the principles of an administrative review, rather than the requirements of the Act, viz “the reason for dismissal is a fair reason”. The starting point is “Whether there is a commercial rationale for the decision”¹⁷. That ties in with the *Discreto* approach. The Judge goes further by saying “rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party”¹⁸. The Judge has set up a straw man here in that *Discreto* never suggested that the decision be taken at face value but suggested that it be evaluated for rationality on commercial or operational grounds. The Judge added a further requirement which is logical in the light of Section 188(1) that the decision be

¹⁴ *SA Clothing and Textile Workers’ Union & others v Discreto – a Division of Trump & Springbok Holdings* (1998) ILJ 1451 LAC

¹⁵ *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers’ Union* (2001) 22 ILJ 2264 (LAC)

¹⁶ The Judge was actually referring directly to another case which employed essentially the same test as *Discreto*

¹⁷ at 2269 I

¹⁸ at 2269 J

evaluated on the basis of fairness to both parties. That is almost identical to the approach suggested by Thompson in his review of the *ADE LAC* decision quoted earlier. It appears that this approach is not necessarily less deferential than the *Discreto* approach but has merely added another dimension, ie evaluation for fairness. The Judge goes on further to say that “the court is entitled to examine the content of the reason given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court”¹⁹. This, to my mind, is similar to the *Discreto*’s requirement for rationality but does not go as far as *ADE* as to require the decision to be the only reasonable option. The latter is very similar to saying the reason which would have been chosen by the court. Finally, the Judge sums up the matter by saying: “Fairness, not correctness is the mandated test”.

In the *Algorax* case²⁰ the court addressed the issue of the extent of judicial interference in the decisions of management. As a general rule the judge acknowledged “that a court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with the problems of the workplace”²¹. The Judge said this was not an absolute rule and the court still has an obligation to determine the fairness of the dismissal in an objective manner. The court cannot defer to management in this context as this would be tantamount to have abrogated its responsibility. Finally, in relation to this issue the court should not hesitate to deal with an issue which does not require specialist expertise but simple common sense as was the case in this matter. The Judge was of the opinion that in the context of this particular case the solution was so self-evident as to allow the court to delve into the area normally reserved for management as conceded in the quotation above.

A good example of the implementation of the issue of substantive fairness, based on the employer’s operational requirements is the case of *General Food Industries v FAWU*²². When the case was heard initially by the Labour Court²³ it found that the

¹⁹ at 2270A

²⁰ *CWIU v Algorax (Pty) Ltd* (2003) 11 *BLLR* 1081(LAC)

²¹ at 1101 I

²² *General Food Industries Ltd v Food and Allied Workers’ Union* (2004) 25 *ILJ* 1280 (LAC)

²³ *Food and Allied Workers’ Union v General Food Industries Ltd* (2002) 10 *BLLR* 950 (LC)

company did not have a compelling reason to justify the dismissals in the case in terms of Section 189 of the 1995 Labour Relations Act, other than to reduce the wage bill via outsourcing. The court had therefore found that dismissals were merely a way of pressurizing the workers to accept lower wages and were automatically unfair in terms of Section 187 (1) of the Labour Relations Act²⁴. As regards that issue the Court found that on the basis of the *Fry's Metals* judgement²⁵ the company was entitled to endeavour to reduce costs by way of dismissals even though it was profitable at the time. In the *Fry's Metals* case the Judge concluded that “(it) is an employer’s right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business, the survival of which is under threat and a business which is making a profit and wants to make more profit”²⁶. That in itself was fairly profound in terms of business restructuring in South Africa, but it also had the effect of undermining the judgement of the Labour Court in the *General Food* case. Nevertheless the Labour Appeal Court still had to consider the retrenchments in the light of the Section 189 requirements. In terms of its operational requirements the employer stated that the mill had limited capacity to store its output, flour, and had to have a way of dealing with the many fluctuations in demand that it faced. A solution, which was prevalent in the industry, was to increase the use of outsourcing whereby additional workers could be employed when demand picked up and could be reduced when a slack demand period occurred. Its outsourcing proposal was calculated to effect a saving in wages of R123 000 per month. The union responded during the process of negotiation with a series of measures including a wage freeze which in total would save R20 000. The union would not accept any reduction in wages and salaries nor would they countenance any negotiation regarding outsourcing, insisting that this had to be conducted at national level.

This is the scenario envisaged by the Labour Relations Act: management and the employee representatives jointly negotiating a solution to the problem. Only when an impasse to that process is created may the management move to the next step of retrenchment. As expressed by the Judge, the loss of jobs due to retrenchment has

²⁴ The issue of 187(1)(e) will be dealt with more fully in Section 4 of this dissertation

²⁵ *Fry's Metals (Pty) Ltd v National Union of Metal Workers of SA & others* (2003) 24 ILJ 133 (LAC)

²⁶ at 148 E

such a devastating effect on the circumstances of the workers “... that – even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum”²⁷.

The consideration of all viable alternative steps is a reasonable test of management’s role in the retrenchments. It does not prescribe the outcome but merely mandates the process. The Judge acknowledged that the enterprise required flexibility on the part of employees’ terms and conditions of employment in order to be competitive. Although the business was profitable at the time, the substantial differential in costs between the mill in question in comparison to the other mills owned by General Food, put at question the long term viability of the mill.

The union was not prepared to offer the needed flexibility. This was ultimately the deciding factor in the Judge’s ruling that there was a compelling reason for the dismissals and that they were thereby substantively fair. The difference between the Labour Court and the Labour Appeal Court decision, other than the intervening *Fry’s Metals* judgement, was the acknowledgement that the issue was not merely a question of reducing wages of the workers, but of giving flexibility in the employment of workers to match the variability of final demand.

3(c) Summary of the Substantive Fairness Issue

As mentioned in both Thompson, Todd and Damant²⁸ in their articles on the issue there is seldom, if ever, a right or wrong answer in the approach chosen by an employer in deciding a particular course of action. Inevitably there is a whole range of options which have to be evaluated and a course of action selected for the range for execution. As required by law, the employer has to engage with the representatives of the work force; if consensus cannot be reached, the employer has to make a decision in the best interest of the business. That is why the employer is appointed by the shareholders.

²⁷ at 127 D

²⁸ Chris Todd & Graham Damant *Unfair Dismissal – Operational Requirements* (2004) ILJ 896

As has been deduced from the court's deliberation in the above cases, the decision should have a rational and logical basis arising from the consultation with the affected parties. Management should be seen to be exercising its mind and not merely a sham to disguise some other agenda. The decision must critically, be fair in that the outcomes have balance between the parties. The decision does not have to be correct or even one the court would have come to (except in the *Algorax* case where it was glaringly obvious). Where the issue is one of complexity beyond the expertise of the court it has to concede ground to management as the Judge in *Algorax* put it in the quotation above "should not be critical of the solution". All the above does not mean that the employer has absolute discretion to run the business but within the bounds as described, the employer enjoys the benefit of the doubt. The court on the other hand has a responsibility to evaluate the issues of fairness and rationality and cannot defer to management in its deliberations. Todd and Damant summarize the situation as follows: "The courts must, in our view, show deference to the employer's decision in the sense that the enquiry is limited to the question whether or not the employer's decision under scrutiny, falls within the parameter set for it"²⁹

There is an issue with regard to the parameters. Todd and Damant suggest the fairness parameter merely requires that rational business decisions are made and does not require adjudication of the trade-off between gains and hardships. Fairness, as mandated by the Judge in the case of *BMD Knitting Mills* as being the test, surely as suggested by Thompson, requires some evaluation of gains and hardship. Thompson quotes the case³⁰ where the employer retrenched to save a princely R282 per month. That cannot be fair however rational the business decision.

