EMPLOYER’S PREROGATIVE –
IN THE CONTEXT OF OUTSOURCING

S.F.M. TEN BERGE

<Examination Copy>
EMPLOYER’S PREROGATIVE – IN THE CONTEXT OF OUTSOURCING

Susanne Francijna Maria ten Berge

Keywords

Labour Relations Act
Business restructuring
Outsourcing
Fair labour practice
Fixed-term contracts
Terms and conditions of employment
Dismissal
Operational requirements
TUPE-Regulations
Abstract

EMLOYER’S PREROGATIVE – IN THE CONTEXT OF OUTSOURCING

S.F.M. ten Berge

Degree of Legum Magister, research paper, Faculty of Law, University of the Western Cape.

In this research paper, I investigate whether there are any limitations (or restraints) in the Labour Relations Act 66 of 1995, which possibly keeps an employer from outsourcing functions or parts of a business to a third party. By virtue of the desirability of the limitations on the employer’s prerogative, I determine whether the South African should not be changed in light of comparative jurisprudence adopted overseas to create more certainty for employers. In addressing this research problem, will use the Rand Airport case [2002 23 ILJ 2304 (LC)] as a basis from which this research paper will proceed. And contributes to tackle this issue in an appropriate way, while comparing approaches adopted overseas (i.e., the European Council Directive, United Kingdom’s TUPE-Regulations and its proposal to amend the current Regulations and New Zealand’s Employment Relations Law Reform Bill).

I will discuss four topics; the first issue is outsourcing in relation to fair labour practice, the second issue is outsourcing in relation to fixed-term contracts, the third issue is outsourcing in relation to the enforcement of changing terms and conditions of employment and the last issue discusses the relationship between outsourcing and dismissals for operational requirements.

I place sec 197 of the LRA in its constitutional context to determine the employer’s prerogative in the context of outsourcing in relation to fair labour practice. In this manner the effect of a decision to outsource can be determined, considering fair labour practice.

I emphasis on fixed-term contracts and sec 186(1)(b) which regards an employee who reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew on less favourable terms, or did not renew it at all as a form of dismissal. I discuss in which cases (and circumstances) the Labour Court found an objective basis
for a ‘reasonable expectation’, especially in the context of outsourcing. Further, I define the acceptance of a premature termination of fixed-term contracts.

I concentrate on sec 187(1)(c) and determine the concept of changing terms and conditions of employment contracts, in order to draw a line between sec 187(1)(c) and a dismissal for operational requirements. This is important, since the definition of operational requirements is wide enough to include dismissals of employees that refuse to agree to proposed changes to their terms and conditions of their employment contracts. Only when the differences are made clear, it is clear in which circumstances an employer may resort to a dismissal for operational requirements. Hereby will the TUPE-Regulations – and its proposal to amend the current Regulations – and the European Council Directive be discussed, in order to make clear the differences (and the consequences of that) with the LRA in the definition of the term ‘operational requirements’.

And finally, I suggest that I should be better if an employer would be obliged to first exhaust the collective bargaining process, in order to avoid that an employer does not fall back too easily on a dismissal for operational requirements.

June 2005
Notification of intention to submit

In order to graduate as soon as possible, I hereby declare that I am ready to submit my research paper 'Employer’s Prerogative – in the context of Outsourcing' for examination.

Full Name  ...SUSANNE FRANCJMA MARIA TEN BERG...

Date  ....12/05/2005.............

Signed  ................................
Declaration

I declare that *Employer's Prerogative – in the context of Outsourcing* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: SUSANNE FRANCIS MA MARIA TEN BERG

Date: 14/06/2005

Signed: 

Ber}
Contents

Keywords i
Abstract ii
Declaration iii
Contents iv

Chapter 1 Introduction 1

Chapter 2 Outsourcing and fair labour practice 6

Introduction 6

a. The purposive approach and objects of the LRA 7
b. The constitutional right to fair labour practice 9
c. The LRA in compliance with the right to fair labour practice 10
d. Business transfers and the right to fair labour practice before 1995 11
e. Section 197 12
f. The constitutional dimension of section 197 14
g. The employer's prerogative in the context of outsourcing in relation to fair labour practice 14
h. What is the scope of the right to fair labour practice? 15
i. The effect of an employer's decision to outsource, considering fair labour practice 16
j. Is sec 197 establishing a new dimension to employee protection? 19
k. Section 197, the TUPE-Regulations and the Employment Relations Law Reform Bill of New Zealand 20
l. Section 186(2)(c) of the LRA 29

Chapter 3 Outsourcing and fixed-term contracts 33

Introduction 33

a. Fixed-term contracts 35
b. The termination date in a fixed-term contract 38
c. The employee's 'reasonable expectation' of renewal 38
d. The employee's reasonable expectation of permanent employment 42
e. Outsourcing and a fixed-term contract 45
f. Outsourcing and the premature termination of a fixed-term contract 48
g. Different 'test' in case of outsourcing fixed-term contracts? 51

Chapter 4 Outsourcing and changing terms and conditions of employment 54

Introduction 54

a. Variation by the new employer 56
b. Matters of right and Matters of interest 61
c. Section 187(1)(c) of the LRA 63
d. Dismissal for operational requirements 66
e. The Fry's Metals case 66
f. Comment on Fry's Metals 69
g. Other case law 71
h. The justification of dismissals for operational requirements 75

Chapter 5 Outsourcing and operational requirements dismissals 78
Introduction 78
a. The definition of ‘operational requirements’ 80
b. Reason for a dismissal 81
c. Reason related to a transfer 83
d. Dismissal for operational requirements prior to a transfer 83
e. Dismissal for operational requirements following a transfer 87
f. Automatically unfair or operationally justifiable? 87

Chapter 6 Conclusion 93

Bibliography 104
Chapter 1 Introduction

Globalisation has modernised and influenced the ‘employment relationship’. This makes it difficult not to exaggerate the importance of employment in the social and economic life of the modern state in which we live today. Due to the tension between the demand for flexibility imposed by the free market system, the concept of the ‘employment relationship’ has thrown off its dead weight of the past and must now be interpreted in a total different way. One can no longer hold the statement that an employment relationship is nothing more than an employee’s right to choose one’s employer.\(^1\) The rights that emerge from an employment relationship are so personal, that one cannot simply waive these rights, and reasonably or substantially benefits the other party when it enforces them.\(^2\) Therefore, an old employer may not give up its rights to its employee’s services to the new employer of a business without the employee’s permission. Besides, the concept of fairness has become the centre stage in South African labour law. It even has become a constitutional imperative; section 23(1) of the Constitution states that ‘everyone has the right to fair labour practices'. And to give effect to and regulate this fundamental right the South African Labour Relations Act 66 of 1995 (hereinafter ‘LRA') must be interpreted in compliance with the Constitution.\(^3\) Further, purports the LRA to ‘advance economic development, social justice, labour peace and the democratisation of the workplace'.\(^4\) Thus, the existence of a employment contract suggests some form of commercial equality between an employer and employee. However, the employment relationship is in truth a relationship of power and subordination, whereby the employee is often the underdog. Fortunately, South African labour law tends to re-enforce the existing distribution of wealth and power.

Another consequence of the globalisation, is the desire for contractual flexibility – since the efficiency of modern economies depends to a great extent on the ability of corporations to conclude commercial transactions, which have the effect that businesses change hands – and the need to protect employees; especially when an employer of a business embarks on restructuring aimed at

\(^1\) Lord Atkin, in Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 (HL) at p. 1026; [1940] 3 All ER 549 (HL), held that this right to choose one’s employer is the main difference between a servant and a serf.


\(^3\) See ss 1(a) and 3(a) of the LRA.

\(^4\) See sec 1(a) of the LRA.
improving its efficiency or profitability. One of the most common forms of business restructuring involves the outsourcing of functions or parts of a business to a third party. It are these kind of business transfers which have become an increasingly important part of commercial life, both national and international.

Nevertheless, the consequences of these transfers in the field of employment relationships are complicated and sensitive for both the employer and employee. Especially, when taking into account that only a few (commercial) companies would have any value without employees. Thus, in other words, the impact on employees can be fundamental to the success of a transaction, and may determine whether the objectives underlying the transaction are successfully achieved. It is, therefore, not surprising that employment consequences of business transfers (e.g. outsourcing) have long given rise to much disagreement between employers and trade unions as well as judges, legal practitioners and academics in South Africa, and even abroad. As a result of this, many books and articles are written about this topic, particularly in relation to the interests of employees in the context of business transfers in general. The competing interests of employers, on the other hand, have been poorly researched. As a matter of fact, the current knowledge about the LRA-regulation of the employer's interests in the context of outsourcing and to what practical consequences this leads is inadequate.

For this reason, this research paper investigates whether there are any limitations (or restraints) in the LRA, which possibly keeps an employer from outsourcing. More specifically, it analyses the desirability of those limitations. In other words, whether the South African approach should not be somewhat different in light of the approaches adopted overseas, which perhaps create more certainty for employers and thus be more 'employer-friendly'. This research paper contributes to tackle this issue in an appropriate way, while comparing approaches adopted overseas (i.e. the European Council Directive, United Kingdom's TUPE-Regulations and its proposal to amend the current Regulations and New Zealand's Employment Relations Law Reform Bill). In addressing this research problem, the Rand Airport case will be used as a basis from which this research
paper will proceed; this makes it unnecessary to determine (again) what the meaning is of terms as ‘business’, ‘outsourcing’, ‘as a going concern’, etc.

Chapter 2 is placing sec 197 of the LRA in its constitutional context to determine the employer’s prerogative in the context of outsourcing in relation to fair labour practice. It determines what the effect may be of a decision to outsource, considering fair labour practice. In addressing this, the scope of the right to fair labour practice is assessed. Subsequently, the consequences of sec 197(2) are determined as to find out whether or not a new dimension of employee protection has been created; can the concept of fair labour practice be interpreted that far, that a duty rests on the (old) employer to get a fair deal for its employees? Furthermore, is the focus on the European Council Directive\(^9\), United Kingdom’s TUPE-Regulations\(^10\) – and its proposal to amend the current Regulations – and New Zealand’s Employment Relations Law Reform Bill\(^11\), in order to determine whether the South African Labour Courts and legislature have interpreted sec 197 right. It is interesting to compare sec 197 with these three foreign regulations as to find out whether or not the South African approach should not be somewhat different in light of those approaches adopted overseas. And finally attention is paid to sec 186(2)(c), to determine what occurs if after a sec 197 transfer the new employer does not (or cannot) honour an agreement to reinstate or re-employ dismissed employees anymore.

Chapter 3 emphasises on fixed-term contracts and sec 186(1)(b) which regards an employee who reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew on less favourable terms, or did not renew it at all as a form of dismissal. Attention is paid to the theory behind fixed-term contracts and the principles that present the acceptance of a renewal of fixed-term contracts. Further, the chapter gives a general determination in which cases (and circumstances) the Labour Court found an objective basis for a reasonable expectation required in sec 186(1)(b) of the LRA. Next to this, clarity is given about the content of a termination date in fixed-term contract of employment. After that, attention is paid as to whether such expectation can also be interpreted that far that it actually is an expectation of permanent employment. Subsequently, is determined why fixed-term contracts of

---

employment might give rise to particular issues in the context of outsourcing. An interesting question is whether the ‘reasonable expectation’ becomes less reasonable when a fixed-term contract of employment ends shortly after the employee has been outsourced to the new employer, due to the transfer of (a part of) a business that falls within the ambit of sec 197? Also the *Buthelezi* case is discussed with regards to the premature termination of fixed-term contracts of employment in the context of outsourcing. And finally, whether indications (in the case law) can be found which perhaps justify the application by the Labour Court of a different test for determining the reasonable expectation – and, thus, dismissal – in case of fixed-term contracts of employment.

Chapter 4 concentrates on sec 187(1)(c) and determines the concept of ‘changing terms and conditions of employment’. Accordingly, the chapter explains several ways of implementing changes to terms and conditions of contracts of employment unilaterally by the employer. Nevertheless, due to sec 187(1)(c), dismissal is not the solution in situations where collective bargaining does not lead to an outcome the employer was looking for – or worse, results in an impasse of the (economic) interest dispute – in order to compel employees to accept a demand in respect of any matter of mutual interest between the employer and employee. The key question in these circumstances is whether an employer may resort to a dismissal for operational requirements? However, difficulties might give rise to particular issues when dismissals for operational requirements are used to pressurise employees into agreeing to such demands. Therefore, is this chapter explaining the meaning of the word ‘dismissal’ in sec 187(1)(c).

Further, does the chapter make clear the distinction between matters of right and matters of interest and determines the preferability of making such a distinction. Besides, it determines whether or not sec 187(1)(c) can be interpreted in a way that it contemplates a ‘migration’ from matters of interest to matters of right. Next to this, attention is paid to dismissal for operational requirements, whereby the *Fry’s Metals* case and some other cases are discussed in detail. The chapter tries to draw a line between dismissals for refusal of proposed changes to terms and conditions of employment and dismissals for operational requirements, since the definition of ‘operational requirements’ is wide enough to include dismissals of employees that refuse to agree to proposed changes to their terms and conditions of employment.

---

12 See *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC).
13 See ss 189 and 189A of the LRA.
14 [2003] 2 BLLR 140 (LAC).
And finally, the justification of dismissals for operational requirements is discussed, in stating which process an employer should follow first – in order to change the terms and conditions of the contracts of employment of employees – before passing on to dismiss the affected employees for operational requirements.

Chapter 5 defines the concept of ‘dismissal for operational requirements’ in a way that it takes into account the inclusion of proposed changes to terms and conditions of employment contracts in this definition. Hereby, will the TUPE-Regulations\(^{15}\) – and its proposal to amend the current Regulations – and the European Council Directive\(^{16}\) be discussed, in order to make clear the differences with the LRA in the definition of the term ‘operational requirements’. Further, are the requirements for the fairness of dismissals for operational requirements discussed, before and after a transfer takes place. After this, the meaning of sec 187(1)(g) is discussed on the basis of the Afrox case.\(^{17}\)

However, although sec 187(1)(g) prohibits dismissals ‘for reason of a transfer’ or ‘a reason related to a transfer’, an employer should be permitted to dismiss for operational requirements, according to ss 188 and 189, if it does not intend to avoid its obligations in terms of sec 197 by dismissing employees. But difficulty might arise when an employer’s motivation for a dismissal – in the context of a sec 197 transfer – will genuinely be its operational requirements, as well as being related to the transfer. The question in these situations is whether such a dismissal is automatically unfair or operationally justifiable?

Besides, attention is paid to the relationship between a dismissal for operational requirements (i.e. sec 189) and collective bargaining (i.e. sec 187(1)(c)), in order to discuss which ‘path’ is better to follow to avoid that a dismissal for operational requirements is (automatically) unfair. And finally, in the statement that an employer should not be allowed to fall back too easily on a dismissal for operational requirements, the permission of the use of temporary replacement labour is discussed.

Finally, chapter 6 is a conclusive chapter which contains a summary and suggests a solution to address the research problem.

---

\(^{15}\) English Transfer of Undertakings (Protection of Employment) Regulations of 1981 (TUPE-Regulations).


\(^{17}\) SACWU & others v Afrox Ltd [1999] 10 BLLR 1005 (LC).
Chapter 2 Outsourcing and fair labour practice

Introduction
The courts have tended to apply more restrictive criteria for extending protection of outsourcing operations.\(^1\) Outsourcing might give rise to difficult questions, even on an objective application of sec 197 of the Labour Relations Act (hereinafter ‘LRA’). Therefore, it is appropriate to consider the constitutional dimension of sec 197 of the LRA.

Placing this issue in its constitutional context, it is interesting to determine the employer’s prerogative in the context of outsourcing in relation to fair labour practice. In other words, what the effect may be of a decision to outsource, considering fair labour practice. Besides this, it is interesting to find out whether the concept of fair labour practice can be interpreted that far, that a duty rests on the old employer to get a fair deal for its employees. And further, in the light of sec 186(2)(c), it is interesting to determine what occurs with sec 186(2)(c) in the context of a sec 197 transfer. Who commits an unfair labour practice, the old and/or new employer?

This chapter will start explaining the purposive approach and objects of the LRA in general. Further, attention will be paid to the constitutional right to fair labour practice in relation to the LRA, and in particular to sec 197. Following this, the employer’s prerogative will be determined in the context of outsourcing in relation to the concept of fair labour practice. In addressing this, the scope of the right to fair labour practice will be assessed. Subsequently, the consequences of sec 197(2) will be determined as to find out whether or not a new dimension of employee protection has been created. After this, the focus will be on the European Council Directive\(^2\), United Kingdom’s TUPE-Regulations\(^3\) – and its amended proposal - and New Zealand’s Employment Relations Law Reform Bill\(^4\), in order to determine whether the South African Labour Courts and legislature have interpreted sec 197 right. It is interesting to compare sec 197 with these three foreign regulations as to find out whether or not the South African approach should not be somewhat different in light of those approaches adopted overseas.

---

1. See NEHAWU v University of Cape Town & others [2000] 7 BLLR 803 (LC).
And finally, sec 186(2)(c) will be scrutinised. It is interesting to determine what occurs if after a sec 197 transfer the new employer does not (or cannot) honour an agreement to reinstate or re-employ dismissed employees anymore. Can an employer end such an agreement with regards to its bindingness to it?

a. The purposive approach and objects of the LRA

Different kind of approaches can be used to interpret the purpose(s) and object(s) of a statute. For example, the traditional (or orthodox ‘literalist-cum-intentionalist’) approach, the purposive (or ‘practical’) approach, the liberal (or ‘extensive’) approach and the constitutional approach. However, the LRA follows the purposive approach that includes a contextually-sensitive and value-coherent approach to statutory interpretation. In other words, the approach endeavours to derive the design or purpose which lies behind the legislation.

The LRA spells out its purposes and objects in quite specific terms; sec 1 states that the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the LRA, which are –

(a) to give effect to and regulate the fundamental rights conferred by sec 27 of the Constitution;
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
(c) to provide a framework within which employees and their trade unions, employers and employer’s organisations can –
   (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
   (i) formulate industrial policy; and

---

7 Sec 23 (the ‘labour clause’) of the (final) Constitution must now be read in place of sec 27, in sec 1(a) of the LRA.
8 See sec 1(a) of the LRA.
9 See sec 1(b) of the LRA.
10 See sec 1(c)(i) of the LRA.
(d) to promote –
   (i) orderly collective bargaining;\(^\text{12}\)
   (ii) collective bargaining at sectoral level;\(^\text{13}\)
   (iii) employee participation in decision-making in the workplace;\(^\text{14}\) and
   (iv) the effective resolution of labour disputes.\(^\text{15, 16}\)

Furthermore, does the LRA also establish a direct link between the interpretation and the primary objects of the Act; sec 3 states that any person applying the LRA must interpret its provisions –
   (a) to give effect to its primary objects;\(^\text{17}\)
   (b) in compliance with the Constitution;\(^\text{18}\) and
   (c) in compliance with the public international law obligations of the Republic.\(^\text{19, 20}\)

The effect of this direct link between the interpretation and the primary objects of the LRA is that it makes clear that the objects of the LRA are important in such a manner that when interpreting the LRA, one must keep in mind these objects. Besides, one must also act in compliance with these objects when applying the LRA.\(^\text{21}\) However, according to the Labour Appeal Court (hereinafter ‘LAC’), none of these objects should be considered in isolation.\(^\text{22}\) Next to sec 3 of the LRA, is sec 39(2) of the Constitution stating that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights\(^\text{23}\), which are values that underlie an open and democratic society based upon human dignity, equality and freedom.\(^\text{24}\)

As a result of explicitly supporting this purposive approach, sec 3(a) of the LRA modified the way the common law used to interpret the LRA. This means that the objects of the LRA have become

\(^{11}\) See sec 1(c)(i) of the LRA.
\(^{12}\) See sec 1(d)(i) of the LRA.
\(^{13}\) See sec 1(d)(ii) of the LRA.
\(^{14}\) See sec 1(d)(iii) of the LRA.
\(^{15}\) See sec 1(d)(iv) of the LRA.
\(^{16}\) Sec 1 of the LRA is also known as the ‘objects clause’ of the LRA.
\(^{17}\) See sec 3(a) of the LRA.
\(^{18}\) See sec 3(b) of the LRA.
\(^{19}\) See sec 3(c) of the LRA.
\(^{20}\) Sec 3 of the LRA is also known as the ‘interpretation clause’ of the LRA.
\(^{22}\) Foodgro (a division of Leisurenet Ltd) v Keil [1999] 9 BLLR 875 (LAC) at par 11.
\(^{23}\) See sec 39(2) of the Constitution.
\(^{24}\) See sec 39(1)(a) of the Constitution.
extremely important. In this way that the LRA as a whole must be read in the light of its objects; one cannot interpret and apply the LRA without taking into account its objects.\textsuperscript{25} \textsuperscript{26}

b. The constitutional right to fair labour practice

The Bill of Rights states a number of fundamental human rights and freedoms that due to supremacy of the Constitution are protected from infringement by the legislative or executive institutions of the government. These fundamental human rights and freedoms can be divided into three different groups of rights; political and civil rights (the so-called ‘first generation rights’), socio-economic and cultural rights (the ‘second generation rights’) and environmental rights (the ‘third generation rights’). Included amongst the socio-economic rights is the ‘right to fair labour practice’, set out in sec 23(1) of the Constitution. This right, inter alia, provides a primary framework within which the LRA must be interpreted, since this provision forms a part of the objects of the LRA.\textsuperscript{27} \textsuperscript{28}

However, the meaning of this constitutional right is not defined in the Constitution, since it is incapable of precise definition. Combined with this problem, is the tension between the interests of employers and the interests of employees, which is common in labour relations.\textsuperscript{29} The content of the constitutional right to fair labour practice must be given meaning by the legislature and through decisions of the specialist tribunals, whereby they have to seek guidance from domestic and international experience.\textsuperscript{30} Nevertheless, ‘the Labour Court still has a crucial role in the determination of fair labour practices; it must ensure that the rights guaranteed in sec 23(1) are honoured.’\textsuperscript{31} This means that ‘what is fair depends upon the circumstances of each case and essentially involves a value judgment. Therefore, ‘it is neither necessary nor desirable to define this concept.’\textsuperscript{32}

In giving content to that right, it is important to bear in mind the tension between the interests of employers and the interests of employees that is inherent in labour relations. Care must


\textsuperscript{26} Specific provisions of the LRA also direct the courts and other decision makers to promote the LRA’s primary objects; e.g. ss 32(3)(f), 40(5)(a), 44(3)(b) and 158(1)(iii); also see sec 8(3) of the Constitution; Du Toit D. et al, ‘Labour Relations Law: A Comprehensive Guide’, 4\textsuperscript{th} Ed, LexisNexis Butterworths, 2003, p. 58.

\textsuperscript{27} See sec 1(a) of the LRA.


\textsuperscript{29} See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 33.

\textsuperscript{30} See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 34.

\textsuperscript{31} See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 35.

\textsuperscript{32} See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 33.
therefore be taken to address these interests so as to obtain a balance – between those competing interests – required by the concept of fair labour practices. And it is in this context that the LRA must be construed.\textsuperscript{33} As a result of this is ‘the view of the focus of sec 23(1), broadly speaking, the relationship between the employer and employee and the continuation of that relationship on terms that are fair to both.’\textsuperscript{34}

c. The LRA in compliance with the right to fair labour practice

As mentioned above, the declared purpose of the LRA is the fulfilling of its primary objects which include giving effect to sec 23 of the Constitution. In other words, the LRA must be purposively construed in compliance with the Constitution.\textsuperscript{35,36} However, the LRA contains a dual reference to the Constitution in its ‘interpretation clause’\textsuperscript{37}. Sec 3(a) – read with sec 1(a) – states that the LRA must be interpreted to give effect to the fundamental rights set out in sec 23 of the Constitution.\textsuperscript{38} While sec 3(b) states that the LRA must be interpreted ‘in compliance with the Constitution’,\textsuperscript{39} Nevertheless, sec 3(b) is only applicable when a provision in the LRA infringes the Constitution, whereas sec 3(a) requires a value-based interpretation, even if provisions are constitutional.\textsuperscript{40} Conspicuously, only the objects of the LRA call for an interpretation giving effect to the right contained in sec 23(1) of the Constitution. This means that for the purposes of the interpretation of the LRA all collective rights of employers and employees are subjected to the (individual) right to fair labour practice. This also declares why the legislature has singled out the rights in sec 23 for special treatment in its ‘objects clause’\textsuperscript{31}.