3(d) Introduction of Section 189A via the 2002 Amendments

The introduction of Section 189A makes an interesting legislative contribution to the issue of the substantive fairness of a retrenchment decision. Apparently not entirely satisfied with the differential approach adopted by some courts, the legislature has given the workers and their unions the right to strike in the case of large scale retrenchments. It is assumed that the right is in relation to the decision to retrench

²⁹ Todd and Damant at 906

³⁰ *Mkhize & others v Kingsleigh Lodge* 1989 ILJ 944 (IC)

rather than the procedure because the law prescribes an alternative course of action where there are complaints about the procedure. If the workers decide to take the issue into the power arena then they forfeit the right to take the matter to court on the basis of the substantive fairness of the dismissals. This, in some measure, takes pressure off the court in their scrutiny of the fairness of the dismissals as the workers have the right to strike on this issue in the case of large scale retrenchments envisaged in Section 189A. Before Section 189A, workers did not have the right to strike which placed significant onus on the courts to be vigorous in their scrutiny of management decisions in this regard.

In Section 189A (19) the legislation instructs the Labour Court to find that the employee was dismissed fairly if:

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was proper consideration of the alternatives, and
- (d) the selection criteria were fair and objective

The legislature have effectively defined the concept of fairness without mentioning the issue of fairness other than in sub clause (d) which refers to selection. Du Toit³¹ sees this section as merely a codification of the existing law, and as such do not think that 189A(19) will make a noticeable difference. The authors believe that it may focus the courts to examine the reasons for dismissal more closely and vigorously. It may offset the effect noted above in regard to the strike provision.

Section 189A(19) does raise the obvious question as to why the same amendment was not inserted in Section 189 for the small scale retrenchment. Does the law intend that small scale retrenchment be examined on the basis of fairness as discussed in the case law and that the large scale retrenchment does not have to be evaluated on the basis of "fairness" except as defined. Todd and Damant do not believe so and they are of the opinion that *SACTWU vs Discreto* establishes the correct test and that the test is in

³¹ Du Toit et al *Labour Relations Law* 4th edition (2003) at 425

line with Section 189A(19). Specifically they claim that the legislature has sent a clear message to the courts to stay away from the distributive issues that an enquiry into the relative gains and hardships would involve.

3(e) *Fawu & others v South African Breweries Ltd*³²

This has been regarded as one of the landmark cases for 2004 and has attracted considerable attention especially for employers looking to make changes in the workplace. The intention is to examine the important decisions in the light of the foregoing discussion of dismissal for operational requirements. This case is also important in that it has considerable relevance as it is the type of situation where South Africa needs to uplift its performance to compete on the world stage. South African Breweries was typical of a pre 1994 South African company which was trapped in a sanctioned South Africa and could not follow its rational strategic path of growing its beer operation world-wide. Instead it became involved in non-strategic investments in hotels via Southern Sun and retail via OK and Edgars. The majority of these investments were relatively unsuccessful. Post Democratic South Africa, SAB were able to divest themselves of these investments and concentrate on growing its beer business world-wide. It has been extremely successful in this strategy culminating in the acquisition of Millers in the USA and thereby cementing its position as number two brewer in the world. At the same time it migrated its' listing from Johannesburg to London so as to access the global capital markets. Having successfully listed in London it now has to produce consistent world-class results so as to continue to attract capital and so maintain its growth path. SAB has become a model which South African companies can aspire to. In its endeavours to attain and sustain its world-class status, it initiated a world-class manufacturing programme. To do this it would need to gear up its local labour practices which were outdated compared to trends in the rest of the world. In this endeavour it had engaged the Food and Allied Workers' Union and signed an agreement with the union in terms of which both parties committed themselves to work together to make the company a successful world-class manufacturer. In subsequent joint meetings the issue of training to attain the required level of performance was discussed as well as awareness

³² (2004) 2J ILJ 1979 LC

of threats to job security which could be minimised by the upskilling of existing personnel. There was an acceptance of the fact that existing standards of education and training were inadequate but the exact implications were uncertain.

Between April 1996 and 1998 a World Class Manufacturing (WCM) pilot project was implemented on line 12 at the Alrode Brewery where the experience of a joint management and union international benchmarking tour was implemented. The Alrode Line 12 Pilot team suggested as part of the project, entry level specifications suitable for the positions so created be developed during the pilot. A joint project team was tested to consider these entry level specifications. In addition an independent company, Flagship Consulting, was approached to recommend actual entry level specifications. In November 1996 another company/union workshop was held and all parties committed to work towards WCM and attempted to address the major issues including job security, competency, acquisition and job losses. In February 1997 a joint session was held in Geneva under the ILO to focus on job security. Project Noah was established to provide a safety net for the anticipated job losses. In April of the following year the parties met in Cape Town to negotiate a workplace change agreement. This was not achieved due to the union's insistence on a moratorium on retrenchment. The moratorium was unacceptable to SAB as it would have delayed the WCM implementation. The board decided nevertheless to implement the results of the WCM pilot at the Prospecton Brewery. As there were no job losses anticipated in the implementation, there was no union objection. The company decided to implement the findings of the WCM project at its Newlands Brewery in 1999. The consultation process began in January 2001 where the business plan for implementation was presented to the union in compliance with Section 189(3) of the Labour Relations Act. The union requested that it be given one month to study the proposals and come up with viable alternatives to the plan. The company did not agree to the request and requested on-going weekly consultative meetings, which were deliberately not attended by the union. At the meeting on the 15th February the company decided to implement the business plan. Despite further meetings and an undertaking in writing by the company to consider any proposal by the union, after a further series of meetings the company unilaterally went ahead with the implementation of WCM at Newlands. After the decision was made to implement at the 15th February 2001 meeting, recruitment commenced.

The employees affected were contacted, informed of the background and told that their jobs were redundant and that they were to re apply. Those who applied were screened for the required entry level as determined at the earlier pilot project either by producing the required qualification or by testing for their Adult Basic Education and Training (ABET) level. After the selection process, 164 positions were declared redundant, 26 employees were successfully placed and the remaining 138 were retrenched.

Of the latter, 115 applied to the Labour Court. They were classified as follows:

- Category 1 applicants – 46. They failed to apply for a position and were not tested
- Category 2 applicants – 55. They did apply but failed
- Category 3 applicants – 6. Did apply, met the entrance requirement but were not selected
- Category 4 applicants – 6. Declared redundant for reasons unconnected with WCM
- Category 5 applicants – 2. Two deaf mutes

The union alleged that the company had failed to prove that the dismissals were based on operational requirements, alternatively if they were, it had not proved that the reason was fair and that the procedure was fair.