Construing the LRA in compliance with the Constitution means that any provision which violates a provision of the Constitution – but is reasonably capable of a more restrictive interpretation consistent with the Constitution – should be construed accordingly.\textsuperscript{42} In other words, the violating

\textsuperscript{33} See NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC) at par 40.
\textsuperscript{34} See NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC) at par 40.
\textsuperscript{35} See sec 3(a) of the LRA; See NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC) at par 41.
\textsuperscript{36} Next to this, must the LRA also be interpreted in accordance with its international obligations.
\textsuperscript{37} See sec 3(a) and (b) of the LRA.
\textsuperscript{38} See sec 3(a) of the LRA.
\textsuperscript{39} See sec 3(b) of the LRA.
\textsuperscript{41} See sec 1 of the LRA.
\textsuperscript{42} This is the ‘principle of restrictive interpretation’. 
provision will be interpreted ‘restrictively’ in the sense of limiting its requirements to those that do not conflict with the Constitution, and treating as invalid those which are constitutionally forbidden. The aim of this is to preserve the validity of laws, which infringe the Constitution.\(^{43}\)\(^{44}\)

The LRA is established to be the chosen motor to give expression to the rights of sec 23 of the Constitution. This means that if an employee suffers from the employer's conduct, he must first resort to a remedy in terms of the LRA; direct reliance on the Constitution is generally excluded. Only if no remedy is to be found, the possibility arises of relying directly on the constitutional right, or challenging the LRA for failing to give adequate protection to the constitutional right to fair labour practice.\(^{45}\)

d. Business transfers and the right to fair labour practice before 1995

Until sec 197 was enacted on 11 November 1996, the principle of \(Nokes v Doncaster\)\(^{46}\) controlled the contracts of employment in South Africa. This meant that ‘an employee was obliged to render services personally, and due to the principle of contractual freedom, an employee was – as much as an employer – free to choose with whom to contract.’\(^{47}\) However, since a new employer was free to decide whether or not it would take over all or some of the employees, the above-mentioned principle of \(Nokes v Doncaster\)\(^{48}\) offered no security (or continuity) of employment for the affected employees in case of a business transfer. The insecurity only became worse with the coming of the corporation, through which contracts of employment did no longer involve a personal relationship between the corporate employer and employee.\(^{49}\)


\(^{44}\) However, if a LRA-provision passes the limitations test stated in sec 36(1) of the Constitution, there will be no need to interpret it restrictively.


\(^{46}\) See \(Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 (HL); [1940] 3 All ER 549 (HL).


\(^{48}\) See \(Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 (HL); [1940] 3 All ER 549 (HL).

With the introduction of the fair labour practice jurisdiction in the 1980s – which led in 1979 to amendments to the old LRA\(^\text{50}\) – the termination of contracts of employment by the old employer had to comply with the standards of fairness. In other words, the old employer needed to have a fair reason and a fair procedure had to be followed when terminating a contract of employment.\(^\text{51}\) However, the fair labour practice did not require the new employer to take over the old employer’s employees, either on the same terms and conditions or at all. Fair labour practice only required that pre-transfer consultation took place between the old and new employer and the affected employees (or their representatives). In order to ensure the affected employees’ interests, the purpose of such consultations was to avoid (or mitigate) possible negative consequences for the affected employees. This was considered to be ‘fair to all three parties being part of a business transfer (e.g. an outsourcing).’\(^\text{52}\) Obviously, this situation was not satisfactory for the affected employees; the new employer could easily adapt the workforce to its own requirements by deciding to whom to offer employment and on what terms and conditions. Thus, the affected employees did not have any guarantee to continuation of their contracts of employment. It was all up to the new employer whether or not it decided to take over all or some of the affected employees.\(^\text{53}\)

e. Section 197

As mentioned above, after the introduction of the fair labour practice jurisdiction in the 1980s the situation in case of business transfers was still not satisfactory; especially not for the affected employees. On the one hand, the old employer needed to have a fair reason and had to follow a fair procedure. And both the old and new employer had to consult with the affected employees (or their representatives) about the possible consequences of a contemplated transfer, before the business transfer actually took place. On the other hand, however, was the new employer not obliged to take over all affected employees on the same terms and conditions, which led to the fact that affected employees did not have any guarantee to security (or continuity) of their contracts of employment.\(^\text{54}\) It was all up to the new employer whether or not it decided to take over all or some

\(^{50}\) 28 of 1956.


\(^{52}\) Ntuli v Hazelmore Group t/a Musgrave Nursing Home [1988] 9 ILJ 709 (IC) at 721B-C.


\(^{54}\) Todd C., Du Toit D. & Bosch C., ‘Business Transfers and Employment Rights in South Africa’, 1st Ed,
of the affected employees. Thus, the old employer was limited in several ways, but the new employer could do whatever it wanted to do in terms of the business transfer.\footnote{55} Obviously, ‘the employees were worst off; they were confronted with a take-over and lost their contracts of employment.’\footnote{56} Besides, this situation had ‘potential to impact negatively on economic development and the promotion of labour peace.’\footnote{57}

In order to address these problems, sec 197 of the LRA came into effect on 11 November 1996 and was amended in 2002. The provision forms part of Chapter VIII ‘Unfair Dismissal and Unfair Labour Practice’, which deals with the security of employment as one of the core values of the LRA.

The first provision of this Chapter provides that every employee has the right not to be unfairly dismissed\footnote{58} and not to be subjected to unfair labour practice.\footnote{59} These rights are essential to the constitutional right to fair labour practices.\footnote{60} They seek to ensure the continuation of the relationship between the employer and employee on terms that are fair to both. Thus, sec 185 can be interpreted as the foundation for the following provisions in Chapter VIII. And against this background sec 197 must be understood and construed.\footnote{61}

‘The meaning and effect of sec 197 is to protect the employment of the employees and to facilitate the sale of businesses as going concerns, by enabling the new employer to take over the employees as well as other assets in certain circumstances.\footnote{62} The provision aims at minimising the tension and the labour disputes that often arise from the sales of businesses which impacts negatively on economic development and labour peace. Accordingly, sec 197 has a dual purpose;
it facilitates the commercial transactions, while at the same time it protects the employees against unfair job losses.\textsuperscript{63}

In the \textit{Schutte} case\textsuperscript{64} it was held that sec 197 ‘gives effect to the constitutional right to fair labour practice in situations of business restructuring and reorganisation of employment and must be interpreted in this context.’\textsuperscript{65} This is later also accepted by the Constitutional Court (Ngcobo J) in the \textit{NEHAWU} case.\textsuperscript{66} Thus, ‘sec 197 is properly construed for the benefit of both the employers and employees and that is the balance consistent with fair labour practice’;\textsuperscript{67} the objects of sec 197 are an essential part of the right to fair labour practice, which the Constitution establishes in sec 23(1).\textsuperscript{68}

f. The constitutional dimension of section 197

Sec 197 is meant to protect employment rights and benefits. However, these rights can only be limited when justification can be found in sec 197 itself; notwithstanding that sec 197 must be interpreted in compliance with the Constitution.\textsuperscript{69 70}

It seems to me that this is a perfect example of ‘checks and balances’. In this sense, even when justification for the limitation of employment rights and benefits can be found in sec 197, one must still take into account the Constitution. This means that if the contemplated limitation of the above-mentioned rights is not in compliance with the Constitution, the limitation cannot be realised, in spite of the justification in sec 197 itself. Thus, this will lead to certainty towards the affected employees and excludes the possibility of arbitrariness.

g. The employer’s prerogative in the context of outsourcing in relation to fair labour practice

Having placed sec 197 in its constitutional context, it is interesting to determine the employer’s prerogative in the context of outsourcing in relation to the concept of fair labour practice. In other

\begin{footnotes}
\item[63] See \textit{NEHAWU v University of Cape Town & others}[2003] 24 ILJ 95 (CC) at par 53.
\item[64] \textsuperscript{[1999]} 2 BLLR 169 (LC).
\item[65] See \textit{Schutte & others v Powerplus Performance (Pty) Ltd & another} \textsuperscript{[1999]} 2 BLLR 169 (LC) at par 31.
\item[67] See \textit{NEHAWU v University of Cape Town & others}[2003] 24 ILJ 95 (CC) at par 70.
\item[69] See sec 3(b) of the LRA.
\item[70] See ss 3(b) and 1(a) of the LRA; Todd C., Du Toit D. & Bosch C., \textit{‘Business Transfers and Employment Rights in South Africa’}, 1\textsuperscript{st} Ed, LexisNexis Butterworths, 2004, p. 61.
\end{footnotes}
words, what the effect may be of a decision to outsource, considering the right to fair labour practice. Besides, it is important to find out where to draw the line; can the concept of fair labour practice be interpreted that far, that a duty rests on the old employer to get a fair deal for his employees?

In addressing these issues, this research paper uses the Rand Airport case\textsuperscript{71} as a basis, so that this makes it unnecessary to determine (again) what the meaning is of terms as ‘business', 'outsourcing', 'as a going concern', etc.

However, firstly it is necessary to have a closer look at the content of the right to fair labour practice.

h. What is the scope of the right to fair labour practice?

The dual purpose of sec 197 is consistent with the right to fair labour practice, which requires a proper balance between the interests of employers and employees;\textsuperscript{72} without giving preference to either the employer’s interests or the employee’s interests. ‘Fairness is not confined to employees only’;\textsuperscript{73} ‘there are no underdogs.’\textsuperscript{74} ‘It is ultimately a policy decision.’\textsuperscript{75}

Accordingly, the Constitutional Court rejected the assumption that the word ‘everyone' in sec 23(1) of the Constitution only refers to natural persons. To let this fundamental right have universal effect, the word ‘everybody' must refer to both natural persons and juristic persons.\textsuperscript{76} To ensure that no preference has been given to the interests of either the employer or the employee in the light of the rights embodied in sec 23 of the Constitution, legislation (e.g. the LRA) will always be subjected to constitutional scrutiny.\textsuperscript{77} In addition, the crucial question is rather whether or not the right to fair labour practice is available to employers who are juristic persons. However, nothing in

\textsuperscript{71} See SA Municipal Workers Union & others v Rand Airport Management Co (Pty) Ltd & others\textsuperscript{[2003]} 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004.

\textsuperscript{72} See sec 23(1) of the Constitution; NEHAWU v University of Cape Town \textsuperscript{[2003]} 24 ILJ 95 (CC) at paras 40 and 53.

\textsuperscript{73} See \textit{NEHAWU v University of Cape Town} \textsuperscript{[2003]} 24 ILJ 95 (CC) at par 37-38; see also Smalberger JA in \textit{National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others} \textsuperscript{[1996]} 4 SA 577 (A); \textsuperscript{[1996]} 17 ILJ 455 (A) at 589C-D.

\textsuperscript{74} See Nienaber JA in \textit{National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others} \textsuperscript{[1996]} 4 SA 577 (A); \textsuperscript{[1996]} 17 ILJ 455 (A) at 593G-H.

\textsuperscript{75} Todd C., Du Toit D. & Bosch C., \textit{‘Business Transfers and Employment Rights in South Africa'}, 1st Ed, LexisNexis Butterworths, 2004, p. 23; See \textit{NEHAWU v University of Cape Town} \textsuperscript{[2003]} 24 ILJ 95 (CC) at par 38-40; Cheadle, 'The First Unfair Labour Practice Case', \textsuperscript{[1980]} 1 ILJ 200, p. 201.

\textsuperscript{76} See \textit{Certification of the Constitution of the Republic of South Africa, 1996} \textsuperscript{[1996]} 4 SA 744 (CC) at par 57; \textit{NEHAWU v University of Cape Town} \textsuperscript{[2003]} 24 ILJ 95 (CC) at par 37.

the nature of sec 23(1) – or in the context in which this section occurs – suggests that employers are not entitled to that right.

From this follows that the entitlement to constitutional rights depends upon the nature of the rights and the nature of the juristic person. Regarding the context I can only conclude that the word ‘everyone’ refers to every person, including natural and juristic persons. Namely, if the right to fair labour practice in sec 23(1) were to be guaranteed to employees only, the Constitution would have said so.

i. The effect of an employer’s decision to outsource, considering fair labour practice

Before the enactment of sec 197 in 1996 the Industrial Court had adopted the view in common law that it was not inherent in the right to fair labour practice, that a new employer – in case of a business transfer – was obliged to take over the employees from the old employer. The unfair labour practice jurisprudence developed under the old LRA required that in case of a business transfer: a) consultations should take place between the old and new employers, and employees or their representatives; b) reasonable efforts must be made by the old employer to ensure that employee’s interests were protected; c) if the old employer had valid economic reasons, it could fairly dismiss employees; and d) dismissed employees would be entitled to severance pay, unless they unreasonably refused employment with the new employer. This was considered to be ‘fair to the three parties involved in the transfer of an undertaking.’ Although the old employer was limited in several ways, the new employer could do whatever it wanted to do in terms of the business transfer; it could adapt the workforce to its own requirements by deciding to whom to offer a contract of employment and on what terms.

---

78 See sec 8(4) of the Constitution which states that ‘a juristic person is entitled to the rights in the Bill of Rights, to the extent required by the nature of the rights and the nature of that juristic person.’
79 See NEHAWU v University of Cape Town [2003] 24 ILJ 95 (CC) at par 39.
81 28 of 1956.
83 See Ntuli v Hazelsmore Group t/a Musgrave Nursing Home [1988] 9 ILJ 709 (IC) at 721B-C.
However, in the **NEHAWU** case\(^85\) the Constitutional Court found that sec 197 – when (properly) interpreted by giving effect to and regulating the constitutional right to fair labour practice – gave rise to an automatic transfer of employment contracts from the old employer to the new employer of a going concern. Nevertheless, the Constitutional Court did not expressly state that the right to fair labour practice itself requires the transfer of employees provided for in sec 197; this right must be given content by the legislature. As a result, the right to fair labour practice is concerned to both follow and lead the legislature at the same time.\(^86\)

In the **Telkom** case\(^87\) the Supreme Court of Appeal (hereinafter ‘SCA’) even went one step further, by stating that the provision of sec 197 gives rise to a ‘statutory transfer’ of contracts of employment, since the purpose of sec 197 is ‘to achieve continuity of the employment contract, despite the eventual change in the identity of the employer.’\(^88\) This means that one employer will be substituted for another without disturbing the continuity and the terms and conditions of the contract of employment.\(^89\) ‘The ‘statutory transfer’ of a contract of employment – provided for in sec 197 – is not constituting a dismissal; it preserves rather than terminates the contract.’\(^90\)

However, since the LRA-amendments in 2002 already established that if a transfer of a business takes place, the new employer is **automatically** substituted in the place of the old employer in respect of all contracts of employment\(^91\), there is actually no difference in effect between an ‘automatic transfer of employment contracts’\(^92\) and a ‘statutory transfer of contracts of employment’\(^93\).

Nevertheless, the constitutional right to fair labour practice must not be measured against every act of an employer that possibly impacts on the employment rights and benefits of the affected employees. This is even prohibited, since direct reliance on constitutional rights must be avoided as much as possible; it is a measure of last resort. Since the LRA is established to be the chosen

---


\(^87\) See *Telkom v Blom* [2003] 7 BLLR 638 (SCA) at par 8.


\(^89\) See *Telkom v Blom* [2003] 7 BLLR 638 (SCA) at par 10.


\(^91\) See sec 197(2)(a) of the LRA.

\(^92\) See *NEHAWU v University of Cape Town* [2003] 24 ILJ 95 (CC).

\(^93\) See *Telkom v Blom* [2003] 7 BLLR 638 (SCA).
motor to give expression to the rights of sec 23 of the Constitution, an employee – who suffers from an employer’s conduct – must first resort to a remedy in terms of the LRA. Only if no remedy is to be found, the possibility arises of relying directly on the constitutional right, or challenging the LRA for failing to give adequate protection to the constitutional right to fair labour practice.\textsuperscript{94}

Besides, it is preferable that Labour Courts do not measure every business decision of an employer against the constitutional right to fair labour practice as to avoid being drawn into the economic merits of an employer’s decision. Because by taking a too direct approach in determining the consequences of outsourcing, the Labour Court risks an accusation of moving beyond its field of competence and getting involved in a critical area of economic decision making. On the other hand, it is questionable whether it would be better if the Labour Court would not measure the economic rationale of outsourcing against the constitutional right to fair labour practice at all. Would this not lead to a creation of an untouchable ‘judicial vacuum’ around outsourcing?\textsuperscript{95}

Fortunately, sec 197 is enacted to regulate business transfers (e.g. outsourcing) and gives the affected employees the protection they need. Nevertheless, an employer must take into account the ‘objects clause’ of the LRA.\textsuperscript{96} This means that the employer must give effect to and regulate the fundamental rights conferred by sec 23 of the Constitution.\textsuperscript{97} Further, is the ‘interpretation clause’ of the LRA\textsuperscript{98} stating that any person applying the LRA must interpret its provisions as to give effect to its primary objects\textsuperscript{99} and to be in compliance with the Constitution.\textsuperscript{100}

Thus, since outsourcing can impact on the employment rights and benefits of the affected employees, I think it is fair to both the employer and employee to take into account the concept of fair labour practice, because the focus of this concept is on the relationship between the employer and employee and the continuation of that relationship.\textsuperscript{101} Therefore, an employer must consider the concept of fair labour practice when deciding to outsource. And what is fair must be determined from both contractual and non-contractual analysis (i.e. competitive interests of the employers and

\textsuperscript{96} See sec 1 of the LRA.
\textsuperscript{97} See sec 1(a) of the LRA.
\textsuperscript{98} See sec 3 of the LRA.
\textsuperscript{99} See sec 3(a) of the LRA.
\textsuperscript{100} See sec 3(b) of the LRA.
\textsuperscript{101} See \textit{NEHAWU v University of Cape Town & others}[2003] 24 ILJ 95 (CC) at par 40.
employees), since contractual principles cannot provide all the answers that are necessary to determine the purpose of an outsourcing in the context of labour law.\textsuperscript{102}

j. Is sec 197 establishing a new dimension to employee protection?

Since the amendments in 2002, sec 197(2) states that in case a transfer of a business takes place, 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 transfer\textsuperscript{103}, whereby all the rights and obligations between the old employer and the employee at the time of the transfer continue in force\textsuperscript{104} and the transfer does not interrupt an employee's continuity of employment.\textsuperscript{105} Besides, a new employer can only comply with this if it employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.\textsuperscript{106} This leads to the conclusion that sec 197 actually has a dual purpose; it facilitates the commercial transactions, while at the same time it protects the employees against unfair job losses.\textsuperscript{107} Nevertheless, sec 197(6) creates the opportunity that the old or new employer – or the old and new employer acting jointly – and the employee’s representatives negotiate and conclude an agreement in which the terms and conditions are otherwise agreed.\textsuperscript{108}

Thus, due to the amendments, a fair deal for the affected employees is ensured; the new employer cannot take them over on less favourable terms and conditions. In other words, affected employees can never decline on their terms and conditions of their contracts of employment, because of an outsourcing. In my opinion, this can be interpreted as a new dimension to employee protection in the context of sec 197 transfers, which creates more certainty of security (or continuity) of employment. As mentioned earlier, before 1995 affected employees did not have any guarantee to continuation of their contracts of employment; it was all up to the new employer whether or not it decided to take over all or some of the affected employees. Fair labour practice

\textsuperscript{103} See sec 197(2)(a) of the LRA.
\textsuperscript{104} See sec 197(2)(b) of the LRA.
\textsuperscript{105} See sec 197(2)(d) of the LRA.
\textsuperscript{106} See sec 197(3)(a) of the LRA.
\textsuperscript{107} See NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC) at par 53.
\textsuperscript{108} See sec 197(6) of the LRA.
only required that pre-transfer consultation took place between the old and new employer and the
affected employees (or their representatives). And now an employer is obliged to take over all
contracts of employment\(^{109}\) including all rights and obligations\(^{110}\) on terms and conditions that are
on the whole not less favourable to the affected employees.\(^{111}\) Taking into account sec 23(1) of the
Constitution, this creation of more security (or continuity) of employment is totally in line with
everybody’s right to fair labour practice. Sec 197 provides affected employees with all the
protection they need. From this follows that transferred employees, due to outsourcing, cannot be
prejudiced in their terms and conditions of their contracts of employment.

k. Section 197, the TUPE-Regulations and the Employment Relations Law Reform Bill of New
Zealand

In formulating the test in sec 197 for ‘the transfer of a going concern’ the current LRA\(^{112}\) sought
guidance in Europe. Especially the European Court of Justice (hereinafter ‘ECJ) and the English
courts played an important role in this whole interpretation process. As a result, there are some
similarities between sec 197 of the LRA, the European Council Directive\(^{113}\) and the TUPE-
Regulations\(^{114}\) of the United Kingdom. In order to determine whether the South African Labour
Courts and legislature interpreted sec 197 right, it is interesting to compare sec 197 with
comparable other provisions in foreign regulations as to find out whether or not the South African
approach should not be somewhat different in light of those approaches adopted overseas. For this
reason I will have a closer look at the European Council Directive and the TUPE-Regulations.
Meanwhile, the United Kingdom proposed to amend the TUPE-Regulations in an attempt to create
more certainty. Therefore I will also have a look at this proposal that is supposed to come into force
sometime this year. Besides, New Zealand enacted on the first of December last year the
‘Employment Relations Law Reform Bill’. And since this regulation also comprises a comparable
provision to sec 197 of the LRA, I will also discuss the situation of New Zealand.

\(^{109}\) See sec 197(2)(a) of the LRA.

\(^{110}\) See sec 197(2)(b) of the LRA.

\(^{111}\) See sec 197(3)(a) of the LRA.

\(^{112}\) 66 of 1995.


The preamble of the European Council Directive\(^{115}\) states, inter alia, that it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.\(^{116}\) For this reason is article 3(1) stating that the old employer’s rights and obligations arising from a contract of employment – or from an employment relationship – existing on the date of a transfer shall, by reason of such transfer, be transferred to the new employer.\(^{117}\)

Looking at the test for ‘the transfer of a going concern’ the European Court of Justice (hereinafter ‘ECJ’) consistently reiterates its statement in the Spijkers case\(^{118}\): in case an economic entity has retained its identity after the transfer, there has been a transfer of a going concern. Consequently, it is necessary to determine whether what has been sold is an economic entity which is still in existence. This will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activities.\(^{119}\) To decide whether these considerations are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question. However, each of the factors is only part of the overall assessment which is required and therefore they cannot be examined independently of each other.\(^{120}\) Accordingly, each transaction must be considered on its own merit in the light of all the surrounding circumstances of the transaction before a determination can be made whether it constitutes a transfer of a business as a going concern. Nevertheless, there can be no transfer of a business as a going concern, unless both the old and new employer have agreed that the latter takes the former’s workforce over as well.\(^{121}\)

Next to this has the ECJ stated that the European Council Directive\(^ {122}\) ‘will not apply if the changes in tendering a service do not occur at the same time as a transfer (or use\(^ {123}\)) from one undertaking to the other of significant (in) tangible assets, or taking over by the new employer of a major part of

\(^{118}\) See Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV[1999] IRLR 37 (ECJ) at par 11.
\(^{120}\) See Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV[1999] IRLR 37 (ECJ) at par 13.
\(^{121}\) See Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV[1999] IRLR 37 (ECJ) at par 65.
\(^{123}\) See Abler & others v Sodexho MM Catering Gesellschaft mbH & another, C-340/01, 20 November 2003.
the workforce in terms of their numbers and skills, assigned by the old employer to the
performance of the contract. 124 This means that an entity ‘cannot be said to have retained its
identity after a transfer if its identifying feature, or a substantial part of it, is not transferred. 125

However, when comparing sec 197 with the test for ‘the transfer of a going concern’ adopted by the
ECJ, it is striking that sec 197 does not state anything about an economic entity that must retain its
identity after a transfer. Although the phrase ‘going concern’ is not defined, what must be
transferred must be ‘a business in operation so that the business remains the same but in different
hands. This means that regard must be had to the substance and not the form of the
transaction.’ 126

This leads to the conclusion that the test for ‘the transfer of a business as a going concern’ in the
LRA is not exactly the same as that adopted by the ECJ. In this sense, the wording is not the
same. Nevertheless, I think it is not preferable to let the test adopted by the ECJ be persuasive in
plotting the course of the South African approach, as employers can avoid the application of
relevant legislation in transfers that do involve a change in tendering a service, by refraining from
transferring employees or assets. 127 This is problematic in the context of outsourcing, since this
means a diminution and uncertainty of the affected employees’ guarantee of security (or continuity)
of employment.

In a response on the approach adopted by the ECJ, the English courts have accepted that the
reason why employees were not taken over by the new employer, can be taken into account when
determining whether the TUPE-Regulations apply. Especially the Court of Appeal was clearly
concerned with the blocking of a route that employers might use to manipulate the mechanics of
business transfers in order to avoid the application of the TUPE-Regulations. For this reason the
Court of Appeal stated that ‘if an economic entity is labour-intensive in a way that there is no
transfer if the employees are not taken over – but there is one if the employees are taken over –
there will be a transfer when it is established that the main reason for this was in order to avoid the

---

125 Todd C., Du Toit D. & Bosch C., ‘Business Transfers and Employment Rights in South Africa’, 1st Ed,
126 NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC) at par 56.
127 Todd C., Du Toit D. & Bosch C., ‘Business Transfers and Employment Rights in South Africa’, 1st Ed,
application of the TUPE-Regulations, even when the employees are not taken over.\textsuperscript{128} In addition, The Court of Appeal held that ‘a decision not to take over the employees is one of the factors to consider whether or not there has been a transfer for the purposes of TUPE-Regulations. Nevertheless, tribunals must still consider and assess all the relevant facts.’\textsuperscript{129}

However, in spite of the fact that the approach of the English courts is different from the approach of the ECJ, I find this approach also not preferable to be persuasive in plotting the course of the South African approach. I agree with the fact that avoiding the statutory obligations of sec 197 on purpose cannot be permitted. Nevertheless, in situations where an employer is not avoiding these obligations on purpose, but due to its operational requirements, Labour Courts can also not be permitted to ‘create’ liability to transfer to a new employer in cases where there has in fact been no transfer as a going concern at all.

United Kingdom’s TUPE-Regulations provide that on the completion of a relevant transfer, all the old employer’s rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the new employer.\textsuperscript{130} And anything done before the transfer is completed by or in relation to the old employer in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the new employer.\textsuperscript{131} Besides, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the new employer.\textsuperscript{132} Nevertheless, if the employee informs the old or new employer that he objects to become employed by the new employer, his contract of employment and the rights, powers, duties and liabilities under or in connection with it, shall not operate.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{130} See sec 5(2)(a) of the TUPE-Regulations of 1981.
\item \textsuperscript{131} See sec 5(2)(b) of the TUPE-Regulations of 1981.
\item \textsuperscript{132} See sec 5(1) of the TUPE-Regulations of 1981.
\item \textsuperscript{133} See sec 5(4)(A) of the TUPE-Regulations of 1981.
\end{itemize}
Thus, the TUPE-Regulations protect the terms and conditions of the contracts of employment of affected employees, when a business – or part of it – is transferred to a new employer (e.g. the transfer of a contract that provides goods or services); the continuity of their contracts of employment is preserved. This means that the new employer cannot just pick and choose which employees to take over; employees employed by the old employer become employees of the new employer on the same terms and conditions of their contracts of employment as they originally had with the old employer. This means that the new employer may not unilaterally worsen the terms and conditions of the contracts of employment of the affected employee(s), otherwise it is possible that an employee may have a claim for unfair dismissal.\textsuperscript{134}

Meanwhile, the United Kingdom proposed to amend the TUPE-Regulations as to create greater certainty and to ensure that these Regulations reach the employees that they are intended to protect. The amendments are to the effect that the TUPE-Regulations can in principle apply in relation to service provision changes (i.e. outsourcing). ‘Whether or not any such change does actually constitute a relevant ‘transfer of an undertaking’ depends – under the principles established by the ECJ in its seminal judgment in the \textit{Spijkers} case\textsuperscript{135} – on the particular factual circumstances. The key question is whether or not there is a transfer of an economic identity – i.e. an organised grouping of resources which has the objective of pursuing an economic activity – that retains its identity in the process.’\textsuperscript{136} This precondition of an organised grouping with the principal purpose of performing service activities specifically on behalf of a particular client under an arrangement consisting in practice of more than an ‘one off’ task-specified contract, ‘intends to ensure that the protection is not applicable in cases where clients buy in services ‘off the shelf’ in the same way as they might buy in goods. The employees who perform the activities comprising such ‘commodity services’ – including for example the arrangement of conferences, the undertaking of printing work, the giving of consultancy advice and the carrying out of plumbing

\footnotesize{\textsuperscript{134} Although this has never been tested in the English courts.  
\textsuperscript{135} See \textit{Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV}[1999] IRLR 37 (ECJ).  
repairs – typically do so on an ‘ad hoc’ basis on behalf of a number of their organisation’s clients (either concurrently or successively) and are not covered by the amended TUPE-Regulations.\textsuperscript{137} Further, ‘in cases where the arrangement between the client and the outside organisation entailed the provision not only of a service but also of goods, the protection of the TUPE-Regulations only applies where the former was the predominant aspect and the latter an ancillary one.’\textsuperscript{138} In other words, the TUPE-Regulations do not apply to organisations that only provide goods or of which the main purpose is to provide goods and of minor importance also provide services.

From this follows, that it is not necessary for the test for ‘the transfer of a going concern’ to determine what has been transferred; all that is required is a change in tendering a service. As a result of the proposed amendments the TUPE-Regulations would find extended application and create more certainty. In this sense, that in the context of outsourcing affected employees do have an extended guarantee of security (or continuity) of employment.\textsuperscript{139}

In New Zealand the Employment Relations Law Reform Bill\textsuperscript{140} ‘identifies specific groups of employees who require special protection in restructuring situations due to their particular vulnerability and lack of bargaining power.’\textsuperscript{141} Those ‘specified groups of employees’ work in the following types of employment: i) cleaning services and food catering services in any place of work; ii) laundry services for the education, health, or age related residential care sector; iii) orderly services for the health, or age related residential care sector; and iv) caretaking services for the education sector.\textsuperscript{142} It are these employees who are granted the right to elect to transfer to the new employer on the same terms and conditions of their contracts of employment. However, this right only arises when:

---


\textsuperscript{140} See Explanatory Note to the Employment Relations Law Reform Bill; The relevant groups appear in a new Sch 1A; also see proposed sec 237A; Todd C., Du Toit D. & Bosch C., ‘Business Transfers and Employment Rights in South Africa’, 1\textsuperscript{st} Ed, LexisNexis Butterworths, 2004, p. 54.

* the employee falls within that specifically protected group;
* the employer’s business is going to be restructured in a certain way; and
* the employee is no longer required by his employer, because the type of work he performed is to be performed by employees of the new employer.  

Accordingly, the employee becomes an employee of the new employer on a specified date agreed by the employee and his old employer, or on the date on which the restructuring of the old employer’s business takes place. The employment contract of the employee is to be treated as continuous. Once employees have transferred, it is up to the new employer to decide how best to manage their resources. Nevertheless, these employees can decide not to transfer to the new employer. In that case, employers and employees (or their representatives) must negotiate alternatives to the transfer.

From this follows that all that is required is the termination of a contract or arrangement under which the employer carried out work on behalf of another person, if the work is to be carried out on behalf of the other person by a new person.

For those employees that fall outside these ‘specified groups’, their employment contracts must contain an ‘employee protection provision’ from the first of December 2004, which aims to provide protection of employment for affected employees if their employer's business is restructured and includes:
* a negotiating process that the old employer must follow with the new employer about the restructuring to the extent that it relates to affected employees; and
* the matters relating to the affected employees’ employment that the old employer must negotiate with the new employer – including whether the affected employees will transfer to the new employer on the same terms and conditions of employment.

---

The exact level of protection for those employees will depend on the agreement reached between the employer and employees (or their representatives). Consequently, all parties need to think attentively about the possibility of a business transfer in the future. However, if an old employer – in relation to outsourcing – arranges for an affected employee to transfer to the new employer (on different terms and conditions), the affected employee may also choose to, or not to, transfer to the new employer – just like the employees who fall within the ‘specified groups’.

With regards to the meaning of sec 197, the Constitutional Court (Ngcobo J) stated that what is transferred must be ‘a business in operation so that the business remains the same but in different hands.’ Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction, whereby regard must be had to the substance and not the form of the transaction. The fact that the old and new employer of a business have not agreed on the transfer of the affected employees as part of the transaction, does not disqualify the transaction from being a transfer of a business as a going concern within the meaning of sec 197. Each transaction must be considered on its own merit regard being had to the circumstances of the transaction in question. Only then can a determination be made as to whether the transaction constitutes the transfer of a business as a going concern.

Thus, the statement – in the context of sec 197 – that a transfer of a business ‘as a going concern’ only occurs where the employees are transferred as part of the transaction is wrong, makes the application of sec 197 conditional and has the potential to deny to the employees protection against job losses and leaves their protection solely in the hands of the employers. Such statement only looks at the aspect of the legislative purpose which concerns the interests of employers. But the purpose of the legislature involves protecting the interests of both the employers and employees. A properly construed sec 197 is for the benefit of both employers and employees. It facilitates the transfer of businesses while at the same time protecting the employees against unfair job losses. That is a balance consistent with fair labour practice.

---

150 See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 56.
151 See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 58.
152 See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 61.
153 See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC) at par 70.
From this follows, that upon a transfer of a business contemplated in sec 197, employees are automatically transferred to the new employer.

Although both the TUPE-Regulations and New Zealand's Employment Relations Law Reform Bill do not permit the exclusion of the transfer of affected employees in case of outsourcing transactions, it seems to me that the TUPE-Regulations provide more certainty for the affected employees than New Zealand’s Employment Relations Law Reform Bill. As soon as there is a change in tendering services, all affected employees automatically become employees of the new employer under the same terms and conditions of employment as applied to them by their old employer, according to the TUPE-Regulations. New Zealand’s Employment Relations Law Reform Bill, on the contrary, makes a distinction between ‘specified groups of employees’ and other employees. Nevertheless, both categories of employees have the option to choose, or not to choose, to transfer to the new employer. But only the ‘specified groups of employees’ have a right to elect to transfer to the new employer on the same terms and conditions of their contracts of employment. This means that other employees do not have this right and, thus, may risk a transfer on less favourable terms and conditions. In my opinion this is unfair.

It is important that sec 197 covers the employees it is intended to protect. Therefore, sec 197 should also be applicable in the context of a change in service provider. However, since for the test for ‘the transfer of a going concern’ the Constitutional Court\(^\text{154}\) held that no factor is decisive, the transfer of a sole activity cannot trigger sec 197. Nevertheless, there is a broad support for sec 197 to apply where there is a change in service provision. I find it preferable to let the amended TUPE-Regulations be persuasive in plotting the course of the South African approach, as they provide that in the context of a change of tendering services all the affected employees automatically become employees of the new employer under the same terms and conditions of employment as applied to them by their old employer. In other words, the amended TUPE-Regulations guarantee affected employees a security (or continuity) of employment in case of a change of tendering services.

\(^{154}\) See NEHAWU v University of Cape Town & others[2003] 24 ILJ 95 (CC).
However, the test for ‘the transfer of a going concern’ adopted by the Constitutional Court in the NEHAWU case\(^{155}\) must then change slightly; in the course of the search for similarity in the business after a transfer, some factors (i.e. whether or not a workforce has been transferred) should be more significant than others. Perhaps the Labour Court can take into account more the period after a transfer in order to determine a similarity in the business after the transfer, so that sec 197 applies and, thus, the affected employees automatically become employees of the new employer under the same terms and conditions of employment in cases of changes in tendering services?\(^{156}\)

I. Section 186(2)(c) of the LRA
Sec 186(2)(c) states that unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement.\(^{157}\) However, it is interesting to determine what occurs if after a sec 197 transfer the new employer does not (or cannot) honour an agreement to reinstate or re-employ dismissed employees anymore. Can an employer end such an agreement with regards to its bindingness to it?

A good example of the situation mentioned in sec 186(2)(c) of the LRA is when an employer and a dismissed employee agree that the employee will be reinstated or re-employed if a suitable job becomes vacant, but the employer disregards the agreement by employing another person when such a suitable job does become vacant. In these circumstances the employer is guilty of an unfair labour practice.\(^{158}\)

Although it seems somewhat strange that an employer can still commit an unfair labour practice after it dismissed an employee, it is actually quite logical if one thinks of the fact that an employment relationship does not necessarily ends at the same time as a contract of employment.\(^{159}\) There are circumstances in which, for purposes of the law, the employment relationship continues beyond the termination of the contract of employment.

---

\(^{155}\) See NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC).


\(^{157}\) See sec 186(2)(c) of the LRA.


\(^{159}\) See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA –
relationship – which provides both parties with enforceable rights and obligations – is still alive, in spite of the ending of the contract of employment. Nevertheless, an ‘extended’ employment relationship is nothing more than a legal relationship in terms of which former employees who are no longer parties to employment contracts retain rights, or have an expectation of acquiring rights against their old employers. Thus, ‘an employment relationship can survive a termination of a contract of employment, until both parties agree that it will end, or for as long as equity permits.’ If the employer does not adhere to its agreement to reinstate or re-employ the dismissed employee when a suitable job becomes vacant, its conduct leads to an unfair labour practice. Especially since former employees are entitled in fairness to expect the employer to adhere to its agreement.

Sec 197(2)(c) states that if a transfer of a business takes place, unless otherwise agreed, anything done before the transfer by or in relation to the old employer, including the commission of an unfair labour practice, is considered to have been done by or in relation to the new employer. This simply means that in case of a transfer, one must have a look at the conduct of the new employer in order to determine whether or not an unfair labour practice has been committed, whereby things done by the old employer before the transfer may not yet have given rise to the enforcements of the rights and obligations contemplated by sec 197(2)(b). Thus, sec 197(2)(c) – together with sec 197(2)(b) – sanctions the continuity of the employment relationship and the enforceability of the rights and obligations that may arise under it. However, ‘unfair labour practice claims will only be enforceable against the new employer, if the employees concerned were transferred to the service of the new employer under sec 197.’

Obviously, a difficulty which might give rise to particular issues is when the new employer does not honour the agreement to reinstate or re-employ the employees, which the old employer and employees made before the transfer took place. According to sec 197(2)(a), (b) and (c) is the new employer automatically substituted in the place of the old employer with regards to the agreement,

---


163 See sec 197(2)(c) of the LRA.

due to the transfer. Consequently, the new employer is committing an unfair labour practice in case it does not honour that agreement to reinstate or re-employ the employees.

Even more important, is the question how long those agreements will bind the new employer after the transfer has occurred. It seems to me that it would be unfair towards the new employer if such an agreement is binding forever, since it never was a party when the agreement was concluded. An employment relationship can be ended by an agreement of both parties, or by considerations of equity.\(^\text{105}\) I think that the affected employees will never be willing to agree with the new employer to end the agreement to reinstate or re-employ dismissed employees, since the agreement creates security (or continuity) of their contracts of employment. Thus, starting from the fact that such an agreement will be binding until both parties – the new employer and the affected employees – agree to end it, is unrealistic. However, starting from the fact that such an agreement will be ended by considerations of equity is also not realistic; such an agreement can never be ended by considerations of equity.

In my opinion it is preferable if the new employer can end these agreements when its operational requirements make that necessary. This means that if economic, technological, structural or similar needs of the new employer make it impossible for the new employer to keep on honouring such an agreement, it must be possible for the new employer to end it. The termination of an agreement to reinstate or re-employ dismissed employees can take place in the form of an agreed notice period. Nonetheless, since I expect that the affected employees will not too easily be willing to agree to such notice period, the termination must also be possible to take place in the form of a reasonable notice period. The advantage of these forms of termination is that they have a defined duration that, consequently, creates certainty for both the employer and the affected employees. In this sense, by using one of these forms of termination both parties exactly know when the agreement – originally concluded between the old employer and the affected employees – comes to an end. The disadvantage of such termination is that the new employer runs the risk that the affected employees will claim to be unfairly dismissed.\(^\text{106}\) Sec 186(1)(a) states, namely, that ‘dismissal’


\(^{106}\) This follows from ss 197(2)(a) and (c); the dismissal of an employee or the commission of an unfair labour practice is, due to the automatic substitution of the new employer in the place of the old employer, considered to have been done by or in relation to the new employer.
means that an employer has terminated a contract of employment with or without notice.\textsuperscript{167} Although it seems to me that an employer can avoid the successfulness of such a claim as long as it can prove that the reason for the ending of such an agreement is based on a fair reason – its genuine operational requirements – and it can prove that it followed a fair procedure.\textsuperscript{168} Therefore, I think that it is very important that a new employer communicates clear and unequivocal when it contemplates the ending of such an agreement to reinstate or re-employ dismissed employees.

\textsuperscript{167} See sec 186(1)(a) of the LRA.
\textsuperscript{168} See sec 188(1)(a) and (b) of the LRA.
Chapter 3 Outsourcing and fixed-term contracts

Introduction
A contract of employment may end in various ways; some consensual, others unilateral.
The end of a fixed-term contract of employment, for example, is determined in advance by agreement between an employer and employee. The period for which the contract is valid, can be determined either by reference to a specific date, or when a specified event occurs. So, when the date arrives (or the event occurs) the contract expires automatically in accordance with the intention of the parties and dismissal will not be said to have occurred.\(^1\) Fixed-term contracts of employment may, thus, provide an easy way for employers to avoid statutory provisions (i.e. of the LRA) connected with dismissals and employment security. However, the legislature has not prohibited fixed-term contracts. Instead, in an effort to control the possibility of abuse, it regards an employee who reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, as a form of dismissal, when the employer offers to renew it on less favourable terms, or does not renew it at all.\(^2\) This means that when the Labour Court finds that the termination of a fixed-term contract constitutes a dismissal, it is in fact saying that the employment relationship actually never ended, if the employer would not have failed to renew the employment contract. Accordingly, the decision not to renew the contract is, thus, a false excuse for terminating the employment relationship. Nevertheless, the employee must still establish the existence of the dismissal and – when this is established – the employer must prove that the dismissal is fair.\(^3\)

The case law is mostly about the critical issue of determining whether or not this form of dismissal has taken place. In other words, whether the employee’s claim that he expected the contract to be renewed, was reasonable in the objective sense. Or, whether the situation was one whereby ‘any reasonable employee’ would have expected the contract to be renewed on the same or similar terms. Whether or not such a reasonable expectation exists, depends on numerous considerations

---

1. Le Roux P. & Van Niekerk A. state that, therefore, ‘employees employed on such a fixed-term contract can have no expectation that the employment will be permanent, as it is envisaged that the employment will come to an end within a relatively short period of time.’ [The SA Law of Unfair Dismissal’, Juta, 1994, p. 66-71]
2. See sec 186(1)(b) of the LRA.
3. See ss 188(1)(a) and (b) and 192(1) and (2) of the LRA.
such as the terms of the contract\(^4\), the surrounding circumstances, the contractual arrangements, promises (or given undertakings) held out by the employer, custom and practice regarding renewal, administration of the relationship, (plans for) outsourcing, nature of the business and consistency, etc. Nevertheless, the legislation does not limit the length of fixed-term contracts nor the number of occasions on which these contracts can be renewed. This means that an employer may endlessly renew fixed-term contracts. Only when there is a reasonable expectation of renewal, an employee may claim to be unfairly dismissed. However, such reasonable expectation of renewal must be determined from the perspective of both the employer and the employee.

This chapter will start with explaining the theory behind fixed-term contracts and the principles that present the acceptance of the renewal of fixed-term contracts. Furthermore, this chapter gives a general determination in which cases (and circumstances) the Labour Court found an objective basis for a ‘reasonable expectation’ required in sec 186(1)(b) of the LRA. Next to this, clarity is given about the content of a termination date in fixed-term contracts of employment. After that, attention will be paid as to whether such expectation can also be interpreted that far that it actually is an expectation of permanent employment. And subsequently, will be determined why fixed-term contracts of employment might give rise to particular issues in the context of outsourcing. An interesting question is whether the ‘reasonable expectation’ becomes less reasonable when a fixed-term contract of employment ends shortly after the employee has been outsourced to the new employer, due to the transfer of (a part of) a business that falls within the ambit of sec 197? Also the Buthelezi case\(^6\) will be discussed with regards to the premature termination of a fixed-term contract of employment in the context of outsourcing. And finally, whether indications (in the case law) can be found which perhaps justify the application by the Labour Court of a different test for determining the reasonable expectation – and, thus, dismissal – in case of fixed-term contracts of employment.

\(^4\) See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 547F-I.

\(^5\) the contract itself can be an important indication that the parties in fact intended the contract and relationship to terminate on the date mentioned.

\(^6\) See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC).
a. Fixed-term contracts

At common law, a fixed-term contract expires automatically on the agreed termination date. However, according to sec 186(1)(b) of the LRA, employees may be unfairly dismissed when they 'reasonably expected' their employers to renew a fixed-term contract of employment on the same or similar terms, but the employer fails to renew or only renews on less favourable terms. This particular provision gives statutory effect to a principle – provided by the Industrial Court – that has been recognised since at least 1986; it extends the protection to temporary employees under certain circumstances. On the other hand, however, its effect is limited to situations where such employees have a 'reasonable expectation' that their contracts will be renewed on the 'same or similar' terms. By enacting sec 186(1)(b) the legislature intended to give an employee whose fixed-term contract has ended a new remedy, that is designed to provide compensation – in addition to the full performance of the employer's contractual obligations – if the employer refuses to agree to renew the contract of employment in spite of the reasonable expectation that such would occur.

There are a number of principles that make the acceptance of a renewal of a fixed-term contract of employment possible, and go beyond the point originally intended by the employer and the employee.

- The first principle is that the concept of fairness is dominant. This means that strict rules of law are not merely important. Fairness can be derived from the wording of ss 185(a) and 186(1)(b) and, strengthened by the constitutional right to fair labour practice, operates at two levels in the LRA; on the one hand in determining whether the refusal (or failure to renew) was fair with regard to the grounds for dismissal provided by the LRA, once it has been determined that a dismissal has

---

7 See sec 186(1)(b) of the LRA; Grogan J., 'Workplace Law', 7th Ed, Juta, 2003, p. 106.
8 See Mtshamba & others v Boland Houtnywerhede [1986] 7 ILJ 563 (IC).
12 See sec 23(1) of the Constitution.
occurred\(^{13}\), and on the other hand in determining whether the refusal (or failure to renew) constitutes a dismissal\(^{14}\). Consequently, the basis for justification of a right to renewal of a fixed-term contract does not necessarily need to be contractual\(^{15}\).

- The second principle is that sec 186(1)(b) prevents employers from trying to avoid the application of the LRA by keeping employees indefinitely on fixed-term contracts, and makes it impossible to terminate without having a fair reason and without following a fair procedure\(^{16}\). Consequently, sec 186(1)(b) supports the principle that the application of an automatic termination clause in a contract of employment cannot be used to put an employee outside the protective framework of the LRA. This limits the employer’s power to lean upon contractual norms only as to avoid the application of the LRA and its fairness regime and remedies\(^{17}\).

- The third principle is the element of security (or continuity) as part of the structure in most employment contracts\(^{18}\). In relation to fixed-term contracts, the Industrial Court held that ‘after a period of adaption, the employment relationship develops continuity and with it certain expectations which lead to security of this continuity. As a result of this, the employer may find the employee to be essential for its business, and the employee relies entirely on the employment for his family’s (future) welfare. In such situations a permanent employment relationship may be brought about without giving express recognition thereto – due to the mutuality of interest or common and continuing intention of both the employer and affected employee(s)\(^{19}\).