The Judge commenced by outlining the traditional approach by the Labour Appeal Court as applied in *Discreto* and *Decision Survey International*³³. The test was whether the retrenchment was genuinely operational and reasonable under the circumstances. The Judge then went further by saying that the LAC had more recently taken a less deferential approach which required the employer to show that the dismissals were a last resort which could not be avoided. The Judge went on to summarize the guidelines for the *Algorax* case:

³³ *Decision Survey International (Pty) Ltd vs Dlamini* (1999) 5 BLLR 413 (LAC)

- 1 Court must decide the fairness issue and not defer to the employer.
- 2 Court should not hesitate to deal with an issue which requires no special expertise or business knowledge.
- 3 If there is a viable alternative to job losses this should be employed as the loss of livelihood should be a measure of last resort
- 4 Court should intervene where measures which could have been taken to avoid dismissal were not and where dismissals were, therefore, not resorted to as a last resort.

As regards the tests distilled from the *Algorax* case one has to agree that the court has an obligation to decide the fairness issue and not defer. As regards the second guideline, the Judge President in that case, referred to favourably by the Judge in the *SAB* case, prefaced the remarks quoted by the Judge, that in most cases the court should not be critical of the decisions of the employer because it did not have the expertise. The conclusion is, therefore, only where no special expertise is required and that common sense would be adequate, should the court second guess the solution arrived at by the employer. The issue in the *Algorax* case was fairly straightforward and the solution so obvious that not to resort to that solution was patently unfair. That appears to have been a special case and not of general applicability.

As regards the third and fourth guidelines introducing the issue of last resort, this injunction seems to make sense when one is dealing with a company such as *ADE*, where the issue of last resort appears to have been raised, which was in very difficult straits and needed to cut costs. In that instance one needs to examine all ways of reducing costs to ensure the survival of the business. If there are other ways of reducing costs then they should be employed in preference. How does one relate that to a company such as *SAB* where profitability runs into billions of rands per annum. As Todd and Damant³⁴ put it “most decisions to retrench can be avoided if the employer is willing to accept continuing inefficiency in its business, lower levels of profit than could otherwise be achieved, or if it is to continue sustaining losses”. *SAB* could continue the employment of the 115 employees retrenched almost ad infinitum. As the Judge said in the *SAB* case “Here the company has openly come to court and

³⁴ at 908

explained that its decision to restructure was motivated by a desire to become more efficient and competitive and to increase its profitability. In a market driven economy there can be no objection in principle, to retrenching to increase profit margins, provided always that the employer's conduct is found to be fair on a general assessment of all the evidence"³⁵. However, to be fair in terms of the criteria laid down by the Judge, the action to dismiss has to be the last resort, given the hardship entailed. Todd and Damant go on to say that the LAC in the *ADE* case was articulating the importance of engagement with the workers in a joint problem solving exercise to avoid retrenchment if possible. If the court is of the opinion that the objective that the employer seeks to pursue may legitimately give rise to retrenchment, ie motivated by genuine commercial considerations, then retrenchment need only be unavoidable only to the fact that it cannot be achieved by consensus.

It is instructive in this instance to refer to the injunction in Section 189A(19) to the Labour Court to find that an employee was dismissed for a fair reason if (c) there was a proper consideration of alternatives. This is in line with the criterion set out by the Labour Appeal Court Judge in the *General Food* case quoted above. "All viable alternative steps have been considered" and to my mind is not as severe a test as that of the last resort. It again raises the issue of a two track process if the test in Section 189 is one of the last resort and in the case of Section 189A merely proper consideration of alternatives, it begs the question of whether this was in fact the intention of the legislature. Nevertheless the Judge in the *SAB* case was satisfied that the WCM programme was a valid commercial rationale and that on that basis the individual officials were not treated unfairly.

The next aspect of fairness was that of the selection criteria. Section 189(2)(b) mandates that the employer and consulting parties should attempt to seek consensus on the method of selecting the employees to be dismissed. Section 189A(19)(d) mandates that to be a fair dismissal the selection criteria must be fair and objective. This is the only part of Section 189A(19) that uses the phrase fair.

³⁵ at 1997 G

The Judge in the *SAB* case³⁶ referred to an article by Professor Alan Rycroft³⁷ This article addresses an industrial relations practice whereby a new organizational structure with revised job descriptions and competencies is introduced by the employer and all existing staff are retrenched and are requested to apply for the new positions. Rycroft concludes that this process is not unfair if conducted correctly and is not a sham to disguise a dismissal for performance or incapacity issues which should not be dealt with in a redundancy no-fault dismissal regime. Rycroft proposed a number of tests to be applied in deciding whether the process was fair, one of which is that the criteria for appointment to the ‘new’ jobs are clear and justifiable³⁸. In the article Rycroft refers to the “Code of good Practice: Dismissal” of the Labour Relations Act. The Code includes a recommendation to use objective criteria in the selection of employees. “The less capable these criteria are of measurement against objective standards other than the opinion of the person making the selection, the less likely they are to be fair”³⁹. It goes on to say that the less objective the criteria are the greater the obligation to consult becomes. The Judge decided that the practice Rycroft described above did not apply in the *SAB* case but used the Rycroft article to evaluate the selection test applied in the *SAB* case. The Judge summarised the company’s position in that they were of the opinion that the test was a fair comparator and as such was justified as an initial selection tool. The Company believed that their choice of test was supported by the referral to the independent company Flagship Consulting. Even if the use of ABET was found to be subsequently wrong, it was chosen in good faith and was reasonable and as such should be accepted the by court. The Judge appeared to accept that approach, quoting the *BMD Knitting Mill* case where fairness not correctness was mandated. After expert witness on behalf of FAWU, the judge concluded that the test was of insufficient predictive value to be used for selection processes. In deciding that the ABET tests were inappropriate the Judge was left with the question of whether an invalid tool was fair in respect of these category 2 employees who failed to attain the desired ABET levels. Despite favourably quoting the *BMD Knitting Mills* decision the judge decided the use of ABET was unfair. It’s instructive to bear in mind that the ABET tests were used in

³⁶ at 681

³⁷ A Rycroft *Corporate Restructuring and Apply for your own Job* (2002) 23 *ILJ* 678

³⁸ at 682

³⁹ at 1998 H

selection in the pilot application of WCM in Alrode and in the Prospecton application of WCM with the acceptance of the union. Despite the endorsement of the three senior Industrial Relations Consultants at SAB, in selection of the candidates at Newlands (because of the retrenchment issue), it was found to be unfair. The Judge appears to ignore his own test in *BMD Knitting Mills* as well as the Rycroft article which the Judge acknowledged that he was adopting which asks for objective standards. It is my submission that the Judge was inconsistent at arriving at the decision he arrived at. He ignored the issue of all viable steps when arriving at his decision of substantive fairness but resurrected it when reviewing the selection criteria issue. In reviewing the applicability of the ABET the Judge accepted the bona fides of the company in applying the tests but chose to second guess the company's decision. Surely the Judge was intruding on the management prerogative to decide on the tests it would apply, as long as the tests were objective and chosen in good faith, especially after these tests were applied at other sites with no objection from the union.

As the Judge in the *Algorax* case said: "the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic"⁴⁰. Surely that does not apply in this case; common sense is totally inadequate in this context. The ABET programme was introduced to the company nationally nearly 10 years before the case took place by an acknowledged "experienced human resources practitioner" to take cognisance of the background of the workers and the need to acknowledge the changing world of work that would require new levels of literacy and numeracy.