- The fourth principle is that by enacting sec 186(1)(b) it is recognised that in case of a fixed-term contract an employment relationship does not necessarily end on arrival of the final day of the contract – notwithstanding the common law rules of consensus between an employer and employee\(^{20}\). The Labour Court has never accepted that lawful termination of a contract of employment also terminates the employment relationship – in this sense that the employee stops

\(^{13}\) See sec 185(a) of the LRA.

\(^{14}\) See sec 186(1)(b) of the LRA.


\(^{19}\) See Mtshamba & others v Boland Nywerhede [1986] 7 ILJ 563 (IC) at 573H-574D.

\(^{20}\) See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner Sa (Pty) Ltd [1994] 15 ILJ 509 (A).
to be an ‘employee’ and is excluded from seeking relief. Thus, the employment relationship can continue to exist even though the employment contract has formally terminated.

Normally, the end of a fixed-term contract of employment is determined in advance by agreement between an employer and employee. The period for which the contract is valid can be determined either by reference to a specific date, the occurrence of a specified event or the performance of a particular task. In that case, a fixed-term contract expires automatically in accordance with the intention of the parties and dismissal will not be said to have occurred. However, as mentioned above, an employment relationship does not necessarily end on arrival of the final day of a fixed-term contract of employment; the employment relationship can continue to exist though the employment contract has formally terminated.

Nevertheless, in order to determine the duration of an employment relationship – while obeying the above-mentioned four principles in the context of fixed-term contracts – ‘the intention of the parties to continue with the employment relationship is of decisive importance. The requirement (or practice) whereby an employment contract would terminate, even automatically after a period of time, is not a conclusive indication of the duration of the employment relationship. On the contrary, of much greater relevance is the fact that the relationship was in fact continued. This means that the Labour Courts must give effect to the existence of an employment relationship; the pure contractual perception and approach are of minor importance.

In addition, due to these four principles much of the case law is about whether or not an employee reasonably expected his contract of employment to be renewed. In terms of the fair labour practice jurisdiction, the Labour Court is charged with prohibiting acts that unfairly infringe or damage labour relations. This means that when the Labour Court finds a disciplinary dismissal not having a fair reason (or a non-disciplinary termination of a contract of employment not effected in

---

accordance with a fair procedure\textsuperscript{25}) it will state that the refusal (or failure) to renew was in fact a means to avoid the application of the LRA.\textsuperscript{26}

\textbf{b. The termination date in a fixed-term contract}

Obviously, employment may be of undeterminable duration where no fixed date has been set for its expiry but instead is discharged by performance. This means that after performing the particular task (or carrying out a particular purpose) the contract of employment ends. Fortunately, the temporary period required can often be correctly measured.\textsuperscript{27} However, when this period cannot be accurately determined, ‘it is preferable – in order to avoid any possible confusion – that the contract of employment does not make reference to a specific termination date when the stipulated task may reasonably come to an end prior to that date. The contract of employment may rather specify the nature of the task which requires to be completed, coupled with an estimation of the expected duration.’\textsuperscript{28} Further, it is highly recommended to describe the ‘business rationale’ behind a fixed-term contract in a contract of employment. In cases where these circumstances are likely to change, it is perhaps preferable to expressly define the duration of the employment relationship.\textsuperscript{29}

\textbf{c. The employee’s ‘reasonable expectation’ of renewal}

The case law is quite divided on whether employees can claim to have been dismissed in terms of sec 186(1)(b) if they claim a reasonable expectation of renewal of employment after their fixed-term contract ended.\textsuperscript{30} The most well known cases in the case law are the ones discussed below:

- In *Malandoh v SA Broadcasting Corporation*\textsuperscript{31} there was a substantial dispute about the nature of the employee’s contract of employment. Malandoh tried to make out a case that he had become a permanent employee; he alleged that he had a reasonable expectation of continued employment. The Labour Court (Mlambo AJ) referred to *Plascon Evans Paints v Van Riebeeck Paints*\textsuperscript{32} to

---


\textsuperscript{27} See Khalo v Bateman Pipeline [1998] 19 ILJ 1288 (CCMA) at 1290D.

\textsuperscript{28} See Khalo v Bateman Pipeline [1998] 19 ILJ 1288 (CCMA) at 1290C-J.

\textsuperscript{29} ‘Is There a Better Way With Fixed Term Contracts?’, Beaumont Express (no. 23), 2003, [Electronic], Available: Butterworths.


\textsuperscript{31} [1997] 18 ILJ 544 (LC).

\textsuperscript{32} [1984] 3 SA 623 (A).
formulate the appropriate legal position: ‘Where there is a dispute as to the facts, a final interdict should only be granted in motion proceedings if the facts – as stated by the respondents together with the admitted facts in the applicant's statement – justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted.’

Accordingly, the employee had to satisfy the Labour Court (Mlambo AJ) that: 1) he had a clear right; 2) he had a well-grounded anxiety of irreparable harm if the relief was not granted; and 3) that there was no satisfactory alternative remedy. The counsel for SA Broadcasting Corporation argued that the Labour Court had to apply an ‘objective test’ as to whether Malandoh’s contract of employment had indeed become permanent and whether he could hold the alleged reasonable expectation of continued employment. After establishing the terms of the contract of employment between the parties and focussing on the conduct between the parties (especially SA Broadcasting Corporation's conduct towards Malandoh that could possibly give rise to Malandoh’s reasonable expectation of continued employment) Mlambo AJ came to the conclusion that Malandoh had not become a permanent employee; Malandoh had failed to persuade the Labour Court that he had a bona fide reasonable expectation of continued employment.

- In Dierks v University of South Africa the Labour Court (Oosthuizen AJ) stated that sec 186(1)(b) of the LRA finds its origins in the equity jurisprudence of the Industrial Court, based on the concept of ‘legitimate expectation’. Nevertheless, the term ‘reasonable expectation’ expressed in sec 186(1)(b) is not defined by the LRA, but its meaning includes the following considerations:

(i) It essentially is an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law (i.e. the LRA) do not foresee in a remedy.

---

33 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 546D-F; see also Setlogelo v Setlogelo [1914] AD 221 at 221.
34 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 546D-F; see also Setlogelo v Setlogelo [1914] AD 221 at 221.
35 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 547D.
36 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 547F-I.
37 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 5473-549A.
38 See Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 549B.
39 [1999] 20 ILJ 1227 (LC).
40 In Administrator of the Transvaal & others v Traub & others [1989] 10 ILJ 823 (A) the Appellate Division held that ‘legitimate expectations’ are capable of including expectations which go beyond enforceable legal rights, provided that they have some reasonable basis; see Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at par 119.
41 Olivier M., ‘Legal Constraints on the Termination of Fixed-term Contracts of Employment: An
The LRA clearly envisages the existence of a ‘substantive expectation’, in the sense that the expectation must relate to the renewal of the fixed-term contract;\(^{42}\)

The expectation is essentially of a subjective nature, vesting in the person of the employee. It is not required that the expectation has to be shared by the employer;\(^{43}\) and

The Labour Courts have to apply an objective test as to whether the employee’s employment had indeed become permanent and whether the employee can hold the alleged reasonable expectation of continued employment.\(^{44}\)

This means that the employee must prove that he had an expectation of renewal and that that expectation was reasonable in that – apart from subjective say-so or perception – there is an objective basis for the creation of his expectation.\(^{45}\)

Nevertheless, ‘proving the existence of a reasonable expectation that a fixed-term contract will be renewed entails the evaluation of the functional role and the applicability of a wide range of fairness considerations.’\(^{46}\) But these considerations are not a ‘numerous clausus’. According to Oosthuizen AJ is the identified approach of an evaluation of all the surrounding circumstances entailing ‘an analysis of the facts in any given situation for the purpose of establishing whether a reasonable expectation has come into existence on an objective basis.’\(^{47}\) In general, ‘regard should be had not merely to the specific terms of the fixed-term contract and the formal legal principles involved, but also to the specific context of the particular refusal or failure to renew.’\(^{48}\) The following criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeal Courts:

---


\(^{44}\) See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at par 130; Malandoh v SA Broadcasting Corporation [1997] 18 ILJ 544 (LC) at 547D.


\(^{47}\) See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at par 132.

- In case an employer agreed to renew the fixed-term contract, or gave a (tacit) undertaking;\textsuperscript{49}
- a practice or custom, express promise or an existing practice of re-employment or continued employment;\textsuperscript{50}
- a lengthy period of service on a fixed-term basis;\textsuperscript{51}
- a continued availability of a particular job or position;\textsuperscript{52}
- a purpose or reason for entering into a fixed-term form of an employment relationship;\textsuperscript{53}
- the reason for terminating the contract;\textsuperscript{54}
- inconsistent conduct on the part of the employer;\textsuperscript{55}
- the nature of the employer’s business;\textsuperscript{58}
- the granting of a salary increase without restricting it to a limited time period, whereby the increase is made annually reviewable;\textsuperscript{59} and

\begin{itemize}
\end{itemize}
- favourable progress reports about the employee.\textsuperscript{50}

d. The employee's reasonable expectation of permanent employment

What is not so clear from the wording of sec 186(1)(b) is what follows if the reasonable expectation is one of permanent employment.\textsuperscript{61} According to Olivier, sec 186(1)(b) requires an expectation that the fixed-term contract in question would be renewed on the same or similar terms. 'It is evident that the LRA does not require that (or regulate the position) where the expectation implies a permanent or indefinite relationship on an ongoing basis. The reference to 'renewal on the same or similar terms' supports that this is the right conclusion to be drawn from the wording of sec 186(1)(b).'\textsuperscript{62} Oosthuizen AJ, on the contrary, stated that 'it seems logical that if reasonable expectation can lead to a renewal of a fixed-term contract, the same expectation should lead to appropriate relief for permanent employment by implication; especially if there is no provision in the LRA to address this gap.'\textsuperscript{63} However, there are other considerations.

Firstly, sec 186(1)(b) is founded on the unfairness of the indefinite renewals of fixed-term contracts. And secondly, the employee with a claim for permanent employment is not without remedy.\textsuperscript{64}\textsuperscript{65} Therefore, Oosthuizen's opinion is that it is better to seek to rely on the unfair labour practice jurisdiction than on the unfair dismissal jurisdiction defined in sec 186(1)(b), in circumstances where the employee alleges that a reasonable expectation has been created for permanent employment (or where the fixed-term contract has been converted into one of permanence). Sec 186(2)(c) is stating that 'unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement.\textsuperscript{66} Thus, this provision provides an employee with a claim for permanent employment a remedy. From this follows, that Oosthuizen AJ finally finds that 'an entitlement to permanent employment cannot be based on the reasonable


\textsuperscript{61} See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at par 135.


\textsuperscript{63} See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at par 141.

\textsuperscript{64} See sec 186(2) of the LRA.

\textsuperscript{65} See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at paras 142-145.

\textsuperscript{66} See sec 186(2)(c) of the LRA.
expectation of sec 186(1)(b); sec 186(1)(b) does not include a reasonable expectation of permanent employment. 67

- In McInnes v Technikon Natal 68 the Labour Court held that it had to conduct ‘a two-stage enquiry to determine the employee’s subjective expectation in relation to the renewal, and to decide whether this expectation was reasonable given the circumstances. 69 ‘What is required is that the employee must subjectively have held the expectation that his contract of employment would be renewed on terms which are the same or similar to the terms which existed during his fixed-term contract of employment. [Although alternative expectations can be argued, it is obviously not possible to subjectively entertain two or more subjective expectations at the same time; what then needs to be determined is what the genuine employee’s expectation was and whether or not this expectation related to the renewal of his contract of employment on the same or similar terms.] 70

The Labour Court (Penzhorn AJ) disagreed with Oosthuizen AJ’s opinion by expressing that ‘sec 186(1)(b) clearly seeks to address the situation where an employer fails to renew a fixed-term contract of employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, which gives the employee the protection afforded by this provision. If then the expectation is that the renewal is to be indefinite, then the provision must be held to also cover that situation. 71 In addition, the focus must be on the ‘nature of that expectation’ and whether that expectation was reasonable. ‘In the normal course of events where fixed-term contracts are renewed from time to time, an expectation that the contract would be renewed indefinitely would probably not be reasonable and not be genuine. However, that does not mean that such a situation can never arise. It stands to reason that in cases where an employee genuinely believed that he would stay on in his post – which was to become permanent – and if this belief is such that it would have been shared by ‘any reasonable person’ in that position, then the Labour Court (Penzhorn AJ) sees no reason why this provision should not be held to also cover this situation. 72 This leads to the conclusion that the employee was dismissed in the extended sense of that term as used in sec 186(1)(b) of the LRA. 73

---

67 See Dierks v University of South Africa [1999] 20 ILJ 1227 (LC) at paras 146-149.
69 See McInnes v Technikon Natal [2000] 6 BLLR 701 (LC) at par 15.
70 See McInnes v Technikon Natal [2000] 6 BLLR 701 (LC) at paras 16-17.
71 See McInnes v Technikon Natal [2000] 6 BLLR 701 (LC) at par 20.
72 See McInnes v Technikon Natal [2000] 6 BLLR 701 (LC) at par 21.
73 See McInnes v Technikon Natal [2000] 6 BLLR 701 (LC) at paras 22-30.
- In *Auf der Heyde v University of Cape Town*\(^{74}\) the Labour Appeal Court (Du Plessis AJA) upheld the view of the Labour Court in *McInnes v Technikon Natal*\(^{75}\) by assuming, without finding, that a reasonable expectation of a permanent appointment falls within the ambit of sec 186(1)(b).\(^{76}\) It stated that ‘in order to determine whether the employee had a reasonable expectation, it is necessary to determine whether he in fact expected his contract of employment to be renewed or converted into a permanent appointment. If he did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable.’\(^{77}\) However, the LAC concluded that ‘the facts show that the employer made it clear that the contract was for three years, and that extension to five was only a possibility. In no manner did the employer hold out even the possibility of a permanent appointment.’\(^{78}\) Therefore, ‘the LAC was not convinced that the employee had proved his reasonable expectation of the renewal of his contract of employment; in Du Plessis’ view did the employee not reasonably expect the employer to renew his fixed-term contract of employment.’\(^{79}\)

Interestingly are all later (and thus more recent) cases referencing to one or more of the above-mentioned cases and use them as a starting point. In spite of this, it is, in my view, not necessary to discuss these cases as well.

Finally, I must disagree with Olivier and Oosthuizen that ‘there seems to be no reason in logic or law why an expectation of permanent employment should provide a ground for a claim of dismissal under sec 186(1)(b). The point of view that a fixed-term contract terminates automatically, does not take account of the expectations of renewal, or the development of a permanent relationship that might exist or come about, nor of any common intention (or understanding) that is not included in a contractual arrangement.’\(^{80}\) In *Borg-Warner*\(^{81}\) the Appelate Division held that the employer was
bound to its undertaking, even though the undertaking was not laid down in a contract concluded at common law; it was laid down in a collective bargaining agreement which did not purport to be a contract. As a matter of fact, the Labour Courts should rely on developments which take place subsequently to an initial contract for the determination of the period of duration. However, there can be other equity considerations as well. Equity considerations – together with agreements that regulate the employment relationship after the contractual termination of an employment contract – should form the basis for an entitlement that an employee had a reasonable expectation that his fixed-term contract of employment would be renewed in the form of a permanent contract of employment. This declares why there exists such a wide range of fair considerations (which is not exhaustive) of when an employer does have a reasonable expectation of the renewal of his fixed-term contract of employment.

Besides, by requiring that an employee reasonably expected the employer to renew a fixed-term contract of employment ‘on the same or similar terms’, does not mean that the ‘duration of the contract of employment’ must be renewed on the same or similar terms. Such an interpretation would lead to a too restrictive effect of sec 186(1)(b). On the contrary, sec 186(1)(b) must be interpreted in a wider interpretation whereby an employee may claim to be dismissed if he reasonably believed that his fixed-term contract of employment would be renewed for an indefinite period.

e. Outsourcing and a fixed-term contract

The aforementioned case law illustrated the criteria which the Labour Court has accepted for the foundation of a ‘reasonable expectation’. However, in cases where the Labour Court had to determine whether this ‘reasonable expectation’ was one of permanent employment, it is very

---

81 See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner SA (Pty) Ltd [1994] 15 ILJ 509 (A).
82 See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner SA (Pty) Ltd [1994] 15 ILJ 509 (A) at 518I-J and 519C-G.
difficult to find consistency. Whether or not such a 'reasonable expectation' exists, depends on numerous considerations such as the terms of a contract of employment, the surrounding circumstances, the contractual arrangements, promises (or given undertakings) held out by the employer, custom and practice regarding renewal, administration of the relationship, (plans for) outsourcing, nature of the business and consistency, etc. Nevertheless, taking into account the concept of fairness, sec 186(1)(b), the element of security (or continuity) in a contract of employment and the possibility of the continuation of the employment relationship, the intentions of both the employer and employees to continue with the employment relationship are very important to assess the definite duration of that relationship and the afforded protection to those affected employees. However, the requirement (or practice) whereby an employment contract would terminate, even automatically after a period of time, is not a conclusive indication of the duration of the employment relationship. On the contrary, of much greater relevance is the fact that the relationship was in fact continued. This means that the Labour Courts must give effect to the existence of an employment relationship; the pure contractual perception and approach are of minor importance.\textsuperscript{86}

With regards to fixed-term contracts in the context of outsourcing, sec 197(2)(a) states that if a transfer of a business takes place – unless otherwise agreed in terms of subsection (6) – 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.\textsuperscript{87} In addition, sec 197(3)(a) states that the new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.\textsuperscript{88} This means that all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.\textsuperscript{89} Thus, in case of an outsourcing which falls within the ambit of sec 197\textsuperscript{90}, a fixed-term contract in existence

\begin{footnotesize}
\begin{itemize}
\item[87] See sec 197(2)(a) of the LRA.
\item[88] See sec 197(3)(a) of the LRA.
\item[89] See sec 197(2)(b) of the LRA.
\item[90] See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
\end{itemize}
\end{footnotesize}
immediately before the date of the transfer, will transfer to the new employer on the same terms and conditions. Next to this, will the new employer automatically be substituted in the place of the old employer.

In case a fixed-term contract of employment expires before the outsourcing (which falls within the ambit of sec 197)\(^91\), the conduct of the old employer will be looked at to determine whether or not the affected employee reasonably expected the employer to renew his fixed-term contract of employment.\(^92\) Nevertheless, anything done before the outsourcing (which falls within the ambit of sec 197)\(^93\) by or in relation to the old employer including the dismissal of an employee is considered to have been done by or in relation to the new employer.\(^94\) This means that if according to sec 186(1)(b) one can speak of a dismissal, this dismissal is considered to have been done by the new employer.

Difficultly which might give rise to particular issues, is when a fixed-term contract of employment is expiring shortly after an outsourcing (which falls within the ambit of sec 197)\(^95\) has taken place. It seems to me that in such situations it is more difficult to determine whether or not the affected employee had a reasonable expectation of the renewal of his fixed-term contract of employment. Seeing that I could not find any case law dealing with this issue, I think that sec 197(2)(c) gives us something to go by; since anything done before the transfer by or in relation to the old employer is considered to have been done by or in relation to the new employer, the Labour Court must take account of the conduct of both the old and new employer when determining whether or not the affected employee had a reasonable expectation of the renewal of his fixed-term contract of employment. This is also totally in line with the concept of fairness, sec 186(1)(b), the element of security (or continuity) in a contract of employment and the possibility of the continuation of the employment relationship.

---

\(^91\) See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.

\(^92\) See sec 186(1)(b) of the LRA.

\(^93\) See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.

\(^94\) See sec 197(2)(c) of the LRA.

\(^95\) See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
f. Outsourcing and the premature termination of a fixed-term contract

In *Buthelezi v Municipal Demarcation Board*\(^{96}\) Buthelezi was appointed as a deputy manager in charge of MDB's financial operations for a fixed term period of five years. However, by the end of the first year MDB already gave Buthelezi a notice of retrenchment; due to its institutional restructuring process Buthelezi's position had become redundant. Despite a consultation meeting in which alternative proposals to the retrenchment had been discussed and the unsuccessful application for a different vacant post within MDB's structure, MDB finally dismissed Buthelezi and required him to vacate his office immediately.\(^{97}\) Then the dispute arose between Buthelezi and MDB about the fairness of the dismissal. Buthelezi argued that the termination of his employment contract was substantively unfair by virtue of the fact that the parties had concluded a fixed-term contract of employment and that MDB could not terminate such contract for operational requirements during its currency. MDB disputed the contention that Buthelezi had been employed on a fixed-term contract of employment.\(^{98}\)

The Labour Court found that a fixed-term contract of employment had been concluded by the parties. Further, it also concluded that Buthelezi's dismissal during the currency of his fixed-term contract was substantively unfair. However, the Labour Court found the dismissal substantively fair on other aspects; MDB had a fair reason to restructure its business which made the retrenchment substantively fair. Besides, the Labour Court also found the dismissal procedurally unfair by reason of the manner in which Buthelezi's dismissal was effectuated. 'This was unfair and constituted an invasion of Buthelezi's dignity.'\(^{99}\)

On appeal Buthelezi argued that the dismissal was substantively unfair, because MDB had no right in law to terminate the fixed-term contract of employment between them prior to the expiry of its term, even if there were operational requirements which could have justified a termination of contract for an indefinite period. Besides, Buthelezi argued that the Labour Court erred in finding that his retrenchment complied with the requirements of sec 189 of the LRA.

---

96 [2005] 2 BLLR 115 (LAC).
97 See *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) at paras 1-4.
98 See *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) at paras 4-5.
99 See *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) at par 5.
MDB, on the contrary, disputed all Buthelezi’s contentions and argued that where there are operational requirements an employer is entitled to dismiss an employee, even if his contract of employment is for fixed term. Thus, there was a fair reason for the dismissal of Buthelezi which was based on MDB’s operational requirements.\(^{100}\)

With regards to the question whether MDB was entitled to terminate the employment contract, the LAC stated that ‘there is no doubt that in common law a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words, there is no right to terminate such contract even on notice, unless its terms provide for such termination. The rationale for this is clear; when parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their mutual obligations in terms of that contract for the duration of the contract and they are entitled to – in the light of their agreement – their lives on the basis that the obligations of the contract will be performed for the duration of that contract, in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term, in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate a fixed-term contract of employment prematurely, in the absence of a material breach of such contract by the other party.’\(^{101}\) “This does not constitute unfairness for the employer, because it is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period, if it thinks that there is a risk that it might have to dispense with the employee’s services before the expiry of the term. If it chooses to enter into a fixed-term contract, it takes the risk that it might have need to dismiss the employee prematurely, but is prepared to take that risk. If it has elected to take such a risk, it cannot be heard to complain when the risk materialises. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.”\(^{102}\)

\(^{100}\) See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 7.

\(^{101}\) See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 9.