As regards the category 1 applicants who did not submit their qualifications or submit to the ABET tests, the Judge found their retrenchment to be substantively fair, or conversely, not sufficient evidence was present to show that their dismissals were substantively unfair. The Judge speculated that they may have relied on the company's intention to set minimum entry levels and did not think that they would have met those standards. I find this decision to have a measure of inconsistency. If the Judge found that these standards were incorrect or inapplicable, then if the

⁴⁰ at 1104

workers did not submit to the tests because they did not believe them to be predictive of their abilities to do the job, should not they also be entitled to the protection of the court in the same way as their colleagues who did the tests and failed?

The Judge further found the dismissal of category 3 employees who passed the ABET tests and subsequently did not meet the criteria set down for the new positions and were subsequently retrenched, was substantively fair. In effect the effort by the company to introduce an objective test by the adoption of ABET to filter out those people who would not ultimately have made the grade in their opinion, was a complete waste of time. In accepting the fairness of the retrenchment of the category 3 employees, the judge appears to be inconsistent in applying the Code of Good Practice: Dismissals referred to by Rycroft in the article referred to above viz “The less capable these criteria are of measurement against objective standards other than the opinion of persons making the selection the less likely they are to be fair”. The selection process of the category 3 employees was essentially by subjective evaluation by the interview panel (although they did have psychometric assessment results). This was acceptable but the ABET tests objectivity was not. Again inconsistency.

The dismissal of category 4 and 5 workers was found to be substantively unfair and substantively fair respectively but these decisions were incidental to the main issues and do not require comment.

The LAC and the AD in the *Atlantis Diesel* case endorsed the view that consultation should commence at the earliest opportunity and before a final or even an in-principle decision is taken. Once that decision is taken it becomes difficult to involve the parties in a joint problem-solving exercise as required by Section 189 (2) of the Labour Relations Act. This view has been subsequently endorsed by numerous LAC decisions. In the *SAB* case the Judge was of the opinion that this was the situation. The Operating Committee at head office took the decision to implement the WCM plan at Newlands in 1999 before Union consultation took place at Newlands. As a result of this and numerous other procedural shortcomings the Judge decided that the dismissals were procedurally unfair. This aspect of the case is relatively straightforward. The court ordered that the employees unfairly dismissed for reasons of

substantive unfairness be reinstated and the other employees dismissed for procedural unfairness be compensated.

4 LIMITATIONS TO OPERATIONAL REQUIREMENTS **DISMISSALS - SECTION 187**

As has been mentioned above, in an ever accelerating changing world, business will need to continually implement change in the workforce. It is the prerogative of management to introduce change which may be introduced without the consent of the affected employees. The LAC Judge in *Precision Tools Case*⁴¹, where management required the employees to operate two machines instead of the previous one, held that “only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do a job in the required manner”⁴². That gives management a fair degree of latitude. However when a proposed change equates to a variation of a term or condition of employment, is it necessary for employees to be consulted and change negotiated with employees and their representatives.

When that process fails to arrive at the desired result from an employer’s viewpoint, further steps need to be contemplated. In resolving disputes of this nature it is necessary to visit the issue of disputes of right and disputes of interest as different dispute resolution mechanisms apply. In the case of a dispute of interest as above, the party is claiming something new, something to which it currently has no legal right. The current Labour Relations Act presupposes that such disputes are resolved through a process of collective bargaining. This has been referred to an issue of power, whereby the union on the one side employs the use of strikes and the employer the use of the lock-out. At the end of the day the union may capitulate because of the loss of wages whereas the employer is faced with the loss of production and consequently, revenue. This loss may be greater than the benefits accruing to the desired change and the employer simply unlocks the doors. The other dispute is one of rights. Where a right is conferred by way of the law or by contract, a dispute arising therefrom can only be resolved in the appropriate court of law. No power play may be resorted to in

⁴¹ *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & Others* (1995) 16 ILJ 349 (LAC)

⁴² at 357 H

this instance. Dismissals are not part of the power regime – “dismissal is not a legitimate instrument of coercion in the collective bargaining process”⁴³. The 1995 Labour Relations Act endorses this injunction by specifically providing in Section 187(1)(c) that a dismissal is automatically unfair if the reason for the dismissal is “to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee”. However, as we have seen above, in relation to retrenchments, that dismissal is not automatically unfair if the reason for the dismissal is for a fair reason based on the employer’s operational requirements. The reconciliation of the apparent contradiction implicit in the above, has proved to be extremely difficult and no doubt very difficult for management to resolve, let alone the courts.

The benchmark case in this instance is *NUMSA and others v Fry’s Metals (Pty) Ltd*⁴⁴. The background was that the company called in a firm of consultants to review the company’s operations with a view to increasing productivity. It believed that if it did not increase productivity it would eventually have to close down. The consultants proposed a two shift process, a hand-over procedure and the withdrawal of a transport subsidy. The union rejected the proposals. The workers were eventually given an ultimatum – accept the proposals or be retrenched (although the company rejected this characterisation, that is what it was). The Judge found that the dispute was a dispute of mutual interest and as such he was reluctant “to allow the dispute to escape from the protected zone of collective bargaining in which dismissal of the present sort ought never be permitted”⁴⁵. The Judge was of the opinion that the company should have used its strength to lock out the workers until they acceded to the new system or the company withdraw its demand when the cost of the lock-out exceeded the savings of the system. (That this outcome would have ultimately bankrupted the company, if one accepts the view of the consultants, does not appear to have concerned the Judge). “*Fry’s Metals*, therefore, illustrates a classic conflict between the employer’s right to dismiss for operational requirements (provided, of course, a fair procedure is

⁴³ *MCBAWU v Hemic Premier Refractories (Pty) Ltd* (2003) 24 *ILJ* 837 (LC) at 842 H

⁴⁴ (2001) 22 *ILJ* 701 (LC)

⁴⁵ at 711 G

followed), and the employees' right not to be dismissed in order to be induced to comply with the employer's demand"⁴⁶.

The Labour Appeal Court⁴⁷ on the other hand held that there was no conflict between the two rights when it heard the *Fry's Metals* appeal. The apparent contradiction was removed when the historic background to Section 187(1)(c) was taken into account. This section of the Labour Relations Act had its roots in the previous Labour Relations Act's definition of a lock-out. The lock-out under the 1956 Labour Relations Act included the termination of employment to compel employees to comply with demands retarding terms and conditions of employment. Dismissals that were intended to terminate the employment relationship irrevocably did not fall under the definition of a lock-out. They therefore fell outside the scope of an unfair labour practice and were not subject to the 1956 Labour Relations Act. The LAC Judge was of the opinion that the same interpretation could be placed on Section 187(1)(c) of the current Labour Relations Act. "A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept the demand in respect of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two. An employee's acceptance of an employer's demand in respect of mutual interest can only be useful or worth anything if the employee is going to remain in the employer's employ"⁴⁸.

The LAC Judge appeared to see the process as the employer threatening dismissal if the employee does not agree to the changes required by management. In the case of those employees who then agreed to the change, the dismissal ceases because it has served its purpose. Those who did not agree were dismissed not in terms of Section 187(1)(c) but in terms of section 188(1)(a)(ii). The purpose of the dismissal for operational requirements is, therefore, to remove those employees who do not agree to the changes and replace them with new employees who will comply with the revised business requirements. In contrast, the purpose of the prohibited Section 187(1)(c) dismissal is to retain the existing employees under revised terms and conditions.

⁴⁶ Grogan *Chicken or Egg* (2003) April *Employment Law* Vol 19(2) 11 at 13

⁴⁷ (2003) 24 *ILJ* 133 (LAC)

⁴⁸ at 146

Grogan deduces that the difference between the two dismissals is determined by the employer's objective⁴⁹. If the employer intends to give his employees another chance after dismissal to revise their decision and accept the changes, it runs foul of section 187(1)(c). If on the other hand the objective is to replace the existing workers with new workers who will accept the change, it is an operational requirements dismissal authorised in terms of section 188. Grogan, while conceding the logic, asks whether it makes sense to regard as automatically unfair dismissals in the situation where the employer keeps the issue open for the employees to change their minds and retain their jobs, whereas it is acceptable for employers to wash their hands permanently of employees who will not toe the line. It is also problematical when viewed from the point of the legislators. It appears unlikely that they intend to allow disputes in the process of collective bargaining to be settled by unconditional dismissal but not allow conditional dismissal where jobs may be retained.

The *Fry's Metals* case was heard by the Supreme Court of Appeal⁵⁰. It endorsed the view of the LAC that there was a difference between a dismissal in terms of Section 186(1) and that contemplated by Section 187(1)(c). In the latter case the dismissal has a conditional nature depending on whether the employee accepts the employer's demands or not as opposed to the normal dismissal of section 186(1). The Appeal Court in accepting that distinction, concludes that all a court has, therefore, to decide in reviewing such dismissals, is to examine the employer's reason for the dismissals. Once compulsion to accept the employer's demand is excluded (and a valid operational rationale exists), the dismissal will escape Section 187(1)(c).

The jurisprudence in the matter is clear. It is now open to the legislature to amend the law if it is not satisfied with the interpretation of section 187(1)(c). As matters stand the interpretation by the courts makes the issue quite clear from an employer's viewpoint and assists in the implementation of operational changes.

Not long after the *Fry's Metals* case, another benchmark case was heard on appeal which reinforced the *Fry's Metals* decision. The same Judge wrote the majority

⁴⁹ at 17

⁵⁰ *National Union of Metal Workers of South Africa and others v Fry's Metals (Pty) Ltd* (2005) 026/03 (SCA)

decision. The context in the *Algorax*⁵¹ was very similar to that pertaining in the *Fry's Metals*. The key issue was whether the workers had been dismissed to compel them to comply with management's demands to accept the new shift system or whether they were simply being dismissed so management could employ replacement workers who would work the new shift system. As in the *Fry's Metals* case, if the former was the basis for dismissal, then they were unfair in terms of Section 187(1)(c). If the latter applied then a dismissal for operational requirement would be fair as long as the requirements of Section 188 and Section 189 were complied with. In this case there was actually elements of both intentions. Persuasive was the fact that management had indicated that the purpose of the shift change was to avoid the retrenchment of permanent employees in the packaging department. In this instance the dismissals could not have been intended to be final but merely to pressurize the employees to accept the changes and so avoid retrenchment. Also during the case the company representative repeatedly said that they did not want to dismiss the workers merely that they accept the demand for the new shift system. This offer was again made during the hearing. On the basis of two pieces of evidence, the court concluded that the dismissals were made to force the workers to accept the change and therefore fall within the ambit of Section 187(1)(c) and therefore were automatically unfair. Although this decision was consistent with the *Fry's Metals* decision, it appears inconsistent with the objectives of the Labour Relations Act which was to promote economic development, social justice and labour peace and ultimately protecting workers. In these two cases. *Algorax* "perpetrated an automatically unfair dismissal by making genuine attempts to resuscitate an employment relationship while *Fry's Metals* were exonerated for doing the opposite"⁵².

Algorax confirms that if an employer dismisses employees who refuse to accept an operational change and wishes to avoid the automatic unfair dismissal application of Section 187(1)(c), it must not give the employees the impression that they can still accept the change after dismissal and thereby be reinstated and should be seen to be sticking to that decision. The legislature may have introduced Section 187(1)(c) to ensure that the use of dismissal be excluded as much as possible for the collective bargaining process. What it has done is to compel the employer to retrench as soon as

⁵¹ *CWIU and others v Algorax (Pty) Ltd* (2003) 11 *BLLR* 1081 (LAC)

⁵² *Grogan Termination Lock-out Employment Law* December (2003) Vol 9(b) 14 at 17

it appears that the employees will not bend to its operational demands. This does not appear to be in the employees' best interests nor does it really suit the employers. Being forced to retrench to enforce a desired change is probably not what they would want to do. Retrenchment is an expensive exercise. It leads to the loss of valuable skills that employees have accumulated over time at the cost of the employer – either by way of direct training costs or by loss of output and quality while workers acquire their skills by on the job training. It results in the disruption of the slow build-up of production. Not least is the actual severance pay. It would probably be better for both parties to allow the conditional dismissal to be made to bring the workers around to agreeing to the proposed operational changes. The interest of the business should be to get the existing workers to agree to the changes and the interest of the workers should ultimately be to retain their jobs. The loss of employment can be devastating to an individual operating on the margin who has at the same time, got some financial commitments. Allowing the employers to effect operational changes with the intention of increasing profitability and ultimately increasing employment if this allows the business to expand and grow, must be in the interest of the economy as a whole. At the same time retaining existing employees in the market economy can only be in the best interests of all concerned. The legislature, by trying to alter the level playing fields in the favour of the employees, has apparently achieved the opposite to the cost of the country as a whole. Management's prerogative to manage is being negatively affected.

A further example is the exclusion of the employer's ability to use the lock-out as a means of compelling workers to agree to a change in working conditions. The effectiveness of that mechanism has been eroded by the prohibition of the use of replacement labour. One can understand and sympathise with the unions and the legislature in their attempts to prohibit the use of replacement labour, but the effect of that prohibition is to minimise the use of the lock-out and force the employers more quickly to the point of dismissal for operational requirements. Thus, instead of prolonging the dispute with the effect that it should be resolved either way and as such, workers retained in the workplace, the effect is to hasten their dismissal. Again, not really in the interest of anybody concerned.

As mentioned above the issue of whether a dismissal is a lock-out dismissal or an operational requirement dismissal must be determined by the interpretation of the employer's intention. This enquiry may only finally be resolved after much expensive litigation over a number of years. In the *Algorax* case that was some five years after the dismissals. The company then learned that the dismissed workers had to be retrospectively reinstated to a shift pattern which it had abandoned five years previously. This delay was neither beneficial to the workers nor the business. What emerges is that employers should communicate clearly, with a proper understanding of what the implications are, their intentions and the effect of their decisions to the workforce. It is in their interests to do so in order to avoid the possibility of falling foul of Section 187 as well as being fair to the workers concerned.

5 THE TRANSFER OF A BUSINESS AS A GOING CONCERN

Business reorganization will often concern itself with the sale of a part of the business which does not fit a particular strategic direction. Since the age of the conglomerate has passed and business theory is more concerned with capitalising one's strategic strength, "concentrate on the knitting", a necessary concomitant of that view is to dispose of the parts that do not fit the new strategic path. Or alternatively acquire a business that reinforces that strategic strength. Conversely, plain old cost cutting may be applicable. Particularly in the case of peripheral services, rather than tie up capital and management in such activities and thereby lose focus, it is preferable to buy the service from somebody else whose strength is the provision of such services. Especially in the legislative climate of today, so much effort has to go into the management of people and their legal niceties, it is very tempting to pass the problem on to another party so the business can concentrate on the real management of the business. This form of restructuring called outsourcing, has grown exponentially in popularity.