\(^{102}\) See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 11.
Furthermore, the LAC held that ‘the courts have declined to interpret a statute as taking away existing rights, unless that was the purpose intended by the legislature and that is expressed in clear and unambiguous terms in the statute itself’\textsuperscript{103}; ‘there is a presumption against the deprivation of – or interference with – common law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured’.\textsuperscript{104} ‘The LRA does not expressly end an employee’s common law entitlement to enforce contractual rights, nor does it so by necessary implication. The clearest indication that it had no such intention is sec 186(1)(b) which extends the meaning of ‘dismissal’. And although the legislature dealt specifically with fixed-term contracts in this provision, it did not include that the premature termination of such a contract would be manifestly unfair. The reason for that is obvious: the common law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination to be an unfair dismissal.\textsuperscript{105} This is also not inconsistent with the Constitution, because the common law right to enforce prematurely terminated fixed-term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights.\textsuperscript{106}

Thus, the LAC concluded that the operational requirements did not give MDB the right in law to terminate the contract of employment between itself and Buthelezi. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal. The dismissal was, consequently, substantively unfair in the fullest possible sense. Moreover the question of procedural fairness becomes academic in this matter.\textsuperscript{107}

From this follows that an employer cannot terminate a fixed-term contract prematurely, even where it has genuine operational requirements to do so. The only solution that I can derive from the LAC’s judgment in the Buthelezi case\textsuperscript{108}, is that in case of an contemplated outsourcing (which will fall within the ambit of sec 197)\textsuperscript{109} it is very important that the old and new employer conclude an

\textsuperscript{103} See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 12.
\textsuperscript{104} See SA Breweries Ltd v Food & Allied Workers Union & others[1990] (1) SA 92 (A) at 99F; Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 12.
\textsuperscript{105} See Fedlife Assurance Ltd v Wolfaardt [2002] (1) SA 49 (SCA) at paras 16-18; Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 13.
\textsuperscript{106} See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 15.
\textsuperscript{107} See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 16.
\textsuperscript{108} See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC).
\textsuperscript{109} See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December
agreement about the inclusion of terms in the existing fixed-term contracts of the affected employees – before the outsourcing actually takes place – which makes it possible for the new employer to terminate the fixed-term contracts of the transferred employees prematurely, in case it has no work for them anymore. I think it is preferable to conclude such an inclusion of terms in the fixed-term contracts before an outsourcing occurs, because according to sec 197(2)(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment.\textsuperscript{110} And, consequently, all rights and obligations between the old employer and an employee continue in force as if they had been rights and obligations between the new employer and the employee\textsuperscript{111} and anything done before the transfer by or in relation to the old employer is considered to have been done by or in relation to the new employer.\textsuperscript{112} So, if a new employer would include such terms in the fixed-term contract only after an outsourcing has occurred, it runs the risk that it does not comply with sec 197(2), because it then offers terms and conditions that are on the whole less favourable to the employees than those on which they were employed by the old employer.\textsuperscript{113} Finally, an employer always has the opportunity to terminate a fixed-term contract prematurely, if it can prove that the employee repudiated or breached the employment contract materially.

\textbf{g. Different 'test' in case of outsourcing fixed-term contracts?}

Fortunately, the LRA does offer protection to fixed-term contract employees since the adoption of the current LRA\textsuperscript{114} in 1996; sec 186(1)(b) treats a refusal (or failure) to renew a fixed-term contract of employment as a species of dismissal in circumstances where the employee had a reasonable expectation of renewal of his fixed-term contract of employment.\textsuperscript{115} Besides, sec 197(2)(a) expressly states that the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment. This means that when when an outsourcing (which falls within the ambit of sec 197)\textsuperscript{116} occurs, the new employer is automatically substituted in the place of

\textsuperscript{110}2004 at paras 18, 19, 21, 22, 36 and 44.

\textsuperscript{111}See sec 197(2)(a) of the LRA.

\textsuperscript{112}See sec 197(2)(b) of the LRA.

\textsuperscript{113}See sec 197(2)(c) of the LRA.

\textsuperscript{114}See sec 197(3)(a) of the LRA.

\textsuperscript{115}66 of 1995.


\textsuperscript{116}See for criteria when outsourcing falls within the ambit of sec 197 \textit{SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd \& others} [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3
the old employer in respect of both fixed-term contracts of employment and other forms of contracts of employment in existence immediately before the date of the outsourcing.\textsuperscript{117} This does not interrupt the continuity of a fixed-term contract of employment; the fixed-term contract of employment continues with the new employer as if with the old employer.\textsuperscript{118} And only if an employee reasonably expected his old employer to renew his 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 at all\textsuperscript{119}, the fixed-term contract employee is deemed to be dismissed by or in relation to his new employer.\textsuperscript{120}

Next to this, commissioner Bosch in the \textit{Hugo} case\textsuperscript{121} and Ngcobo J in the \textit{NEHAWU} case\textsuperscript{122} stated that the LRA must be interpreted in compliance with the Constitution\textsuperscript{123} and must give effect to its primary objects that includes giving effect to and regulating the fundamental rights conferred by sec 23 of the Constitution;\textsuperscript{124} that, inter alia, provides that everyone has the right to fair labour practice.\textsuperscript{125} Besides, sec 39(2) provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.\textsuperscript{126} This means that according to sec 23(1) of the Constitution no distinction may be made between employees with typical contracts of employment and atypical contracts of employment (i.e. fixed-term contracts); also atypical employees have the right to fair labour practice. This is in line with the equity as one of the founding values of the Constitution.\textsuperscript{127, 128}

From this follows, that the legislature has intended to protect all employees who are affected in case of an outsourcing which falls within the ambit of sec 197.\textsuperscript{129} Even when looking at the

\textsuperscript{117} See sec 197(2)(a) of the LRA.
\textsuperscript{118} See sec 197(2)(d) of the LRA.
\textsuperscript{119} See sec 186(1)(b) of the LRA.
\textsuperscript{120} See sec 197(2)(c) of the LRA.
\textsuperscript{121} See \textit{Hugo v Shandelier Hotel Group CC (In Liquidation) & others}[2000] 21 ILJ 1884 (CCMA).
\textsuperscript{122} See \textit{NEHAWU v University of Cape Town & others}[2003] 24 ILJ 95 (CC).
\textsuperscript{123} See sec 3(b) of the LRA.
\textsuperscript{124} See ss 1(a) and 3(b) of the LRA.
\textsuperscript{125} See sec 23(1) of the Constitution.
\textsuperscript{126} See sec 39(2) of the Constitution.
\textsuperscript{127} See sec 1 of the Constitution.
\textsuperscript{128} Equity is also a founding value of the LRA [See the ‘Explanatory Memorandum to the Labour Relations Bill’ (1995) 16 \textit{ILJ} 278, p. 285.]
\textsuperscript{129} See for criteria when outsourcing falls within the ambit of sec 197 \textit{SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others}[2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
Buthelezi case\textsuperscript{130}, it is obvious that there exists no room for using a different test for determining the presence of a reasonable expectation – and, thus, dismissal – in case an employee is employed on a fixed-term contract basis.

\textsuperscript{130} See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 13.
Chapter 4 Outsourcing and changing terms and conditions of employment

Introduction
According to sec 197(2)(a) a 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 case a transfer of a business takes place, unless otherwise agreed in terms of subsection (6).¹ This means that employees are entitled to invoke upon whatever rights they had under their old contracts of employment towards the new employer. Remarkably, sec 197 states nothing about the situation wherein a new employer wants to try to change the terms and conditions of contracts of employment, which it inherited from the old employer due to the transfer of the business. ‘Possible reasons why a new employer may want to change the terms and conditions of employment that are applicable in the context of outsourcing are:

- the harmonisation of the conditions of service between outsourced employees and existing employees of the employer;
- the complexity of administration, the expensiveness and undesirability to continue to employ employees on a range of different terms and conditions of contracts of employment;
- the indication of complicated terms and conditions of contracts of employment that hinder the efficiency of the business;
- the desirability for improvement of the efficiency and profitability of the transferred business;
- the desirability for changes in the production methods to enhance productivity of the transferred business²; and
- the inability to meet the employer’s previous contractual terms.³

‘The most appropriate instrument to harmonise the various (and different) contracts of employment is collective bargaining, because the consent of both the employer and the employee is necessary to achieve a change in a term or condition of an employment contract.’⁴ Nevertheless, employees

---
¹ See sec 197(2)(a) of the LRA.
² See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC).
may only be taken to have accepted a change to terms and conditions of their contracts of employment if they are clearly informed of the change and continue to work under the new terms and conditions without protest.\(^5\)

Sometimes, collective bargaining does not lead to the outcome the employer was looking for, or worse, results in an impasse of the (economic) interest dispute; especially in situations where the employees must give up material benefits. The key question in these circumstances is whether or not an employer can resort to a dismissal for operational requirements.\(^6\) Indeed, an employer may fairly dismiss employees who refuse to agree to changes to their terms and conditions of employment, if this (final) decision is properly and genuinely justifiable on operational requirements or, put another way, for a commercial or business rationale and the employer followed consultative procedures and was able to prove that the decision to dismiss was genuine.

Nevertheless, employers must keep in mind sec 187(1)(c), which provides that a dismissal is automatically unfair if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.\(^7\) This means that dismissal is not the solution in situations where collective bargaining does not lead to an outcome the employer was looking for, or worse, results in an impasse of the (economic) interest dispute.

The only difficulty which might give rise to particular issues is when dismissals for operational requirements are used to pressurise employees into agreeing to such demands. In other words, when can it be said that in dismissing an employee (or a group of employees) the employer is exercising his right to dismiss for operational requirements, instead of dismissing employees in order to compel them to agree to a demand on a matter of mutual interest, which is prohibited in sec 187(1)(c)?\(^8\) Or, when will it be permissible for the employer to invoke operational requirements to dismiss employees? Further, is it preferable to support the view of a so-called ‘migration’ from a ‘matter of mutual interest’ to a ‘matter of right’ in order to determine whether an employer is dismissing for operational requirements? And finally, what approach should the Labour Court take in adjudicating such cases?

\(^6\) See ss 189 and 189A of the LRA.
\(^7\) See sec 187(1)(c) of the LRA.
\(^8\) See Fry's Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 23.
This chapter starts with explaining the several ways of implementing changes to terms and conditions of contracts of employment unilaterally by the employer. After this, it makes a clear distinction between matters of right and matters of interest and determines the preferability of making such a distinction. Besides, it determines whether or not sec 187(1)(c) can be interpreted in a way that it contemplates a ‘migration’ from matters of right to matters of interest and the other way around. Further, is explained the meaning of the word ‘dismissal’ in sec 187(1)(c). After that, attention is paid to dismissal for operational requirements, whereby the Fry’s Metals case\(^9\) and some other cases are discussed in detail. And finally, the justification of dismissals for operational requirements is discussed, in stating which process an employer should follow first – in order to change the terms and conditions of the contracts of employment of employees – before passing on to dismiss the affected employees for operational requirements.

a. Variation by the new employer

According to both the Constitution and the LRA, both the employer and the employee are allowed to use industrial action (i.e. a strike or lock-out) in an effort to force agreement. However, for a new employer that has good reasons to introduce change, the possibility of using industrial action to force agreement to change may not be attractive. In these circumstances the question is to what extent the terms and conditions of contracts of employment may be changed unilaterally by the employer. However, to achieve a change in a term or condition of an employment contract a proposal to change must first be negotiated with the affected employees (or their representatives), and the consent of both the employer and employee is also necessary.\(^10\)

Ways to change terms and conditions of contracts of employment unilaterally are:

- a unilateral change in a way that is to the advantage of the employee. ‘This does not constitute a breach of contract of employment, since the employer performs something more than its contractual obligation. However, as mentioned above, the consent of the employee is necessary to achieve the change.’\(^11\)

---

\(^9\)\([2003]\ 2\ BLLR\ 140\ (LAC)\).


- a change in the performance of the employer or employee. However, ‘both of them can change their performance, but only in a rational and fair way that is not calculated or likely to destroy the employment relationship of trust, when exercising this prerogative.’

- a change that is contemplated by and provided for in the contract of employment. This occurs, for example, when the contract states that the employee can choose between a day- or night shift.

- a change in the employer’s contractual obligations towards its employees, in case it is no longer possible to provide a particular benefit due to changed circumstances after the transfer. This ‘substituted performance’ is necessary to make sure the continuity of the (terms and conditions of an) employment contract.

- a unilateral change based on sec 197(3)(a). This section states that the new employer may employ transferred employees on terms and conditions that are one the whole not less favourable to the employees than those on which they were employed by the old employer. This provision makes it possible for the employer to try to achieve harmonisation in the terms and conditions of the various contracts of employment. However, changing certain terms and conditions of a contract of employment may cause harm to employees. Knowing that some terms and conditions of a contract of employment are inherently group based and others not, sec 197(3)(a) does not make clear whether the new employer must be able to demonstrate that ‘each individual employee’ is employed on terms and conditions that are on the whole not less favourable to that employee, or whether the comparison may be dealt with and the determination made in respect of the group of transferring employees ‘as a whole’. Nevertheless, standard terms and conditions of a contract of employment (e.g. wages) may not be dependent on the entitlements or participation of other employees and must, thus, be compared on an individual basis. Further, sec 197(3)(a) does not apply to employees if any of their conditions of employment are determined by a collective

15 Sec 197(3)(a) of the LRA establishes a degree of flexibility for the new employer that is for the most part absent in comparable European statutes. Neither the European Council Directive nor the TUPE-Regulations have a similar provision.
16 There is also a converse provision; sec 186(1(f) of the LRA. This provision provides an employee with a claim for (constructive) dismissal, if ‘an employer after the transfer provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer’.
This means that as soon as a condition of employment is regulated by a collective agreement, a change may be achieved only by an agreement contemplated by sec 197(6), unless performance by the new employer is impossible; in those circumstances the new employer must come up with a ‘substituted performance’.

- A unilateral change to terms and conditions of contracts of employment by trying to reach an agreement with the affected employees (or their representatives) as contemplated by sec 197(6), in circumstances where sec 197(3)(a) is not an option. However, the new employer can only resort to this unilateral action if agreement is concluded. Remarkably, sec 197(6) seeks to establish consistency with the consultation obligations of employers contemplating dismissal that is regulated by sec 189.

- A unilateral change based on the employer’s operational requirements. Nevertheless, the change – which is mostly a dismissal – must be properly and genuinely justifiable on operational requirements or, in other words, for a commercial or business rationale. Besides, the employer must follow consultative procedures that are fair and the employer must be able to prove that the change is genuine.

Interesting in this whole issue about unilateral implementation of changes to terms and conditions of contracts of employment in order to achieve harmonisation, is sec 186(2)(c). This provision states that an ‘unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement. Thus, in the light of unilateral implementation of changes to terms and conditions of employment contracts, a new employer cannot decide not to...

---

17 See sec 197(3)(b) of the LRA.
19 Sec 197(6) expressly states that ‘the agreement must be in writing and that it must be concluded between either the old employer, the new employer, or the old and new employer acting jointly, and the appropriate person or body referred to in sec 189(1), on the other.’
21 See sec 213 of the LRA.
22 See ss 188 and 189 of the LRA.
24 See sec 187(2)(c) of the LRA.
reinstate or re-employ former employees at all in the case of an outsourcing (which falls within the
ambit of sec 197\(^{25}\)), since this constitutes an unfair labour practice.

In addition, sec 186(1)(f) states that a (constructive) dismissal may occur in circumstances where
an employee terminates a contract of employment – with or without notice – because the new
employer actually provides the employee after a transfer with conditions or circumstances at work
that are substantially less favourable.\(^{26}\) This means that an employee who is dissatisfied with the
substantially changed conditions and circumstances may resign and claim to be unfairly dismissed.
Thus, obviously, this provision confirms the protection sec 197 offers to employees in the context of
business transfers (e.g. an outsourcing). Nevertheless, an employee cannot ground his claim to be
unfairly dismissed on sec 186(1)(f) if the new employer substantially changes the conditions or
circumstances according to a concluded agreement in terms of sec 197(6). Further, the substantial
change to conditions or circumstances at work is only justifiable if the new employer can prove that
these changes were necessary due to its genuine operational requirements and if it has followed a
fair procedure as set out in ss 188 and 189.\(^{27}\)

The provision uses the words ‘conditions or circumstances at work’, whereby ‘conditions’ can be
interpreted as ‘terms and conditions of a contract of employment’ and ‘circumstances’ can cover a
very broad scope of incidents of the employee’s situation with the new employer (e.g. the
cancellation of a daily massage for account of the employer during lunch break). The test whether
or not the conditions or circumstances at work are substantially less favourable is an objective one
and must be determined from the perspective of the reasonable person in the position of the
employee, while taking into account all circumstances of the specific case. Obviously, the
subjective view of the way the employee is experiencing the substantially changed conditions and
circumstances at work will ultimately lead to the termination of the contract of employment by the
employee and eventually to a claim of unfair dismissal, but this view is not decisive. Furthermore, it
is insufficient to claim to be unfairly dismissed when an employee does not have exactly the same
conditions or circumstances at work with the new employer. Especially not when the new employer

\(^{25}\) See for criteria when outsourcing falls within the ambit of sec 197 *SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others* [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
\(^{26}\) See sec 186(1)(f) of the LRA.
actually provides some conditions or circumstances at work that are less favourable, and some that are more favourable than those enjoyed before the transfer.\textsuperscript{28}

From this follows, that a (constructive) dismissal grounded on sec 186(1)(f) can also constitute a automatically unfair dismissal as mentioned in sec 187(1)(g).\textsuperscript{29} The reason (or purpose) of both the dismissals is a transfer or a reason related to a transfer contemplated in sec 197. The only difference is the ‘prerequisite’ that the conditions or circumstances at work – that are actually provided by the new employer – must be substantially less favourable to the employee than those actually provided by the old employer before the transfer, to ground a successful claim of unfair dismissal on sec 186(1)(f). While a ‘187(1)(g)-dismissal’ can relate to all kinds of transfer related reasons. This means that the scope of sec 186(1)(f) is narrower than of sec 187(1)(g).

Unfortunately, the employer’s unilateral implementation of changes to terms and conditions of a contract of employment weakens the collective bargaining mechanism. Even though, (striking) employees may either require the employer not to implement the change to terms and conditions of a contract of employment unilaterally, or require the employer to restore the terms and conditions of employment that applied before the change\textsuperscript{30}, employers have recourse to lock-out\textsuperscript{31}.\textsuperscript{32}

Nevertheless, the recourse to lock-out is not an obligation; an employer is free to make use of it when it is faced with circumstances in which the LRA permits the institution of a lock-out.\textsuperscript{33}

Next to the right to strike stands the protection of striking employees from dismissal.\textsuperscript{34} However, this does not preclude an employer from fairly dismissing an employee for a reason based on the employer’s genuine operational requirements.\textsuperscript{35} On the one hand, this limits the effect of immunity enjoyed by striking employees. But on the other hand, this is justified because an employer does not need to suffer a strike to the point of financial ruin.\textsuperscript{36} Thus, it is preferable to try to reach an

\begin{itemize}
\item \textsuperscript{30} See sec 64(4) of the LRA.
\item \textsuperscript{31} See sec 64(1) of the LRA.
\item \textsuperscript{32} See Cohen T., ‘Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?’, [2004] 25 ILJ 1883, p. 1885.
\item \textsuperscript{33} See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 34.
\item \textsuperscript{34} See sec 67(4) of the LRA.
\item \textsuperscript{35} See sec 67(5) of the LRA.
\end{itemize}
agreement about the proposed changes to terms and conditions of a contract of employment before an employer even starts considering dismissal.\footnote{37}

**b. Matters of right and Matters of interest**

The South African labour law system makes a separation between ‘matters of right’ and ‘matters of interest’, whereby a ‘matter of right’ involves a legal claim under an individual employment contract, a collective agreement, a statute (e.g. the LRA) or even the common law. A typical example of a matter of right is a dispute about the correct meaning of a provision in a collective agreement. A ‘matter of interest’, on the contrary, is a dispute about a claim by a party for something new; something to which it presently had no legal right. Perfect examples of matters of interest are proposals to change the terms and conditions of an employment contract\footnote{38}, wage-work deals and disputes about a business restructuring (e.g. an outsourcing) for survival or growth in the product and services market – the operational requirements of an employer.\footnote{39}

In general, the importance of making such a distinction is that power is not an option in relation to matters of right. This means that the bargaining process and its supporting legislative framework are not supposed to deal with the correction of competing rights. Matters of right must be referred for adjudication to the Labour Court or for arbitration to an arbitrator. Accordingly, strikes and lock-outs are forbidden.\footnote{40} Nevertheless, dismissal is available as a final and binding remedy.

Matters of interest, on the contrary, must be sorted out by the bargaining process itself. Since there is no final and binding legal remedy available, it is all about which party can convince the other party the most to compromise or waive its interest(s) and try to get whatever it can wrest from the bargaining process. If the bargaining process (which includes information sharing and consultation) cannot be concluded, the parties can use conciliation – as a form of dispute resolution – or strikes, lock-outs and unilateral variation by the employer as an ultimate remedy. This means that coercive capacity is more often than not the real dealmaker. Nevertheless, parties are not allowed to play the dismissal card, since sec 187(1)(c) of the LRA renders any dismissal (whether temporary or

\begin{footnotes}
\item[37] ‘Mergers and Acquisitions – Alignment of Terms and Conditions’, \textit{Beaumont Express} (no. 17), 2003, [Electronic], Available: Butterworths.
\item[38] See \textit{Gauteng Provinsiale Administrasie v Scheepers & Others} [2000] 21 ILJ 1305 (LAC) at paras 7-8.
\item[40] See sec 65(1)(c) of the LRA.
\end{footnotes}
final) to compel acceptance of an employment demand automatically unfair. Besides, ss 67(4) and 187(1)(a) of the LRA preclude dismissal as a lawful response to procedural strike action.41

Although the world of labour and business requires sharp distinction42, the question is whether is it preferable to make a separation between 'matters of right' and 'matters of interest', since the case law obviously shows that it is impossible to draw a clear line between matters of right and matters of (mutual) interest. Thompson argued that dismissal can never be a permissible expression of power in the bargaining process.43 Nevertheless, an operational requirements dismissal – which falls outside the area of collective bargaining – can occur in disputes over business restructuring (which are matters of interest and, thus, must be resolved through collective bargaining) in case the viability is at stake. But, since it is not always possible to draw a clear line between matters of right and matters of interest and the term 'viability' is ambiguous, the Supreme Court of Appeal (hereinafter ‘SCA’) held that it is not clear when exactly it will be permissible for the employer to involve operational requirements to dismiss employees. Thompson suggested a ‘flexible court-scrutinised test’; as long as a demonstrably sensible business analysis has been investigated during the consultative process, a dismissal for operational requirements will be reasonable and proportionate. Therefore, Labour Courts have to determine on a case-by-case basis when a dispute has permissibly ‘migrated’ from the bargaining domain (where matters of interest cannot legitimately trigger dismissals) to the legal domain (where the employer is permitted to dismiss for operational requirements).44 However, the SCA stated that such a separation between matters of right and matters of interest does not form the basis of the collective bargaining structure that the LRA has adopted, since taking into account such a separation leads to unavoidable complexities.45 Besides, sec 187(1)(c) can also not be interpreted in a way that it contemplates such a separation; the LAC has assigned a distinctive (and more) specific) meaning to ‘dismissal’ in sec 187(1)(c),

compared to ‘dismissal’ in sec 186(1)(a). This means that the Labour Court must only inquire the employer’s purpose for effecting the dismissal. Once the dismissal lacks the proscribed statutory purpose, it is not automatically unfair. Next to this, the employer must be able to prove, according to ss 188 and 189, that the dismissal was based on operational requirements.\textsuperscript{46}

I must agree with the SCA; it is not preferable to support Thompson’s view of the possibility of a so-called ‘migration’ from a matter of interest to a matter of right in order to determine whether an employer is allowed to dismiss employees for operational requirements. I even think that making a separation between matters of right and matters of interest is impossible, because in the end all matters will impact somehow on the wage-work deal, which is a matter of interest. Therefore, it is better not to use such a separation. Instead, an employer must be obliged to always first use the instrument of collective bargaining; only then the best results – to achieve a change to terms and conditions of a contract of employment – will be obtained. Further, it will also be more likely that alternative solutions to dismissal will be found during the collective bargaining process, which is supported by sec 189(2)(a). And finally, I think that a dismissal for operational requirements must only be used when operational requirements of an employer genuinely require such a dismissal; a ‘migration’ must never be the cause of dismissing employees for operational requirements.

c. Section 187(1)(c) of the LRA

Section 187(1)(c) of the LRA provides 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 employer and employee.\textsuperscript{47} This means that as soon as employees refuse to accept an employer’s demand in respect of proposals concerning wages and benefits, working conditions or business restructuring, dismissals for this reason are prohibited according to sec 187(1)(c), since they undermine the collective bargaining mechanism.\textsuperscript{48}

The wording of sec 187(1)(c) nearly reflects the definition of ‘lock-out’ under the old LRA.\textsuperscript{49} Under the old LRA a distinction was made between ‘termination lock-outs’ and ‘exclusion lock-outs’. The former occurred in circumstances where an unsuccessful lock-out – as part of the bargaining


\textsuperscript{47} See sec 187(1)(c) of the LRA.