Under common law closure or transfer of a business resulted in the termination of the contracts of employment. Employees could not be compelled to work for another employer. In most cases they had to accept new terms and conditions of employment with the transferee at whatever terms were on offer. Under the 1956 Labour Relations Act, the Industrial Court would intervene to some extent in these situations in terms of

its unfair labour practice jurisdiction. If the Court was of the opinion that the transfer was for an ulterior motive other than conventional business rationale, it would intervene. In the case of the sale of the business as a going concern, the Court would generally follow the common law in that there was no transfer of employment contracts. It did not require the seller to consult the employee in question and involve the purchaser where appropriate. If consultation did not take place and job losses resulted, the Court would declare the retrenchment unfair.

5(a) Section 197 of the Labour Relations Act

To regulate the transfer of a going concern, Section 197 of the Labour Relations Act was enacted. Initial problems with the wording of this section resulted in the section being rewritten and substituted in the 2002 amendment of the Labour Relations Act⁵³. The revised Section 197 defines a business as including the whole or part of any business, trade undertaking or service. Transfer means the transfer of a business by one employer to another employer as a going concern. If the transfer of a business takes place, unless the employers agree otherwise with the representative of labour, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer. In effect there is a seamless transfer of the employees from one employer to another. All the rights and obligations are thus transferred, with the proviso that the terms and conditions may be varied as long as they are on the whole, not less favourable to the employees. This element does introduce a degree of flexibility which allows the employer to vary some of the conditions and terms of employment to suit the new work environment. However this is not applicable if the conditions are determined by collective agreement. It is interesting to note that Section 197 was based on the Acquired Rights Directive 77/187 EEC promulgated by the European Parliament and the Transfer of Undertakings (Protection of Employment) regulations 1981 in the UK which gave effect to the EU Directive. As a consequence our courts have relied on the European jurisprudence on interpreting the section (as will appear later).

⁵³ Act 12 of 2002

5(b) Application of Section 197

When deciding whether Section 197 applies in the case of a business transfer there are three initial tests to be applied:

- 1 did a transfer take place
- 2 of a business
- 3 as a going concern

In applying these tests as per the European jurisprudence, substance takes precedence over form and it is not what the parties agreed to but what the actual impact was.

In the issue of whether a transfer took place it is instructive to look at the local jurisprudence. In *Schutte and others v Powerplus Performance (Pty) Ltd and other*⁵⁴, a car rental company transferred its workshops to a new entity in which it took a 50% interest. Employees were told to apply to the new entity and those who did not accept new conditions of employment were retrenched. The court regarded those parts of the agreement between the parties regarding the transfer of employees, stock and equipment and the sharing of premises as support of the fact that a transfer had taken place. In support of that notion it noted that the service had continued uninterrupted and management staff were also transferred. The Labour Court in this case introduced a wide interpretation of the term transferred, which included sale, merger, take-over, donation and exchange of assets.

However the Judge in the Labour Court in the case of *National Education, Health and Allied workers' Union vs University of Cape Town and Others*⁵⁵ was not able to include outsourcing in the list of activities which constituted a transfer. In that case the university outsourced its gardening maintenance and cleaning division to a number of outside companies. Implicated in this development were 267 staff members who could either apply for a limited number of positions retained by the university or apply for positions at the outsourcing companies (at reduced wages). The union claimed that Section 197 applied and that the workers' contracts of employment were automatically transferred to the new companies.

⁵⁴ (2000) 20 ILJ 655 (LC)

⁵⁵ (2002) 21 ILJ 1618 (LC)

The Judge was of the opinion that transfer did not take place because of the inherently different nature of outsourcing. Outsourcing involves putting out to tender of certain services for a fee. The employer pays the contractor a fee to render the service as opposed paying salaries and wages to the employees. The outsourcing transaction is for a fixed period after which there is a re-tendering process at which point the contract could be awarded to another contractor. In addition the employer retains an element of control over the process whereas in the case of a sale or any other form of alienation, control is no longer an issue. When this case was heard before the Labour Appeal Court the decision did not turn on the issue of whether an outsourcing activity constitutes a transfer or not. C Bosch⁵⁶ submits that there is nothing in the wording of Section 197 which supported the court in their decision. The word transfer used by the legislature is all embracing rather than exclusive; also the issue of permanency does not appear in the legislature. In addition the other jurisdictions where this type of legislation applies have included outsourcing in the definition of business. Finally he concludes that the inclusion of ‘service’ in the 2002 amendments indicates that the legislation had outsourcing in mind in respect of Section 197⁵⁷.

5(c) Business Whole or Part

In the amended version Section 197(1) now defines a business as including the whole or part of any business. For the effects of Section 197 to come into place a business or part thereof will have to be the subject of the transfer. It is the “part of a business” that provides the difficult issue of interpretation. *In SAMWU and others vs Rand Airport Management Company (Pty) Ltd and others*⁵⁸ the Labour Court had to decide whether a garden service which had been outsourced constituted a business in terms of the Act. The Judge on this issue appears to conclude that it was not a business or part of a business primarily because the gardening function forms part of maintenance service. In other words, gardening could not be a part of the Airport Management business because it was part of another part, ie maintenance. In addition gardening and maintenance of which it was a part was also non-core activities of the Airport. The other issues raised by the Judge in this regard, appear to be incidental to the issue

⁵⁶ C Bosch *Balancing the Act: Fairness and Transfers of Business* (2002) 25 ILJ 923 at 929

⁵⁷ at 930

⁵⁸ (2002) ILJ 2307 (LC)

of whether a business or part was transferred. Bosch⁵⁹ concludes that this is a very narrow view, one which is not supported by the wording of the Act or the European Court of Justice which describes a relevant entity as “an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective”⁶⁰. Again in the *University of Cape Town* case the Labour Court in part of its reasoning to exclude the working of Section 197 indicated that the outsourced services, although they could be identified as a separate economic entity, did not constitute a business because part of the business as such was retained by UCT. This reasoning appears to be similar to that in *Rand Airport* in that the outsourced services were part of a part and therefore outside Section 197. As Bosch concludes, if that was the case the employers could outsource piecemeal and therefore avoid section 197⁶¹. It falls back to the court to look at the substance rather than the form.

When the *Rand Airport Management* case came before the Labour Appeal Court⁶² it focused its attention on the 2002 Amendment⁶³ which introduced the concept of “service” into the definition of business in Section 197(1). Given the definition of service in the *New Shorter Oxford English Dictionary* and the use of the term service in the draft agreement drawn up between the company and the two outsourcing companies, the Judge concluded “that both the gardening and security functions fell within the ambit of the word “service” in Section 197 of the Act⁶⁴. The functions thereby also were part of a business.

5(d) Transfer as a Going Concern

In the *University of Cape Town* case the LAC majority decision was that a business was a going concern “only if the assets, movable and immovable, tangible and intangible, are utilised in the production of profit ... In every business its employees are a vital component and in labour intensive industries, the major asset. To say that

⁵⁹ at 934

⁶⁰ *Suzen v Zehmacker Bauvereinigung GmbH Krankenhausservice* (1997) IRLR 255 (ECJ)

⁶¹ at 933

⁶² *SAMWU and Others v Rand Airport Management Company (Pty) Ltd and Others* (2004) 13 LAC 1.16.4.