\textsuperscript{49} 28 of 1956.
process – resulted in an impasse and led to the final dismissal of the employees. Thus, these dismissals were effected to end the lock-out and were not considered to be part of the lock-out. They fell under the unfair labour practice jurisdiction. The latter happened when employees were dismissed in the course of a lock-out in order to force employees to accept a demand, whereafter the employment contract revived. Those dismissals did not fall under the unfair labour practice jurisdiction. Nevertheless, the former fell outside the definition of lock-out purported in the predecessor of sec 187(1)(c), as opposed to the latter. This means that ‘exclusion lock-outs’ were regarded as falling within the acceptable boundaries of economic power-play between the employer and the employee.  

50 However, the current sec 187(1)(c) renders any dismissal to compel an employee to accept a demand automatically unfair. That even includes temporary and final dismissals and makes the distinction between ‘termination lock-outs’ and ‘exclusion lock-outs’ – as it existed under the old LRA – not important any longer.  

51 The fact is that the ‘conditional dismissal’ and the ‘final dismissal’ are part and parcel of a continuous process; the ‘final dismissal’ is the fulfilment of the threat that provides the pressure inherent in the ‘conditional dismissal’. However, the question is whether it is right to read sec 187(1)(c) as to include all conditional dismissals of employees who refuse to accept demands. In Fry’s Metals the dismissals were meant to be final and therefore not automatically unfair. While in Algorax, on the contrary, the dismissals were automatically unfair, because Algorax offered the affected employees reinstatement if they agreed to the proposed changes after the effected dismissals. 

52 It feels not right to me to include all conditional dismissals of employees who refuse to accept demands as being automatically unfair. On the one hand, because such interpretation would not exactly facilitate the sale of a business as a going concern; it limits the employer’s ability to respond to the needs of its business. And on the other hand, because a conditional dismissal (as contemplated in Algorax) seems to fit in the purposes of the LRA more easily than a final dismissal (as contemplated in Fry’s Metals). Perhaps sec 187(1)(c) must be interpreted less literally in a way

52 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC).
that not all conditional dismissals are automatically unfair in advance, but that the Labour Court pays more attention to all the circumstances of each case and to the purposes of the LRA.\textsuperscript{54} \textsuperscript{55} \textsuperscript{56}

The context of dismissal over terms and conditions of a contract of employment is shaped by the intertwined pressures of ‘flexibility’ and ‘competitiveness’, whereby flexibility is ‘the room (or space) to make decisions in a dynamic work environment in order to meet the needs of the labour business. What the employer bargains for, is the flexibility to make decisions to change terms and conditions of a contract of employment in a dynamic work environment in order to meet the needs of its operational requirements. In return, the employee not only demands a wage, but also a continuing obligation of fairness towards the employee on the part of the employer when it makes such a decision.\textsuperscript{57} Knowing that fairness has a formal (procedural) side, as well as a substantive side, the Labour Courts do make sure that employers obey the procedural fairness requirements, but, unfortunately, do not so easily enter the debate on whether the reason to change terms and conditions of employment was fair.\textsuperscript{58} This is quite logical, since meddling would hinder the flexibility an employer needs to operate efficiently.\textsuperscript{59} However, the Labour Court does have the jurisdiction to make sure that every dismissal is substantively fair. ‘Giving up this jurisdiction because of flexibility would amount to an ‘abdication’.\textsuperscript{60} This means that the Labour Court – and not the employers – must investigate into and determine the procedural and substantial fairness of a dismissal. ‘Whatever the powers attributed to flexibility, it cannot beat the power of the Labour Court to apply the law.’\textsuperscript{61}

\begin{itemize}
\item \textsuperscript{54} See ss 1 and 3 of the LRA.
\item \textsuperscript{55} A ‘purposive approach’ reflects the legislature’s intention of the use of dismissal as a measure of pressure to influence the outcome in a matter of interest.
\end{itemize}
d. Dismissal for operational requirements

An operational requirements dismissal often results from a solid plan about business restructuring. The operational requirement itself has got to do with the viability of the business; it is based on economic, technological, structural or similar needs of an employer. This means that operational requirements dismissals are always obliged by external market factors. Thus, whether to ensure the continued viability of a business or to increase profitability, employers are entitled to dismiss employees for operational requirements provided that such dismissals are operationally justifiable and comply with the requirements of ss 189 and 189A of the LRA. In addition, in circumstances where the change to terms and conditions of a contract of employment is offered by an employer as a reasonable alternative to dismissal during a genuine dismissal exercise and is based upon the employer’s operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative offer. Nevertheless, the reason for dismissal must be a fair reason based on the employer’s operational requirements and the dismissal must be effected in accordance with a fair procedure.

e. The Fry’s Metals case

Obviously, the LAC in Fry’s Metals (Pty) Ltd v NUMSA & others addressed the conflict between the provisions of ss 187(1)(c) and 189. After a review of its operations Fry’s Metals decided that it was necessary to change certain of its operating procedures including changing from a three-shift to a two-shift system and stop offering a transport subsidy to its employees. NUMSA’s shop stewards rejected the proposed new shift system. Fry’s Metals then gave the affected employees notice that they might be retrenched if they refused to accept the two-shift system. When the employees refused to revise their opinions they were given notice of dismissal. The LC (Francis J) found that Fry’s Metals proposed dismissal of the employees ‘was sought to be effected in order to compel them to agree to its proposed changes on their terms and conditions of employment. This was contrary to the provisions of sec 187(1)(c) and rendered the dismissals

62 See sec 213 of the LRA.
65 See sec 188(1) of the LRA.
67 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at 140G-H.
automatically unfair.' The court further held that Fry's Metals tried to make use of a so-called ‘dismissal lock-out’ under the guise of a dismissal exercise. By doing so, Francis J held that the employer was in fact using a rights mechanism (i.e. the dismissal exercise) to remedy a matter of interest (i.e. changing terms and conditions of the employment contracts), that is supposed to be resolved through collective bargaining. Also the argument that an employer cannot dismiss employees in order to increase profits but only to ensure survival, was according to the LC not supported by the LRA.

The LAC (Zondo JP) thought that there was no conflict between ss 187(1)(c) and 189. Obviously, ‘sec 187(1)(c) is based on the definition of the word ‘lock-out’ in the old LRA. In order to fall within the ambit of sec 187(1)(c) a dismissal must have as its purpose the pressure on the affected employees to accept a demand in respect of a matter of mutual interest between an employer and employee. If a dismissal is not for that purpose it falls outside the ambit of that provision.

Accordingly, ‘a dismissal that is final cannot serve the purpose of compelling the dismissed employees to accept a demand in respect of a matter of mutual interest between an employer and employee. Because, after an employee has been dismissed finally no employment relationship remains between the two.’

‘A ‘lock-out dismissal’ makes sure that an employer wants his existing employees to agree to a change of their terms and conditions of their contracts of employment. In these circumstances the employer will take the attitude that, if the employees do not agree to the proposed changes he will dismiss them to compel them to agree to the change. Only after that dismissal the employees have an opportunity to agree to the change. When they agree, the dismissal will be nullified – because it has served its purpose. And when the employees do not agree after they have been dismissed, the employer dismisses them finally. However, this last-mentioned dismissal is not a ‘lock-out dismissal’ but an ordinary ‘dismissal for operational requirements’. The purpose of these operational requirements dismissals is to get rid of employees permanently who do not meet the

68 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 19.
69 Under the old LRA (28 of 1956) this was called an ‘exclusion lock-out’.
71 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at 141C.
72 Cohen T., ‘Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?’ at p. 1888.
73 Cohen T., ‘Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?’ at p. 1888.
74 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at paras 24 and 25.
75 See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 27.
business requirements of the employer, so that new employees – who will meet the business requirements – can be employed.\(^{76}\) Therefore, ‘a dismissal contemplated by sec 187(1)(c) is to be effected for the specific purpose given in that section, which is absent in an ordinary dismissal as defined in sec 186(1)(a); it is a special kind of dismissal.\(^{77} 78\)

In evaluating the argument that an employer cannot dismiss employees in order to increase profits – but only to ensure survival – the LAC stated that ‘there is no statutory basis for this argument in our law. All that the LRA refers to – and recognises – in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business of which the survival is under threat and a business which is making profit and wants to make more profit.’\(^{79}\)

Finally, the LAC held that the dismissals ‘were not automatically unfair. The dismissals were supposed to be effected because the employees' contracts of employment were no longer suitable for Fry’s Metals operational requirements.’\(^{80}\) Thus, ‘the purpose of the dismissals was to allow Fry’s Metals to replace the employees permanently with employees who were prepared to work under the terms and conditions that met the employer's requirements.’\(^{81}\) ‘That indicated that the dismissals that Fry’s Metals was going to effect were meant to be final.’\(^{82}\)

The Supreme Court of Appeal (Mpati DP and Cameron JA) stated that the complexity of the Fry’s Metals case arose from the fact that the LRA allows employers to make changes justified by operational requirements.\(^{83}\) Although on the other hand, the LRA tries to establish a system that

---

\(^{76}\) See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at paras 29-30.
\(^{77}\) See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 31.
\(^{78}\) Van Voore states that ‘the effect of such an approach will result in a very limited application of sec 187(1)(c), which can be manipulated at the will of the employer by choosing between a final or conditional character for the dismissal. Placing such a limit on a section that seeks to protect and promote the right to engage in collective bargaining – and, thus, is undeniably employee friendly – is not warranted by the LRA, nor by Fry’s Metals.’; Van Voore R., 2003, ‘Changing Terms and Conditions of Employment: Striking a balance or ‘Anything Goes’’, [Online], Available: [http://lexisnexis.co.za/ServicesProducts/presentations/17th/RandallVanVoore.doc](http://lexisnexis.co.za/ServicesProducts/presentations/17th/RandallVanVoore.doc).
\(^{79}\) See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 33.
\(^{80}\) See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 41.
\(^{82}\) See Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC) at par 45.
\(^{83}\) See ss 67(5), 188 and 189 of the LRA.
carefully protects and supports the collective bargaining process between employers and employees, which facilitates the conclusion of ‘collective agreements’ that concern terms and conditions of a contract of employment or any other matter of mutual interest. Therefore, sec 187(1)(c) declares dismissals whereby the reason is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee automatically unfair. Besides, the SCA had problems with accepting Thompson’s separation between matters of right and matters of interest, because this classification does not form the basis of the collective bargaining structure of the LRA. And a ‘migration’ from a matter of interest to a matter of right only results in unavoidable complexities. Thus, sec 187(1)(c) can neither be interpreted in that way, nor be construed more expansively. When looking at the historical context to sec 187(1)(c), one is left in no doubt that this provision is based on the definition of the word ‘lock-out’ in the old LRA. And it is this historical context that declares the distinctive nature of the protection conferred to those dismissals meant in sec 187(1)(c); only they are automatically unfair. This means that when a dismissal lacks this proscribed statutory purpose the dismissal is not automatically unfair, and the only inquiry is then whether the employer can prove – according to sec 188 – that the dismissal was based on its operational requirements.

f. Comment on Fry’s Metals

Unfortunately, the LAC did not try to distinguish between an operational requirement and a matter of mutual interest. Furthermore, the question is whether it should not have been better if Fry’s Metals had started the process under the banner of sec 189? Can an employer suddenly go into

---

84 See sec 213 of the LRA.
85 See sec 187(1)(c) of the LRA.
89 28 of 1956.
dismissal mode? Do financial considerations play a role in this? Accordingly, the LAC in *Fry's Metals*\(^{92}\) held that it all depends on the process and format of the notice. However, this suggests that he who controls the process actually also controls the nature of the dispute. It is all up to the employer to choose between a final and a conditional character for a dismissal. However, since a dismissal is automatically unfair if the purpose for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest\(^{93}\), employers will more likely be inclined to ground the contemplated dismissal on its genuine operational requirements. Due to this interpretation, sec 187(1)(c) places a limit on its effect. As a result, this will negatively impact on the protection and promotion of the right to engage in collective bargaining, which is in my opinion not fair towards the employees. This will lead to false positions between the rights of employers and the rights of employees, which is contrary to the purposes of the LRA.\(^{94}\)

Next to this, *Fry's Metals* does not define the relationship between sec 187(1)(c) and the employer's right to have recourse to a lock-out.\(^{95}\) Sec 187(1)(c) states that a dismissal is automatically unfair if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.\(^{96}\) And a 'lock-out' means an exclusion by an employer of employees from the employer's workplace for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee.\(^{97}\) Zondo JP held in *Fry's Metals*\(^{98}\) that the recourse to a lock-out 'is not an obligation; an employer is free to resort to it when faced with the circumstances in which the LRA permits the institution of a lock-out.'\(^{99}\) However, the SCA stated that as soon as a dismissal is designed to make employees change their minds in a dispute with an employer on matters of mutual interest, the proscribed statutory purpose is fulfilled and the dismissal will be automatically unfair.\(^{100}\) Thus, the question is at what stage an employer can 'avoid' a dismissal being automatically unfair by having recourse to a lock-out? Is it perhaps possible to interpret this

---

\(^{92}\) [2003] 2 BLLR 140 (LAC).

\(^{93}\) See sec 187(1)(c) of the LRA.

\(^{94}\) See ‘Coping with corporate re-organisation: Post-Strike Retrenchments – A Delicate Choice’, *Beaumont Express* (no. 8), 2004, [Electronic], Available: Butterworths.

\(^{95}\) See sec 64(1) of the LRA.

\(^{96}\) See sec 187(1)(c) of the LRA.

\(^{97}\) See sec 213 of the LRA.

\(^{98}\) [2003] 2 BLLR 140 (LAC).

\(^{99}\) See *Fry's Metals (Pty) Ltd v NUMSA & others* [2003] 2 BLLR 140 (LAC) at par 34.

in a way that the legislature – under certain circumstances – does allow employers to escape the protection for employees of sec 187(1)(c)?\(^\text{101}\) And if so, is this unfair towards the affected employees, or not? Stating that an employer is free to resort to the recourse to lock-out leads to uncertainty for the affected employees, which is definitely not preferable. Besides, the LRA complicates this whole issue even further by expressly permitting employers to dismiss for their operational requirements.\(^\text{102}\) It seems to me that the substantial fairness is suddenly becoming more important than the procedural fairness. Therefore, I think it is extremely important that the Labour Court carefully investigates the fairness of a decision to dismiss.\(^\text{103}\)

g. Other case law

- In *Freshmark (Pty) Ltd v CCMA & others*\(^\text{104}\) the LAC again considered the employer’s right to dismiss in order to implement changes to terms and conditions of contracts of employment. In this case the court (Zondo JP) held that ‘when a contract of employment as a whole or some of its terms and conditions can no longer serve – or no longer suit – the operational requirements of the business, that is a valid reason for the employer to terminate that contract of employment.’\(^\text{105}\) Furthermore, the court held that while the employer is obligated to present the new contract of employment with the proposed changes to the terms and conditions of a contract of employment to the employee, that new contract of employment is no longer valid if it is rejected.

- In *NCBAWU v Hernic Premier Refractories (Pty) Ltd*\(^\text{106}\) Hernic tried to standardise terms and conditions through the banner of reorganisation under sec 189 after a business transfer occurred. The issue at stake was whether Hernic was entitled to effect a change to conditions of the contracts of employment of the affected employees as part of a restructuring exercise resulting from the operational requirements. And whether the dismissal of the employees constituted an automatically unfair dismissal in terms of sec 187(1)(c). The court held that ‘the replacement of the dismissed employees by contract workers weakened Hernic’s argument that operational

---

\(^{101}\) See ‘Chicken or egg – Dismissals to enforce demands’, 19(2) Employment Law 11, 2003, [Electronic], Available: Butterworths.

\(^{102}\) See sec 67(5) of the LRA.

\(^{103}\) See *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* [1993] 14 ILJ 642 (LAC) at p. 648.

\(^{104}\) [2003] 24 ILJ 373 (LAC).


\(^{106}\) [2003] 1 BLLR 50 (LC).
requirements lay behind the dismissals. This made the dismissal a ‘guise’ and a ‘negative incentive’ to force the employees to accept the revised contracts of employment.”

Sec 187(1)(c) prevents an employer from dismissing employees who refuse to accept a demand regarding a matter of mutual interest. Thus, ‘a dismissal is not a legitimate instrument of pressure in the collective bargaining process.’

- In NUMSA and others v Zeuna-Starker Bop (Pty) Ltd the reasons given for the dismissals could not constitute grounds for a fair dismissal in the light of the outstanding collective bargaining items. The court held that ‘the genuine reason was the refusal of employees to accept the Zeuna-Starker Bop’s demands. As such, this was contrary to the spirit of the LRA and amounted to an automatically unfair dismissal contemplated by sec 187(1)(c).’

- In Chemical Workers Industrial Union & others v Algorax (Pty) Ltd the issues raised were similar to those that were raised before the LAC in Fry’s Metals. So, the law – as laid down by the LAC in the Fry’s Metals case – had to be applied. Zondo JP disagreed with Algorax that ‘when an employer has valid operational requirements to address, a dismissal cannot be one effected for the purpose of compelling the employees to accept a demand in respect of a matter of mutual interest. Nevertheless, the current LRA clearly states that the existence of valid operational requirements does not prevent a dismissal being effected for the purpose contemplated by sec 187(1)(c).’ Zondo JP held that the evidence showed that ‘while there were indications that the purpose of the dismissal was to compel the employees to agree to the employers demand, there were also indications that the purpose of the dismissal was to get rid of the employees permanently.’ Ultimately, Zondo JP came to the conclusion that ‘on balance’ the employees’ opinion – that the purpose of the dismissal was to compel the employees to agree to Algorax’

---

107 See NCBAWU v Hernic Premier Refractories (Pty) Ltd [2003] 1 BLLR 50 (LC) at paras 38 and 40.
110 See NUMSA and others v Zeuna-Starker Bop (Pty) Ltd [2003] 1 BLLR 72 (LC) at 77E-F.
113 [2003] 2 BLLR 140 (LAC).
114 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at par 33.
demand – had to prevail, because evidence pointed out strongly that Algorax did not effect the dismissal to get rid of the employees permanently so that it could employ new employees in their positions who where prepared to work the rotating shift, but in order to compel them to agree to the demand that they would work the rotating shift." Thus, Zondo JP concluded that ‘the dismissal was effected for the purpose of compelling the employees to agree to Algorax’ demand that they would work the rotating shift which, accordingly, fell within the ambit of sec 187(1)(c) and was automatically unfair.” Furthermore, Zondo JP stated that ‘in case the dismissal was not automatically unfair, it would nevertheless be unfair for the lack of a fair reason to dismiss.’ The true reasons, according to Zondo JP, were ‘to ensure that the packaging department employees still had jobs for the foreseeable future; to no longer have to use contractors in the packaging area; and to work on Saturdays and Sundays to ensure that the silos did not get too full.” However, ‘the most obvious, natural and logical solution for Algorax to address its problems would have been to stop employing contract labour and have permanent employees instead. In this way Algorax would have addressed all of its true problems (i.e. its concerns about costs) and either totally avoided the dismissal of any of its employees or limited the number of employees to be dismissed to a few.”

‘The fact that a court should not be critical about the solution that an employer has decided to use – in order to resolve a problem in its business – because it normally will not have the business knowledge/expertise is true, but not absolute nor should it be taken too far. The Labour Court has to determine the fairness of the dismissal objectively. Therefore, the Labour Court should not hesitate to deal with an issue that requires no special knowledge that it does not have; the law simply requires common sense or logic, especially where the employer has had an opportunity to criticise on such an issue and has not said anything that indicates that any special knowledge is required.” Thus, ‘if the employer has chosen a solution that results in a dismissal of

---

118 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 40-54.
119 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at par 55.
120 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at par 55.
121 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 21, 61 and 62.
122 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 66-68.
123 See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC)
a (number of) employee(s) when there is a clear way in which it could have addressed the problems without any or limited job losses,\textsuperscript{124} and the court is satisfied – after hearing the employer on such a solution that it can work – it should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs. Particularly, since resort to dismissal is meant to be a measure of last resort\textsuperscript{125}, \textsuperscript{126}

In this case ‘it was clear that certain measures could have been taken to address the problems without the dismissals for operational reasons, or that dismissal was not resorted as a measure of last resort. In other words, the problems which Algorax sought to address could have been efficiently addressed without the implementation of the rotating shift and without harming Algorax’ business in any (significant) manner. Therefore, the dismissal was without a fair reason and, thus, unfair\textsuperscript{127}.

However, Hlophe AJA (dissenting) held that the main questions on appeal were ‘whether an employer has a right to dismiss employees who are not prepared to agree to certain changes being effected to their terms and conditions of their contracts of employment, when such changes are necessary for the viability of the employer’s business or to improve efficiency in the business. And if an employer has such a right, is this implicit in sec 187(1)(c), and does the exercise of such right by the employer constitute unfair dismissal?\textsuperscript{128}

Hlophe AJA mentioned sec 189 that sets out the procedure to be followed by an employer before dismissing an employee for reasons based on operational requirements. From this follows that ‘if an employer has satisfied the provisions of sec 189(1) and the dispute is still not resolved, it has a right to dismiss the affected employees as it is left with no alternative. The necessity to effect changes in order for a business to be more viable or to improve efficiency falls within the ambit of operational requirements. In this case Algorax complied with the provisions of sec 189. Besides, it succeeded in proving that the reason for the dismissal was based on its operational requirements as required by sec 188(1)(a)(ii). Therefore, the right of the employer to dismiss employees who are not prepared to agree to certain changes is implicit in sec 187(1)(c), since in terms of sec 188 such

\begin{flushright}
\begin{footnotesize}
\text{\textsuperscript{124}} See sec 189(2)(a) of the LRA.
\text{\textsuperscript{125}} See also sec 189(2)(a)(ii) read with subsection (3)(a) and (b).
\text{\textsuperscript{126}} See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 69-70.
\text{\textsuperscript{127}} See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 70-71.
\text{\textsuperscript{128}} See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at par 45.
\end{footnotesize}
\end{flushright}
dismissal is not automatically unfair. And if the employer proves that the reason for dismissing its employees are for genuine operational requirements as required by sec 188(1)(a)(ii), then the third question should be answered positive (i.e. the exercise of such right does not constitute unfair dismissal). Finally, Hlophe AJA concluded that the dismissals were not automatically unfair.'\textsuperscript{129}

h. The justification of dismissals for operational requirements

When an employer believes that operational requirements will eventually make it necessary to adopt a particular set of terms and conditions to contracts of employment, the change process should begin with negotiations, consultation, or information sharing (as part of the bargaining process). This means that only after the bargaining process fails and the employer can show that factors outside its control warrant a particular change, a case for an operational requirements dismissal can be made. In other words, the need to dismiss must only arise if bargaining fails and not before.\textsuperscript{130} In my opinion only the best results can be obtained when an employer should first use the instrument of collective bargaining to achieve a change in terms and condition to a contract of employment. Further, it is more likely that alternative solutions to dismissal will be found during the collective bargaining process, which is supported by sec 189(2)(a). [Besides, an employer may not dismiss an employee for participating in a protected strike.\textsuperscript{131} However, ‘the right to strike does not override the operational requirements factor and actually yields when the Labour Court is satisfied that operational requirements allow a dismissal.’\textsuperscript{132}] Whether a dismissal will be justified or not depends on an adjudication of the (economic) business needs. However, there is often not a clear right or wrong answer to the question whether a business change is necessary, which makes it difficult to justify a dismissal. Therefore, on the one hand, the Labour Court should look for ways of avoiding being drawn into the economic merits of an employer’s decision. Nevertheless, the disadvantage of this ‘hands-off view’ is that it will be accused of not fulfilling its statutory duty and of leaving labour at the mercy of greedy market forces. On the other hand, when the Labour Court takes a too direct approach in determining the consequences of outsourcing, it risks an accusation

\textsuperscript{129} See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at paras 46-47.
\textsuperscript{131} See sec 67(4) of the LRA.
of moving beyond its field of competence and getting involved in a critical area of economic decision making.\(^{133}\)

When an employer thinks it is necessary to change terms and conditions to a contract of employment due to operational requirements (e.g. outsourcing) it must first use the instrument of collective bargaining. Only after the failure of this process, the employer may dismiss employees for operational requirements. ‘To prohibit a statutory interpretation that allows to develop a untouchable ‘judicial vacuum’ around the economic rationale of outsourcing, the LRA instructs the Labour Court not to adjudicate the employer’s reason for the decision and not to judge the business virtue of an outsourcing programme.’\(^{134}\) This means that the Labour Court must be careful not to interfere in the legitimate business decisions taken by the employers who are entitled to make a profit and who are entitled to outsource their businesses\(^{135}\); ‘their function is not to second guess the commercial or business effectiveness of the employer’s ultimate decision to dismiss for operational requirements, but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham’.\(^{136}\) ‘It is not the Labour Court’s function to decide whether it was the best decision under the circumstances.’\(^{137}\) Thus, it is fairness and nothing but fairness that must be adjudicated.\(^{138}\) The Labour Court’s task is to enquire whether there is a fair reason for dismissal based on the employer’s operational requirements. In other words, whether the ultimate decision to dismiss is ‘operationally and commercially justifiable on rational grounds’. However, the testing of this fairness cannot be interpreted too far that the termination of the contract of employment was the only reasonable option under the given circumstances.\(^{139}\)

Finally, ‘it is the employer’s prerogative to determine the parameters, the direction, the structure and the objectives of its business operations. Nevertheless, employers involved in outsourcing are limited by employees’ rights by the requirement that they must treat their employees fairly. This


\(^{135}\) See Hendry v Adcock Ingram [1998] 19 ILJ 85 (LC) at p. 92.