⁶³ Act 12 of 2002

⁶⁴ at paragraph 19

there can be a sale of a business as a going concern without all or most of its employees going over is to equate a bleached skeleton with a vibrant horse”⁶⁵. The majority were also of the opinion that the going concern principle could only be satisfied if there was an agreement to that effect between the employers. The Labour Court Judge in the *Rand Airport Management* case was bound by the *UCT LAC* judgement. Even if the Judge was able to find that the garden service was part of the business as defined, because the employers did not intend to transfer the employees the Judge was not able to find that the transfer was of a going concern. In addition the garden service had no management, goals, assets, customers and no goodwill, ie not a going concern. The Going Concern issue is dealt with extensively in 5(e) below.

5(e) The Constitutional Court Pronouncements on the *University of Cape Town Case*

The Constitutional Court in its pronouncements on the *University of Cape Town*⁶⁶ case started off by examining the Labour Relations Act itself. In Section 1 of the Labour Relations Act, the purpose of the Labour Relations Act is described as “to advance economic development, social justice, labour peace and the democratisation of the workplace”. This is to be achieved by giving effect to Section 23 of the Constitution which in section 23 (1) provides that “Everyone has the right to fair labour practice”. In the opening section of Chapter VIII of the Labour Relations Act which contains Section 197, Section 185 provides that “every employee has the right not to be unfairly dismissed”. The Constitutional Court drew a direct line from the Constitution to Section 185 of the Labour Relations Act and furthermore concluded that Section 185 is the foundation for the sections of the act that follow. This, the Constitutional Court concluded, is the backdrop against which Section 197 should be understood. By implication the Constitutional Court determined that the LAC was incorrect to arrive at the decision it did because it was approaching Section 197 from the wrong angle. The majority judgement of the LAC was that the primary purpose of Section 197 was to facilitate the transfer of the business, ie the emphasis on the assets

⁶⁵ *The National Education, Health and Allied Workers’ Union v University of Cape Town and Other* (2002) 23 ILJ 306 (LAC)

⁶⁶ *The National Education, Health and Allied Workers’ Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC)

and the workforce being transferred. The minority appeared to favour the protection of the workers in the event of a transfer. The Constitutional Court was of the opinion that the answer was somewhere between the two views, ie the protection of the workers could not be ignored. The Constitutional Court referred to the European origins of Section 197, noted earlier in this dissertation, and stated that the effect of these regulations was to protect workers against unfair dismissals in the event of the sale of a business. Section 197 takes the issue further in that it also facilitates the commercial transaction by ensuring that the new employer can take over the workers and assets from the old employer.

In reviewing the LAC decision that Section 197 can only take place when the employers agree to transfer the assets and the employees in other words as a “going concern”, the Constitutional Court repeated the injunction that the substance and not the form must be the subject of review and in this respect cognisance must be given to a number of factors. These include the transfer or otherwise of the tangible and intangible assets; whether the workers are taken over; whether the customers are transferred and whether the source business is conducted by the new employer⁶⁷. The list is not exhaustive and is peculiar to each case. The fact that the workers are not transferred in the agreement, in itself, does not preclude the transfer from the wording of Section 197. To accept that interpretation would give the employers an out to avoid the working of Section 197.

The Constitutional Court concluded that the force and effect of Section 197 was that the transfer of a business had the irresistible consequence that all the rights and obligations flowing from employment are transferred to the new employer. Any doubt in this regard was eliminated by the amendment to section 197 which stated in Clause (2)(a) that the “new employer is automatically substituted in the place of the old employer in respect of all contracts of employment”.

⁶⁷ at 120 A

5(f) Outsourcing and Business Reorganization

As far as business reorganization is concerned outsourcing remains a valuable business tool and will continue to have a place in the business order of things. What these decisions reviewed above do, is to ensure that outsourcing is not a method of reducing unwanted staff or amending what the employer considers are unfavourable conditions of employment. If the employer has surplus employees then the employer must go through the dismissal for operational requirements procedure. The employer may certainly not dismiss in anticipation of a transfer. The Labour Court in *Western Cape Workers' Association v Halgang Properties cc*⁶⁸ determined that the old employer could not legally dismiss employees on the basis of the operational requirements of the new employer. They were not the operational requirements of the old employer and had in fact at the time of dismissal, not yet occurred.

The 2002 amendments to the Labour Relations Act brought about two changes to the Act relative to dismissals. The definition of dismissals in Section 186 was expanded to include as a dismissal, where an employee terminates a contract of employment after a transfer in terms of Section 197 because the new employer provided the employee “with conditions or circumstances that are substantially less favourable to the employee than those provided by the old employer⁶⁹. Note that the Act uses the words ‘conditions or circumstances’ which is a very wide catch-all. The other amendment is to Section 187 which deals with automatically unfair dismissals. Section 187 (g) adds to the list of automatically unfair dismissals, a dismissal, the reason for which is a transfer, or a reason related to a transfer contemplated in Section 197. This begs the question raised earlier regarding the dismissal of employees subsequent to the transfer by the new employer. Bosch⁷⁰ says that the injunction is very wide and would seem to cover any dismissals in the transfer environment. The initial drafts of the amendments, while they denied employers the right to dismiss in the context of transfers, still granted employers the right to dismiss based on operational requirements. The final version omitted this specific let-out clause. Bosch speculates that it would create an untenable position were the omission of a

⁶⁸ (2001) 22 *ILJ* 1421 (LC)

⁶⁹ Section 186 (f)

⁷⁰ at 937

specific sanction to employers to terminate for operational reasons, be interpreted as an outright ban. As the Constitutional Court pointed out in the *University of Cape Town* case, everyone has a right to fair labour practice, including employers. Therefore if an employer can establish that operational requirements are the reason for dismissal in the transfer context, then such dismissal would not be automatically unfair. They may be related to the transfer but the transfer as such would not be the main reason for the dismissal. An example could be where an employer transfers employees in an outsourcing exercise, and the new employer finds that the efficiencies the employer is able to produce by specialization makes dismissals for operational requirements possible. It would be prudent to allow a lapse of time to intervene between to distance the dismissal from the transfer and to allow organizational efficiencies to become readily apparent. It may be even more prudent to allow natural attrition to achieve the same purpose. By all means the business person should be allowed to focus on these core competencies and transfer units and divisions to achieve that objective. Section 197 will aid in that process but not to the extent of dismissing staff and reducing terms and conditions.

5(g) Possible Future Problems Relating to Section 197

The Labour Court Judge in the *University of Cape Town* case reached the conclusion that outsourcing was not a transfer as envisaged in Section 197 because inter alia the transfer was not of a permanent nature. At the end of the contract the outsourcer could decide to reverse the process and take the staff back. What, however, if the outsourcing party decides to terminate the contract for whatever reason and places the business with a new contractor? Does Section 197 come into force with respect to the new transfer? Transfer is defined in Section 197 (1)(b) as “the transfer of a business by one employer (the old employer) to another employer (the new employer), as a going concern”. A strict reading of the Act says that there is no transfer in the instance mentioned above. There is no contract between the old contractor and the new outsourcing party. The existing contractor does not transfer the business, the original employer actually transfers the business. In that context it would appear that the old outsourcing party could merely dismiss the workers it was not able to keep or re deploy by reason of its operational requirements.