\(^{136}\) See BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 at par 17.

\(^{137}\) See BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 at par 17.


means that an employer must exercise its prerogative ‘rationally, in good faith and
transparently’. 140 Therefore, I think the Labour Court should not encourage a result that allows a
interest dispute to escape the protected zone of collective bargaining. Even in circumstances
where persuasive (bargaining) action does not deliver the outcome an employer is looking for – or
the (economic) interest dispute finds itself in an impasse – a untouchable ‘judicial vacuum’ must, in
my view, not be developed around the economic rationale of outsourcing. It must be fairness that
remains the ultimate arbiter, which needs to be determined by the Labour Court. This means that
‘the employer must defeat a powerful fairness hurdle in the judicial process’, before it is allowed to
change terms and conditions of employment contracts. 141

Hence, it is desirable that employers are aware of the relevant provisions and how they impact on
particular outsourcing processes. Employers are better served in pointing out the consequences of
the employees’ (or their representatives) pressure and give them a chance to revisit their
choice(s). 142 Therefore, employers must try to prevent a premature decision making and employees
must be aware of their entitlements in terms of the LRA. 143 In addition, ‘sometimes it is just more
preferable for an employer to live with no agreement. In the end, enforcement of reaching an
agreement will, most likely, negatively influence the ongoing power-play, which often results in the
parties losing control. And that is possibly even more dangerous than living with an imperfect
situation.’ 144

---

Chapter 5 Outsourcing and dismissal for operational requirements

Introduction

Most of the dismissals in the transfer context are linked with the transfer. However, the conclusion that all such dismissals are impermissible and automatically unfair, seriously limits the employer’s ability to respond to the needs of its business. Indeed, such an interpretation would fail to achieve a balance between the employer’s interests and the protection of employee’s rights in the transfer context, which can be interpreted – according to Bosch – as a failure to give effect to the important concept of fairness that supports the South African labour law. The LRA clearly seeks to achieve a balance between the adequate protection of the rights of employees and the ability of employers to run their business efficiently. And it is this concept of fairness that involves such a balance between the rights of employers and employees.¹

Yet, as mentioned earlier, the LRA provides the employees with the right not to be unfairly dismissed² and permits employers to dismiss, albeit on a fair reason and in terms of a fair procedure.³ Furthermore, one of the stated purposes of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace⁴. Next to this, sec 1(a) states that one of the purposes is to give effect to the constitutional right to fair labour practice.⁵ And sec 3 requires anyone to apply and interpret the LRA in compliance with the Constitution.⁶ Sec 39(1) of the Constitution states that a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, when interpreting the Bill of Rights.⁷ And sec 39(2) requires that every court must promote the spirit, purport and objects of the Bill of Rights, when interpreting any legislation and developing the common law or customary law.⁸ This means that employees are provided with the protection of labour legislation, because they are in a less powerful economic position than their

---

² See sec 185(a) of the LRA.
³ See sec 188(1)(a) and (b) of the LRA.
⁴ See sec 1 of the LRA.
⁵ See sec 1(a) of the LRA.
⁶ See sec 3(b) of the LRA.
⁷ See sec 39(1) of the Constitution.
⁸ See sec 39(2) of the Constitution.
employers. However, this cannot mean that this legislation may be interpreted as overprotecting the interests of one group (the employees) at the expense of the other (the employers). In other words, employers must be permitted to dismiss in the transfer context, albeit based on their genuine operational requirements.\(^9\)

The purpose of sec 187(1)(g) is the prohibition on dismissals ‘for reason of a transfer’ or ‘a reason related to a transfer’ and to prevent employers using dismissal as a means to avoid their obligations in terms of sec 197. This prohibition applies to dismissals by either the old or the new employer. Nevertheless, if an employer does not intend to avoid its obligations in terms of sec 197 by dismissing its employees, it should be permitted to dismiss ‘for operational requirements’, according to ss 188 and 189.\(^10\) Nonetheless, the only difficulty which might give rise to particular issues is when an employer’s motivation for dismissal – in the context of a sec 197 transfer – will genuinely be operational requirements, as well as being related to the transfer.\(^11\) The question in these situations is whether such a dismissal is automatically unfair or operationally justifiable?

Although already discussed in a previous chapter, this chapter will start with explaining the definition of the term ‘operational requirements’, but in a way that it takes into account the inclusion of proposed changes to terms and conditions of employment contracts in this definition. After this, the meaning of sec 187(1)(g) will be discussed on the basis of the Afrox case\(^12\). Furthermore, will be determined in which situations an exception is possible on the principle that an old employer can never dismiss employees for operational requirements prior to a contemplated transfer and whether these exceptions should be considered to be automatically unfair or operationally justifiable. Hereby, will the TUPE-Regulations and the European Council Directive be discussed in order to make clear the differences – between those regulations and the LRA – in the definition of the term ‘operational requirements’. After this, the requirements for the fairness of dismissals for operational requirements that occur after a transfer has taken place will be determined.

---


\(^12\) SACWU & others v Afrox Ltd [1999] 10 BLLR 1005 (LC).
Besides, attention is paid to the relationship between a dismissal for operational requirements (i.e. sec 189) and collective bargaining (i.e. sec 187(1)(c)), in order to discuss which ‘path’ is better to follow to avoid that a dismissal for operational requirements is (automatically) unfair. And finally, in the statement that an employer should not be allowed to fall back too easily on a dismissal for operational requirements, the permission of the use of temporary replacement labour is discussed.

a. The definition of ‘operational requirements’

The LRA defines ‘operational requirements’ as requirements based on the economic, technological, structural or similar needs of an employer. Notwithstanding, the Code of Good Practice on Dismissal based on Operational Requirements explains that it is difficult to define all the circumstances that might legitimately form the basis of a 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 that 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. And ‘structural reasons’ relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise. The economic, technological or structural (operational) reason(s) for the dismissal should always relate to the viability of the business. This means that such a dismissal must always be forced by (external) factors that an employer cannot control and it must be ‘operational necessary’ as well; the facilitation of the sale of a business, the acquisition of a better price to sell the business, the enhancement of the profit, or the improvement of the financial position of the business cannot constitute the operational needs of a business. This means that dismissals for operational requirements must be operationally justifiable and must comply with the requirements of ss 189 and 189A of the LRA.

Besides, dismissal for operational requirements must be used as a measure of last resort. This means that when an employer proposes to change terms and conditions of contracts of employment instead of dismissing the employees, it will be justified to dismiss those employees if

---

13 See sec 213 of the LRA.
15 See item (1) of the ‘Code of Good Practice on Dismissal based on Operational Requirements’.
they do not accept that alternative proposal and if that proposal was made during a genuine
dismissal exercise and the proposal is reasonably based on the employer's operational
requirements.18

Unfortunately, ‘the range of potential scenarios in which an employer may resort to dismissal for
operational requirements have been enormously increased. As a result of this, an ‘operational
requirement’ can also include proposed changes to terms and conditions of employment contracts.
However, according to sec 187(1)(c) an employer cannot dismiss an employee to force the
employee to accept such a proposal. It can only dismiss employees for operational requirements if
there is a rational and justifiable basis for that dismissal. And besides, the reason for dismissal
must still be a fair reason based on the employer's genuine operational requirements and the
dismissal must still be effected in accordance with a fair procedure.19 Nevertheless, due to the
enormous range of potential operational reasons it is quite easy to justify a dismissal for
operational requirements. Fortunately, the above-mentioned requirements of fair reason and fair
procedure stop this. This means that in case there is no fair reason, no fair procedure and the
dismissal for operational requirements is no rational solution, a dismissal for operational
requirements will not be justified. Thus, these three criteria play a very important role as they can
be interpreted as ‘thresholds' to avoid that an employer abuses this measure (of last resort) to
dismiss employees in every situation.20

b. Reason for a dismissal

A dismissal is automatically unfair if a protected transfer is the reason for this dismissal or, in other
words, the dismissal is a direct result of the transfer itself.21 22 This requires a factual enquiry into the
subjective intentions of the employer to determine whether the dismissals were due to the transfer.

18 See ECCAWU v Shoprite Checkers [2000] 21 ILJ 1347 (LC) at p. 1351; Cohen T., ‘Dismissals to
Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally
19 See sec 188(1) of the LRA.
Goes”’, [Online], Available: http://lexisnexis.co.za/Services
Products/presentations/17th/RandallVanVoore.doc; Cohen T., ‘Dismissals to Enforce Changes to Terms and
Bosch C., ‘Operational Requirements Dismissals and Section 197 of the Labour Relations Act: Problems and
21 This means that the transfer of the undertaking must have been envisaged at the time of the
dismissal.
22 See sec 187(1)(g) of the LRA.
But since there is such a large range of potential operational reasons in which an employer may resort to dismissal for operational requirements, it is not easy for the Labour Courts to determine the employer's intentions.\(^{23}\)

Nevertheless, in *SACWU & others v Afrox Ltd*\(^{24}\) the LAC used the ‘usual two-fold approach to causation’ in order to assess the real reason for a dismissal for operational requirements. This approach involves establishing the presence of ‘factual’ and ‘legal’ causational links between the prohibited reason and the dismissal.\(^{25}\) ‘The first step is to determine the ‘factual causation’: was there a factual link between the business transfer and the employee’s dismissal? In other words, would the dismissal have happened if there was no (intended) business transfer? If the answer is in the affirmative, it is clear that the dismissal is not automatically unfair. If the answer is negative, that does not immediately make the dismissal automatically unfair. The next question is one of ‘legal causation’. Namely, whether this business transfer was the ‘main’ or ‘dominant’, or ‘proximate’ or ‘most likely cause’ of the dismissal. Only if the test of legal causation also shows that the most probable cause for the dismissal was the transfer, it can be said that the dismissal was automatically unfair in terms of sec 187(1)(g).’\(^{26}\)

Thus, on the one hand, this approach tries to avoid that employers try to escape from their sec 197 obligations. On the other hand, it gives employers the opportunity to respond to the valid needs of its business when necessary.

However, ‘if after applying the ‘two-fold approach to causation’ one cannot draw the conclusion that the dominant reason for the dismissal was the transfer, the next question to be considered is whether the dismissal was for a fair reason based on the employer’s operational requirements and was procedurally fair.’\(^{27}\) Obviously, ‘the testing of the fairness of a decision to dismiss does go further than a quick look at its genuineness and commercial rationale. However, the legislature did

---


\(^{24}\) [1999] 10 BLLR 1005 (LAC).


not mean to interpret this testing so far in setting up the requirement that the termination of employment is the only reasonable (and best) option in the circumstances; as long as the decision to dismiss is based on a ‘provable sensible business analysis' that has been investigated in the consultative process and is not unreasonable in its context nor disproportionate, the dismissal for operational requirements in question should be permitted.28 This means that the Labour Court’s function is generally restricted to a determination of whether the ultimate decision to dismiss is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale.

c. Reason related to a transfer
According to sec 187(1)(g), a dismissal is also automatically unfair if the reason for the dismissal is ‘a reason related to a transfer’. ‘This means that the ‘reason related to the transfer’ must be capable of existing independently of the transfer, but must be closely related to the transfer. An example of a ‘reason related to the transfer’ is the cancellation by the new employer of a daily massage for account of the employer during lunch break immediately after a transfer occurred. However, not all reasons that are closely related to a transfer render a dismissal automatically unfair. It is primarily a test of causation based on the question whether the reason for the dismissal is sufficiently close to the transfer to bring it within the ambit of sec 187(1)(g). This means that ‘a reason related to the transfer’ is a broader concept than the transfer itself.29

d. Dismissal for operational requirements prior to a transfer
Although sec 187(1)(g) clearly states that a dismissal is automatically unfair if the reason for the dismissal is a transfer – or a reason related to a transfer – this does not mean that dismissals for (genuine) operational requirements can never arise in the context of a business transfer.
In general, an old employer cannot dismiss employees for operational requirements prior to a transfer. Important in this issue is the Western Cape Workers Association v Halgang Properties CC case30. In this case two employees were dismissed shortly before the business at which they were employed was transferred as a going concern. The reason for their dismissal was that the re

employer would not require the services of the employees after the transfer. However, the Labour Court held that ‘an old employer cannot dismiss employees on the basis of operational requirements of the new employer; the reason was not an operational requirement of the old employer and had in any event not yet arisen at the time of the dismissals.’ Thus, the Labour Court found that ‘there was no valid termination of the employment contracts of the two employees prior to the date of the transfer. As a result of this, the consequences set out in sec 197(2)(a) had to follow; the new employer was automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer.’

However, sometimes an old employer really needs to dismiss employees as a result of the influence of a future transfer on its own operational requirements. Such situations occur, for example, when an employer must economise on its employment costs by dismissing employees before that future transfer in order not to go bankrupt after a future transfer. The only difficulty that might give rise to particular issues is whether the need for those (significant) changes in the conduct of a business prior to the transfer falls within the scope of ‘operational requirements’, or must be considered as a dismissal for ‘a reason related to a transfer’, which is automatically unfair according to sec 187(1)(g). Nevertheless, as mentioned above, the test is whether the main purpose for the dismissal is to get rid of employees in an attempt to avoid the application of sec 197 or whether it can be justified in terms of genuine business requirements. Examples of dismissals for operational requirements that can be justified are:

- Dismissals for operational requirements prior to a transfer, because of the loss of business.
- Dismissals for operational requirements prior to a transfer, ‘whereby uniform selection criteria are used for selecting the employees to be dismissed in both the transferor business and the transferee business. This minimises the possibility that employees of both the employers are dismissed in different stages of the transfer process and makes the transfer itself easier. Thus, employees will profit by this as long as they do not envisage a greater risk of dismissal or other

---


unfairness and are not placed in a worse position than they were in before the contemplated transfer.\(^{34}\)

- Dismissals for operational requirements prior to a transfer, ‘whereby the survival of a business depends on a transfer, but the new employer does not want to continue unless the employees – whose services the new employer does not require – are dismissed. The only difficulty that might give rise to particular issues is that the selection criteria for the dismissal must be determined by the operational requirements of the new employer. Nevertheless, the transfer – as an alternative to the closure of the business – can be considered to be an alternative measure to minimise the number of dismissals.\(^{35}\) According to sec 189(2) should the employer and the other consulting parties engage in a meaningful joint consensus-seeking process and try to attempt to reach consensus on the contemplated transfer.\(^{36}\) In addition, an employer should take substantive steps on its own initiative to take appropriate measures to avoid the dismissals;\(^{37}\) to minimise the number of dismissals;\(^{38}\) to change the timing of the dismissals;\(^{39}\) to mitigate the adverse effects of the dismissals\(^{40}\) and to select a fair and objective method for the dismissals.\(^{41}\) Yet, ‘what is appropriate will depend on the facts of each case, and on the evidence presented about the steps taken if the matter proceeds to the Labour Court.’\(^{42}\)

- Dismissals for operational requirements prior to a transfer, following an agreement between the old employer and the affected employees that they will not be transferred to the new employer.\(^{43}\) Nevertheless, ‘the refusal of employees not to be transferred to the new employer can never be a fair and objective criterion to select employees for dismissal (based on operational requirements).’\(^{44}\)

This means that the old employer must convince the Labour Court that the dominant reason for the dismissal are genuine operational requirements.


\(^{36}\) See sec 189(2) of the LRA.

\(^{37}\) See sec 189(2)(a)(i) of the LRA.

\(^{38}\) See sec 189(2)(a)(ii) of the LRA.

\(^{39}\) See sec 189(2)(a)(iii) of the LRA.

\(^{40}\) See sec 189(2)(a)(iv) of the LRA.

\(^{41}\) See sec 189(2)(b) and (7) of the LRA.

\(^{42}\) See SACWU & others v Afrox Ltd [1999] 10 BLLR 1005 (LAC) at par 36.

\(^{43}\) Sec 197(6) permits an (old and/or new) employer and affected employees to vary any of the consequences of the transfer by (concluded and written) agreement.

The European legislation addresses this issue in a different way. Regulation 8(1) of the TUPE- Regulations states that any employee of the transferor or transferee who has been dismissed either before or after a relevant transfer, shall be treated – for the purposes of legislation relating to unfair dismissal – as being unfairly dismissed, if the transfer or a reason connected with it is the (principal) reason for this dismissal.\(^{45}\) However, Regulation 8(2) states that whenever an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the (principal) reason for dismissing an employee, subsection 1 will not apply. Instead the dismissal shall be regarded as having been for a substantial reason of such a kind as to justify the dismissal of an employee.\(^{46}\)

Article 4 of the European Council Directive provides that the transfer of an undertaking (business, or part of a business) shall not in itself constitute grounds for dismissal by the transferor or the transferee. Nevertheless, this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.\(^{47}\)

Although the LRA categorises dismissals for operational requirements as 'no fault' dismissals and, thus, places particular obligations on an employer – of which most of them are directed towards ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated fairly\(^{48}\) – I find it striking that the LRA does not explicitly require the precondition of 'entailing changes in the workforce' in its definition of 'operational requirements'. However, as opposed to the LRA, both the TUPE-Regulations and the European Council Directive give an employer the opportunity to dismiss employees for operational requirements on a fair basis: the ‘indirect’ economic, technical or organisational reason that entails changes in the workforce of either the old or new employer before or after a relevant transfer. This broadens an employer’s ability to respond to the needs of its business, which is in line with the balance the concept of fairness tries to achieve between the employer’s interests and the protection of employee’s rights in the transfer context. Therefore, I find it preferable to include such a

---


\(^{48}\) See item (2) of the Code of Good Practice on Dismissal based on Operational Requirements.
precondition in the LRA as well, instead of automatically criticising a transfer – or a reason related to a transfer – as the main reason for a dismissal as unfair.  

e. Dismissal for operational requirements following a transfer

Changes in the operational requirements of a business are sometimes necessary after a transfer occurred, because the new employer finds the terms and conditions of the employment contracts impossible to bear and the affected employees reject the proposed changes (to the terms and conditions of their contracts of employment). In these circumstances an employer must have the option to dismiss after the transfer of the business occurred, since obtaining a new business and its employees may lead to organisational differences and possible ‘copies’ of positions. However, the fairness of such a dismissal depends on the economic realities of the business of the new employer and its need to make its business more efficient; ‘as long as the dominant reason for this dismissal for operational requirements can be found within the new employer’s corporate strategy (i.e. the new employer’s objective financial circumstances in comparison with those of the old employer), the dismissal is not automatically unfair.’

f. Automatically unfair or operationally justifiable?

The old LRA did not limit or forbid dismissals in which the employer’s purpose was to change the terms and conditions of the employment contracts of its employees. Yet, the current LRA finds these kind of dismissals automatically unfair, according to sec 187(1)(c). Though, the definition of ‘operational requirements’ is wide enough to include dismissals of employees who refuse to agree to proposed changes to their terms and conditions of their contracts of employment. This means that despite sec 187(1)(c) an employer can still resort to dismissal for operational requirements in a

49 See sec 187(1)(g) of the LRA.
50 See NCBAWU v Hernic Premier Refractories (Pty) Ltd [2003] 1 BLLR 50 (LC).
53 28 of 1956.
54 66 of 1995.
genuine case.\textsuperscript{56} Therefore, it is important to consider the relationship between a dismissal for operational requirements (i.e. sec 189) and collective bargaining (i.e. sec 187(1)(c)).

As mentioned earlier, operational requirements are essentially dealing with the viability or success – and, thus, the economic side – of a business. According to Thompson can dismissals for operational requirements occur if the viability of a business is at stake, in case the dispute over business restructuring (which is a matter of interest) does not lead to the outcome the employer was looking for, or worse, results in an impasse of the (economic) interest dispute.

However, the SCA rejected this view by stating that a separation between matters of right and matters of interest does not form the basis of the collective bargaining structure that the LRA has adopted; a clear line between both categories of matters cannot be drawn and, consequently, such separation only leads to unavoidable complexities. Besides, sec 187(1)(c) can also not be interpreted in a way that it contemplates such a separation.\textsuperscript{57}

In a reaction on this I agree with the SCA by stating that it is not preferable to support Thompson’s view of the possibility of a so-called ‘migration’ from a matter of interest to a matter of right, in order to determine whether an employer is allowed to dismiss employees for operational requirements. Instead, an employer should actually be obliged to always first exhaust the instrument of collective bargaining, because only then the best results – i.e. the achievement of a change to terms and conditions or alternative solutions to dismissal – will be obtained.

In addition, I must agree with Todd and Damant that it is wrong to believe that the bargaining process and the consultation process are separate processes. The assumption that in the end actually all matters somehow impact on the wage-work deal, and thus are matters of interest, only fortifies this even more. Bargaining requires information sharing and a good faith obligation of both the employer and affected employee(s) to reach outcomes or solutions (i.e. ‘consensus’), or an agreement. Consultation over dismissals requires exactly the same process. The success of the parties reaching their goals in both processes depends to a great deal on their ability of compromising. Both processes attempt to reach consensus.\textsuperscript{58} The ‘good faith obligation' entails that both the employers and the affected employees (or their representatives) must communicate

\textsuperscript{56} \textit{See Schoeman v Samsung Electronics (Pty) Ltd} [1999] 20 ILJ 200 (LC) at par 19.

\textsuperscript{57} \textit{See SCA in Fry's Metals (Pty) Ltd v NUMSA & others,} case 026/03, 12 april 2005, [Online], Available: \url{http://wwwserver.law.wits.ac.za/sca/files/02630/02630.pdf?PHPSESSID=701fee051d715e043d51780dba903c7f} at paras 53, 54 and 60.