Bosch⁷¹ finds the notion that the “transfer” does not comply with Section 197 and so provides a blanket exclusion for Section 197, very unsatisfactory. A drafting oversight would deny the employees the protection afforded by Section 197. Bosch believes that the issue is not whether or not there is a transfer, but whether what is transferred is a going concern. He believes that something will be transferred between the outgoing to the incoming contractor. First of all, in my view, there is no certainty that anything will be transferred. If the original contract is for a number of years, the equipment will probably have been replaced over the period and a large number of the staff will have left and have been replaced, others would have been transferred to other contracts run by the outsourcing company. In my own experience of cleaning contractors, for example, is that the staff turnover is high both by way of voluntary dismissal and by way of transfer to another contract with the new company. And if there is no transfer between the old contractor and the new contractor, either by way of the interpretation of Section 197 or by way of fact, then the test of a going concern does not come into play.

To get around this problem he postulates that the entire service is transferred to the new contractor by the outgoing contractor but in a two stage notional process via the outsourcing party. He contends that there is nothing in Section 197 that requires the transfer from one employer to another to occur in one stage. However, in my view, section 197 does not support that contention – it is clear that the legislators did not envisage the process of second generation contracting out. Otherwise it would have framed the regulation differently. The two stage transfer is difficult to comprehend when there could be a lapse of a number of years between the stages. Finally, when we are asked to accept the notion of the two stage transfer, we are enjoined to have regard and substance and not the form of the transferring transaction. On the same basis we are asked to regard the lack of a contractual relationship between the old contractor and the new contractor as insignificant. In this regard Bosch refers to a number of European cases where the first generation contracting out employees are transferred to the second generation contractor but with the rider that “The European authorities have held, however, that the lack of any contractual link between the

⁷¹ at 930

transferor and the transferee might mitigate against finding the transfer as a going concern⁷².

As in the *University of Cape Town* case the issue may find its way to the Constitutional Court. In this eventuality the Constitutional Court may adopt the same approach as it did in the *University of Cape Town* case in that Chapter VIII of the Labour Relations Act is a direct manifestation of the constitutional right to fair labour practice; and if a lower court did not apply Section 197 in the case of a second operation transfer, it would have denied workers the fair labour practice protection of Section 197. An interesting prospect.

Another pertinent issue that may arise from Section 197 transfer is to determine the employees that are transferred. This is relatively straight forward when looking at an integrated self-standing unit but if it is part of a unit which has support staff elsewhere or workers also service more than one unit, how are they to be treated? In a European case⁷³ the European Court of Justice invoked the test that it was sufficient to determine to which part of the business the employee was assigned. Nevertheless in that case the Court decided that the support staff were not covered by the transfer. A useful test of assignment appears in another European case⁷⁴ viz the amount of time spent in differing parts of the business, the amount of value given to each part, the terms of the employment contract and how the costs of the employees' service are apportioned. In the European cases quoted by Bosch⁷⁵ in this matter it appears necessary that the assignment is to one specific part of the business to prevent confusion as to when parts or even sub divisions of parts are transferred. Again from the European experience of transfers, the courts will have to be vigilant to the possibility that employers may intentionally transfer employees that they wish to get rid of to a part of the business which is to be transferred to a third party and so avoid the problems associated with a non-performance dismissal. Bosch does not address the issue but the reverse may also occur. The transferring employer may hold back employees that the employer does not wish to transfer and so retain the benefit of their

⁷² Bosch at 931

⁷³ *Bozon v Rotterdamsche Droogdok Maatschappij Bv* (1986) 2 CMLR 5 (ELJ)

⁷⁴ *Duncan Webb Offset (Maidstone) Ltd v Cooper* (1995) IRLR 633 (EAT)

⁷⁵ C Bosch *Of Business Parts and Human Stock: Some Reflections on Section 197(1)(a) of the Labour Relations Act* (2004) 25 ILJ 1865 at 1880

services. In this case the employee or the new employer may feel aggrieved and wish to take action.

5 CONCLUSION

This dissertation started off by way of introduction outlining the business environment and the escalating rate of change, this being compounded by the South African situation where the correction of past injustices adds another necessary layer of complication. To be able to respond to these changes and to meet the developmental challenges of the country, employers have to be able to operate in a flexible manner. They need to be able to reorganize their businesses fairly rapidly in response to the changing environment. In the earlier phase of South African labour law environment, the common law offered little or no protection to the employees and the employers were able to ride roughshod over their workforce and do precisely whatever they wanted. This is definitely not in the best interests of industrial peace and harmony. Fairness demands that both the employer and employee face level playing fields in their contest to share in the economic wealth of the country. The 1956 Labour Relations Act started the process and the development of the concept of a fair labour practice which arose from the subsequent jurisprudence, still echoes through the labour law of today. The 1995 Labour Relations Act which was the product of a process of protracted negotiation between Labour, Business and Government, encapsulated the developments of the earlier years but because it was the product of the post democratic dispensation, it has an understandable bias towards the Labour side of the equation. As has been found in many economies, particularly in Europe, where the legislature is focused on the protection of the workers, it introduces mechanisms which limit the flexibility in the use of the labour resource and ultimately impede the growth of employment and subsequently of the economy as a whole. Germany today is an acknowledged example of this process. As the current government there has found that once you have given, it is politically very difficult to take away.

Inevitably in South Africa where one has had a distinctly labour unfriendly dispensation for a number of years, once the opportunity presents itself to right these injustices, the pendulum will swing too far in the opposite direction. History is

replete with such examples. What is required in this context is an adjustment of the pendulum back towards the centre with a level playing field for all. As the governing classes spread their wings into the realm of business and begin to appreciate the impact of the legislation on business they themselves manage, they will begin to facilitate the required changes.

In specific terms this dissertation has looked at business reorganization in relation to downsizing where the business has to reduce its workforce to either save costs, increase profits or take advantage of strategic opportunities. These dismissals have to be substantively fair and procedurally fair. In the case of the substantively fair requirements, this dissertation concludes that the judicial pronouncements appear to have intruded to a level in the management's prerogative to manage, which could be regarded as excessive.

The debate appears to be whether the focus of the earlier case law in giving management the benefit of the doubt in its decision making process, given that it has applied its mind to the subject and has genuinely arrived at its decision, was appropriate as opposed to the approach of the Judge in the *S A Breweries* case which appeared to be intrusive into the area of the prerogative of management to manage the business. The earlier approach appears to be more in line with the criteria established in Section 189A(19) other than in relation to the selection criteria. It begs the question as to the intention of the legislature. The plea for this dissertation is that management be given a level of discretion to manage as long as their bona fides are established. This is not to suggest that the courts are deferential to management; their role is to challenge but not, it is submitted, to usurp their role.

The judicial process itself is very ponderous at times and cost consuming. A case could be made for some form of early dispute resolution mechanism similar to that provided for procedural fairness dispute resolution. In the case of problems with lock-out dismissals and dismissals for operational requirements, the law appears to have exceeded its original intention by way of the unintended effects of the Labour Relations Act. There appears to be scope for the Legislature to review the effects of Section 187(1)(c) as it can have negative implications both for management and workers.

Finally the law in relation to the transfer of business and particularly the issue of outsourcing, has corrected some nefarious business practices which has the effect of unfairly depriving workers of their livelihoods. Nevertheless not all these issues have been resolved and further complications could emerge as this practice becomes increasingly popular both here and in the wider business community.

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