\textsuperscript{58} \textit{See sec 189(2) of the LRA.}
clearly and unequivocally. It seems to me that this means that both the employer and the affected employees (or their representatives) should bring all possible options to the bargaining table in order to come to a consensus, because all factors impacting either the employer or the affected employees should be considered.\textsuperscript{59} The chance that the bargaining process leads to an impasse is always present, since it is all about persuasion – through force of argument – of the other party to accept the proposed demands. In other words, the results of a bargaining process are not fixed in advance. So even if the employer thinks it is possible that – as a last measure – it will resort to the dismissal for operational requirements of the affected employees, I think that the employer should already make these plans public during the bargaining process. Although it maybe never even comes that far. Therefore it is preferable to either introduce ‘some form of ‘obligatory early dispute resolution’ in relation to the substantive fairness of dismissals for operational requirements, or some form of ‘advisory or binding arbitration’ before taking the final steps of dismissal.\textsuperscript{60}

In addition, ‘sec 187(1)(c) does not prohibit a dismissal where the ‘reason for dismissal’ is the failure of employees to accept a change to their employment contracts; sec 187(1)(c) only does not allow a dismissal if the ‘reason for dismissal’ is to compel employees to accept a proposed change. Yet, dismissal is an action ‘that goes beyond the simple persuasion used during the bargaining process and may only be used if it fulfils the ordinary test for operational requirements dismissals and is also operationally and commercially justifiable on rational grounds, considering whatever came out from the collective bargaining process.\textsuperscript{61} This means that it cannot considered to be fair if a dismissal can reasonably be avoided through collective bargaining efforts. Only when collective bargaining solutions fail to occur, dismissal for (genuine) operational requirements is permissible.\textsuperscript{62} ‘Sec 187(1)(c) is not intended to give rise to a more demanding test for the substantive fairness of an operational requirements dismissal. What is prohibited is a dismissal which purpose is to compel acceptance of an employer’s collective bargaining demand. This requires a difficult factual enquiry by the Labour Court that must be conducted into the subjective intentions of the employer. Although sec 76(1)(a) prevents an employer from taking into employment any person for the

\textsuperscript{59} The concept of (substantial) ‘fairness’ commands that all potential options should be put on the bargaining table upfront.


\textsuperscript{61} See SACWU & others v Discreto (a Division of Trump & Springbok Holdings) [1998] 12 BLLR 1228 (LAC) at par 8.

purpose of performing the work of any employee who is locked out, the legislature should permit the use of temporary replacement labour in employer initiated lock-out situations to make sure that the employer does not too quickly reaches the point of dismissal – and throws out (on a operational, commercial and rational justifiable ground) the unwilling employees and replaces them with new employees. This would be desirable for both the employer and employees, because in such situation an employer can go on with the power-play for as long as it can reasonably continue its business by using temporary replacement labour.

Besides, the prohibition on the ‘lock-out dismissal’ would then have greater effect as well; an employer can only resort to dismissal once it has reached that point of impasse in the collective bargaining process where its operational requirements justify substituting the employees altogether with all the costs and troubles that this involves to the employer. Employers will be more likely to achieve a realistic possibility of their proposed goal(s) by power-play in the collective bargaining process, than by resorting to dismissal. Next to this, dismissal will be less easy considered to be commercially justifiable on rational grounds, when the lock-out option has not yet been completely used.

On the other hand, if the legislature decides to permit the use of temporary replacement labour in employer initiated lock-out situations, it should also decide the boundaries of such use. I think it would be unfair towards both the affected and temporary employees if an employer can use temporary replacement labour during an impasse in the collective bargaining process – which can last for a long time. For the affected employees it would be unfair because in such situation the employer will have a stronger position in the collective bargaining process than they have. The employer will not be in a hurry to conclude this process. Therefore, it will keep on bargaining until it reaches its goals, because it does not feel much of the fact that the affected employees are on strike when they can be replaced by temporary employees in the mean time. For the employer it is actually a win-win situation, even if the bargaining process leads to an impasse, it still has a chance that dismissal for operational requirements will be justified as a measure of last resort. Next to this, the affected employees will also feel threatened by the temporary employees which impacts negatively on the labour peace. Perhaps are some of the affected employees not prepared to keep

63 See sec 76(1)(a) of the LRA.
on bargaining about an issue, because they can feel being afraid that somebody else (i.e. a temporary employee) will take over their position in the workforce of the employer. And for the temporary employees it is also unfair, because they cannot be employed as permanent employees. A distinction between 'temporary' and 'permanent' is made on purpose; some of the employment rights, obligations and benefits are different. Consequently, an employer cannot employ a temporary employee on a basis which looks like a permanent basis, without giving him the employment rights and obligations and benefits he deserves. It is important that a collective bargaining process is sorted out by the parties as soon as possible. Therefore, I think that the legislature must set boundaries if they permit the use of temporary replacement labour in employer initiated lock-out situations.

Finally, ‘due to its wide scope, ‘operational requirements’ can include proposed changes to terms and conditions of employment as part of a business restructuring exercise (e.g. an outsourcing). As a result of this wide scope of operational requirements it is very difficult for the Labour Courts to determine the employer’s subjective intentions in determining the reason for the dismissal. To avoid confusion, Van Voore suggested that it is perhaps a good idea to narrow the range of what might constitute an ‘operational requirement’. Personally, I find this not a good and realistic idea. I prefer to enlarge the definition of ‘operational requirements’ in the LRA and the Code of Good Practice on Dismissal based on Operational Requirements. At the moment it is still not clear what falls under ‘economic’, ‘technological’ or ‘structural reasons.’ I do understand that it is difficult to define all the circumstances that might legitimately form the basis of a dismissal for operational requirements. But I think that the explanation of the meaning of the term ‘operational requirement’ is too basic. Perhaps it is possible to change (and enlarge) the definitions of ‘economic’, ‘technological’ and ‘structural reasons’, instead of making a list of all circumstances that may constitute an operational requirements, so that – at least – more certainty is created.

---

68 See sec 213 of the LRA.
69 See Item (1) of the Code of Good Practice on Dismissal based on Operational Requirements.
70 See Item (1) of the Code of Good Practice on Dismissal based on Operational Requirements.
However, ‘when an employer is able to prove on the facts that the purpose of the proposed changes and resultant dismissals is motivated by operational requirements, that it intends to stop trying to persuade the employees to accept the proposed changes, that the dismissal is final, and that it is ‘not supported by the hidden motive to dismiss for not agreeing to a demand’\textsuperscript{72}, no conflict between sec 187(1)(c) and sec 189 needs to occur.’\textsuperscript{72}

\begin{flushleft}

\end{flushleft}
Chapter 6 Conclusion

Outsourcing might give rise to difficult questions, even on an objective application of sec 197 of the LRA. Nevertheless, the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the LRA, which, inter alia, is to give effect to and regulate the fundamental right conferred by section 23(1) of the Constitution. 1 Besides, any person applying the LRA must interpret its provisions to give effect to its primary objects and in compliance with the Constitution. 2 3 This direct link between the interpretation and the primary objects of the LRA makes clear that the objects of the LRA are in such a manner important that when interpreting the LRA, one (e.g. an employer) must keep in mind these objects. 4 Consequently, the ‘right to fair labour practice’ 5 provides a primary framework within which the LRA must be interpreted. 6 This means that the LRA is the chosen motor to give expression to the rights of sec 23(1) of the Constitution, whereby the objects of sec 197 form an essential part of this right to fair labour practice. 7 Since the amendments in 2002, sec 197 is even stating that in case a transfer of a business takes place, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment. 8 Accordingly, a new employer is not allowed to take over employees on less favourable terms and conditions. 9 Thus, since an employer must take into account the primary objects of the LRA and must give effect to the fundamental right conferred by sec 23(1) of the Constitution, an employer must consider the concept of fair labour practice when deciding to outsource. 10

---

1 See sec 1(a) of the LRA.
2 See sec 3(a) and (b) of the LRA.
3 Next to this, is sec 39(2) of the Constitution stating that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or form must promote the spirit, purport and objects of the Bill of Rights.
5 See sec 23(1) of the Constitution.
8 See sec 197(2)(a) of the LRA.
9 See sec 197(3)(a) of the LRA.
The European Court of Justice held that there can be no transfer of a business as a going concern, unless both the old and new employer have agreed that the latter takes over the former’s workforce as well.\textsuperscript{11} In addition, the European Council Directive\textsuperscript{12} does not apply if the changes in tendering a service do not occur at the same time as a transfer from one undertaking to the other of significant (in)tangible assets, or taking over by the new employer of a major part of the workforce.\textsuperscript{13} The English courts have accepted that the reason why employees are not taken over by the new employer, can be taken into account when determining whether the TUPE-Regulations apply; when the main reason was to avoid the application of the TUPE-Regulations there will be a transfer, even when the employees are not taken over.\textsuperscript{14} \textsuperscript{15}

The TUPE-Regulations state that employees employed by the old employer become employees of the new employer on the same terms and conditions of their contracts of employment, as they originally had with the old employer.\textsuperscript{16} And according to New Zealand’s Employment Relations Law Reform Bill, employees who fall within the ‘specified group of employees’ are granted the right to elect to transfer to the new employer on the same terms and conditions of their contract of employment.\textsuperscript{17} However, the exact level of protection for employees who fall outside these ‘specified groups’, depends on the agreement reached (and concluded in an ‘employee protection provision’ in the employment contracts) between the employer and employees (or their representatives).

In spite of the fact that the Constitutional Court has stated that in case the old and new employer of a business have not agreed on the transfer of the affected employees as part of the transaction, this does not disqualify the transaction from being a transfer of a business as a going concern within the meaning of sec 197 and that no factor is decisive in determining in whether a transfer of

\textsuperscript{11} See Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV [1999] IRLR 37 (ECJ) at par 65.


\textsuperscript{16} See sec 5(2)(a) and (b) of the TUPE-Regulations of 1981.

a business as a going concern has occurred\textsuperscript{18}, I find it preferable to let the amended TUPE-Regulations be persuasive in plotting the course of the South African approach, as they provide that in the context of a change of tendering services all the affected employees automatically become employees of the new employer under the same terms and conditions of employment as applied to them by their old employer. In other words, the amended TUPE-Regulations guarantee affected employees a security (or continuity) of employment in case of a change of tendering services. Therefore, it is necessary that the test for ‘the transfer of a going concern’ adopted by the Constitutional Court in the \textit{NEHAWU} case\textsuperscript{19} changes slightly; in the course of the search for similarity in the business after a transfer, some factors (i.e. whether a workforce has been transferred) should be more significant than others.

Sec 186(2)(c) states that an employer can even commit an unfair labour practice after it dismissed an employee, in case it fails (or refuses) to reinstate or re-employ a former employee in terms of any agreement.\textsuperscript{20} However, this agreement also transfers to the new employer in case of an outsourcing which falls within the ambit of sec 197.\textsuperscript{21} In my opinion it is preferable if the new employer can end these agreements when its operational requirements make that necessary, as long as it can prove that the reason for the ending of such an agreement is based on a fair reason – its genuine operational requirements – and it can prove that it followed a fair procedure.\textsuperscript{22}

The LRA offers protection to fixed-term contract employees; sec 186(1)(b) treats a refusal (or failure) to renew a fixed-term contract of employment as a species of dismissal in circumstances where the employee had a ‘reasonable expectation’ of renewal of his fixed-term contract of employment.\textsuperscript{23} This means that an employer cannot terminate a fixed-term contract of employment without having a fair reason and without following a fair procedure.\textsuperscript{24 25}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{NEHAWU v University of Cape Town & others}\textsuperscript{[2003] 24 ILJ 95 (CC)} at par 58.
\item See \textit{NEHAWU v University of Cape Town & others}\textsuperscript{[2003] 24 ILJ 95 (CC)}.
\item See sec 186(2)(c) of the LRA.
\item See for criteria when outsourcing falls within the ambit of sec 197 \textit{SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others}\textsuperscript{[2002] 23 ILJ 2304 (LC)}; unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
\item See sec 188(1)(a) and (b) of the LRA.
\item See sec 188(1)(a) and (b) of the LRA.
\end{enumerate}
\end{footnotesize}
In finding whether a ‘reasonable expectation’ of renewal exists, are strict rules of law not merely important; the determination of this expectation goes beyond the point originally intended (and concluded in a contract) by the employer and the employee. Consequently, an employment relationship does not necessarily end on arrival of the final day of the employment contract. Besides, it is also not required that such expectation has to be shared by the employer. In the normal course of events where fixed-term contracts are renewed from time to time, an expectation that the contract would be renewed indefinitely would probably not be reasonable and not be genuine. However, according to the Labour Court (Penzhorn AJ), this does not mean that such a situation can never arise. It stands to reason that in cases where an employee genuinely believed that he would stay on in his post – which was to become permanent – and if this belief is such that it would have been shared by ‘any reasonable person’ in that position, then there is no reason why this provision should not be held to also cover this situation.

I agree with Penzhorn AJ in that an expectation of permanent employment should provide a ground for a claim of dismissal under sec 186(1)(b). An interpretation of sec 186(1)(b) that does not support this view does not take into account the possibility of the existence (or development) of a permanent employment relationship, nor of any common developments which may take place subsequently to an initial contract for the determination of the period of duration and, thus, leads to a too restrictive effect of sec 186(1)(b).

In case of an outsourcing which falls within the ambit of sec 197, a fixed-term contract in existence immediately before the date of the transfer, will transfer to the new employer on the

27 See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner Sa (Pty) Ltd [1994] 15 ILJ 509 (A).
30 See National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner SA (Pty) Ltd [1994] 15 ILJ 509 (A) at 518I-J and 519C-G.
32 See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v
same terms and conditions. Next to this, will the new employer automatically be substituted in the place of the old employer. This means that according to sec 23(1) of the Constitution no distinction is made between employees with typical contracts of employment and atypical contracts of employment (i.e. fixed-term contracts).

In case a fixed-term contract of employment expires before an outsourcing (which falls within the ambit of sec 197) occurs, the conduct of the old employer will be looked at to determine whether or not the affected employee reasonably expected the employer to renew his fixed-term contract of employment. Nevertheless, anything done before the outsourcing (which falls within the ambit of sec 197) by or in relation to the old employer including the dismissal of an employee is considered to have been done by or in relation to the new employer. This means, for example, that if according to sec 186(1)(b) one can speak of a dismissal, this dismissal is considered to have been done by the new employer. In case a fixed-term contract of employment expires after an outsourcing (which falls within the ambit of sec 197) has occurred, the Labour Court must take account of the conduct of both the old and new employer when determining whether the affected employee had a ‘reasonable expectation’ of the renewal of his fixed-term contract.

Finally, the premature termination of a fixed-term contract by an employer – even where it has genuine operational requirements to do so – constitutes an (substantial) unfair dismissal; in common law a party to a fixed-term contract has no right to terminate such contract, in the absence of a repudiation or a material breach of the contract by the other party. In other words, there is no right to terminate such contract even on notice, unless its terms provide for such termination. This does not constitute unfairness for the employer, because the employer is free not to enter into a

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
See for criteria when outsourcing falls within the ambit of sec 197 SA Municipal Workers Union v Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
See sec 186(1)(b) of the LRA.

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
See sec 186(1)(b) of the LRA.

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
See sec 197(2)(c) of the LRA.

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.

Rand Airport Management Co (Pty) Ltd & others [2002] 23 ILJ 2304 (LC); unreported case JA9/03, 3 December 2004 at paras 18, 19, 21, 22, 36 and 44.
See Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC) at par 9.
fixed-term contract but to conclude a contract for an indefinite period, if it thinks that there is a risk that it might have to dispense with the employee’s services before the expiry of the term. If it chooses to enter into a fixed-term contract, it takes the risk that it might have to need to dismiss the employee prematurely, but is prepared to take that risk.\textsuperscript{40} Therefore, I think it is important that the old and new employer conclude an agreement about the inclusion of terms in the existing fixed-term contracts of the affected employees – before the outsourcing actually takes place – which makes it possible for the new employer to terminate the fixed-term contracts of the transferred employees prematurely, in case it has no work for them anymore after a transfer has occurred. From this follows, that the legislature intends to protect all employees (including fixed-term contract employees) in case of an outsourcing which falls within the ambit of sec 197.\textsuperscript{41}

It is the employer’s prerogative to determine the parameters, the direction, the structure and the objectives of its business operations. Nevertheless, an employer must exercise its prerogative rationally, in good faith and transparently;\textsuperscript{42} fairness remains the ultimate arbiter, which needs to be determined by the Labour Court.\textsuperscript{43} An employer is entitled to dismiss employees for operational requirements provided that such dismissals are operationally justifiable and comply with the requirements of ss 188 and 189 of the LRA. Besides, an employer may change terms and conditions of contracts of employment unilaterally in certain circumstances, as long as the employer can prove that these changes are necessary due to its operational requirements and if it has followed a fair procedure as set out in sec 188 and 189.\textsuperscript{44} In addition, in circumstances where the change to terms and conditions of a contract of employment is offered by an employer as a reasonable alternative to dismissal during a genuine dismissal exercise and is based upon the employer’s operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative offer.\textsuperscript{45} Nevertheless, the reason for dismissal must be a fair
reason based on the employer’s operational requirements and the dismissal must be effected in accordance with a fair procedure.\textsuperscript{46} And if an employer has chosen a solution that results in a dismissal of a (number of) employee(s) when there is a clear way in which it could have addressed the problems without any or limited job losses,\textsuperscript{47} and the court is satisfied – after hearing the employer on such a solution that it can work – it should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs. Particularly, since resort to dismissal for operational requirements is meant to be a measure of last resort\textsuperscript{48}.\textsuperscript{49} Obviously, the employer’s unilateral implementation of changes to terms and conditions of a contract of employment weakens the collective bargaining mechanism. And the employer’s recourse to lock-out only strengthen this even more.\textsuperscript{50} Besides, since any dismissal is automatically unfair if the purpose for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest\textsuperscript{51}, employers will more likely be inclined to ground the contemplated dismissal on its genuine operational requirements. This places a limit on the effect of sec 187(1)(c). As a result, this will negatively impact on the protection and promotion of the right to engage in collective bargaining, which is in my opinion not fair towards the employees. And will lead to false positions between the rights of employers and the rights of employees, which is contrary to the purposes of the LRA.\textsuperscript{52} For this reason, it is important that an employer should be obliged to always first use the instrument of collective bargaining; only then the best results – to achieve a change to terms and conditions of a contract of employment – will be obtained. Further, it will also be more likely that alternative solutions to dismissal will be found during the collective bargaining process, which is supported by sec 189(2)(a). In other words, when an employer believes a change to a particular set of terms and conditions to contracts of employment is necessary, the change process should, thus, begin with negotiations, consultation, or information sharing (as part of the bargaining process). This means that only after the bargaining process fails and the employer can show that

\begin{footnotesize}
\begin{itemize}
  \item[46] See sec 188(1) of the LRA.
  \item[47] See sec 189(2)(a) of the LRA.
  \item[48] See also sec 189(2)(a)(i) (ii) read with subsection (3)(a) and (b).
  \item[49] See Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC) at par 70.
  \item[50] See sec 64(1) of the LRA.
  \item[51] See sec 187(1)(c) of the LRA.
\end{itemize}
\end{footnotesize}
factors outside its control warrant a particular change, a case for an operational requirements dismissal may be made. The need to dismiss should only arise if bargaining fails and not before.53 Finally, the task of the Labour Court is to only pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham, in order to prohibit the development of an untouchable ‘judicial vacuum’ around the economic rationale of outsourcing.54

Most of the dismissals in the transfer context are somehow linked with the transfer. But, the conclusion that all such dismissals are impermissible and automatically unfair would seriously limit the employer’s ability to respond to the needs of its business.55 Although sec 187(1)(g) prohibits dismissals for ‘reasons of a transfer’ or ‘a reason related to a transfer’ and prevents employers from using dismissals as a means to avoid their obligations in terms of sec 197, an employer should be permitted to dismiss for operational requirements if an employer does not intend to avoid its obligations in terms of sec 197 by dismissing its employees and there is a rational and justifiable basis for that dismissal, according to ss 188 and 189.56 Moreover, dismissal for operational requirements must be used as a measure of last resort.57 However, due to the enormous range of potential scenarios in which an employer may resort to dismissal for operational requirements – including the change to terms and conditions of employment contracts – difficulties arise when an employer’s motivation for dismissal – in the context of a sec 197 transfer – will genuinely be operational requirements, as well as being related to the transfer.58 The question in these situations is whether such a dismissal is automatically unfair – according to sec 187(1)(c) that states that an employer cannot dismiss an employee to force the employee to accept a proposed change to terms and conditions of his employment contract – or operationally justifiable?

54 See BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 at par 17.
In Afrox⁵⁹ the LAC used the ‘usual two-fold approach to causation’ in order to determine whether the dismissal was automatically unfair or operationally justifiable. A dismissal is automatically unfair if dismissal would not have occurred if there was no business transfer, and the business transfer was the ‘main’, ‘dominant’, ‘proximate’ or ‘most likely cause’ of the dismissal. And a dismissal for operational requirements can only be permitted if there was a fair reason for that dismissal – based on the employer’s operational requirements – and the dismissal was procedurally fair.⁶⁰

With regards to dismissals for operational requirements in the context of outsourcing, an old employer cannot dismiss employees for operational requirements prior to that outsourcing. Fortunately, there are some situations in which an exception on this principle is permitted. Regulation 8(1) of the TUPE-Regulations states that any employee of the transferor or transferee who has been dismissed either before or after a relevant transfer, shall be treated – for the purposes of legislation relating to unfair dismissal – as being unfairly dismissed, if the transfer or a reason connected with it is the (principal) reason for this dismissal.⁶¹ However, Regulation 8(2) states that whenever an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the (principal) reason for dismissing an employee, subsection 1 will not apply.⁶² In addition, Article 4 of the European Council Directive provides that the transfer of an undertaking (business, or part of a business) shall not in itself constitute grounds for dismissal by the transferor or the transferee. Nevertheless, this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.⁶³ Although the LRA categorises dismissals for operational requirements as ‘no fault’ dismissals and, thus, places particular obligations on an employer – of which most of them are directed towards ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated

---

⁵⁹ See SACWU & others v Afrox Ltd [1999] 10 BLLR 1005 (LAC).
fairly\textsuperscript{64}, I find it striking is that the LRA does not explicitly require the precondition of ‘entailing changes in the workforce’ in its definition of ‘operational requirements’. However, as opposed to the LRA, both the TUPE-Regulations and the European Council Directive give an employer the opportunity to dismiss employees for operational requirements on a fair basis; the ‘indirect’ economic, technical or organisational reason that entails changes in the workforce of either the old or new employer before or after a relevant transfer. This broadens an employer’s ability to respond to the needs of its business, which is in line with the balance the concept of fairness tries to achieve between the employer’s interests and the protection of employee’s rights in the transfer context. Therefore, I find it preferable to include such a precondition in the LRA as well, instead of automatically criticising a transfer – or a reason related to a transfer – as the main reason for a dismissal as unfair.\textsuperscript{65}

In order to avoid that an employer too easily resorts to a dismissal for operational requirements, it should actually be obliged to always first exhaust the instrument of collective bargaining, because only then the best results can be obtained. Consequently, both the employer and the affected employees (or their representatives) should bring all possible options to the bargaining table in order to come to a consensus, because all factors impacting either the employer or the affected employees must be considered.\textsuperscript{66} Even if the employer thinks it is possible that – as a last measure – it will resort to the dismissal for operational requirements of the affected employees, I think that the employer should already make these plans public during the bargaining process. Although it maybe never even comes that far.\textsuperscript{67} From this follows, that dismissal for (genuine) operational requirements should only be permissible when collective bargaining solutions fail to occur.\textsuperscript{68}

Furthermore, the legislature should permit the use of temporary replacement labour in employer initiated lock-out situations to let the ‘lock-out dismissal’ have greater effect.\textsuperscript{69} Nevertheless, the boundaries of the use temporary replacement labour should first be determined in the order to avoid abuse by the employer.

\textsuperscript{64} See sec 187(1)(g) of the LRA.
\textsuperscript{65} See sec 187(1)(g) of the LRA.
\textsuperscript{66} The concept of (substantial) ‘fairness’ commands that all potential options should be put on the bargaining table upfront.
Thus, if an employer is able to prove on the facts that the purpose of the proposed changes and resultant dismissals is motivated by operational requirements, it intends to stop trying to persuade the employees to accept the proposed changes, the dismissal is final, and it is ‘not supported by the hidden motive to dismiss for not agreeing to a demand’\textsuperscript{70}, no conflict between sec 187(1)(c) and sec 189 needs to occur.\textsuperscript{71}

From the above-mentioned follows, that there are limitations (or restraints) in the South African Labour Relations Act 66 of 1995 that may keep an employer from outsourcing. For this reason, by virtue of the desirability of the limitations on the employer’s prerogative, the South African approach should be changed in light of the comparative jurisprudence adopted overseas, whereby I prefer the approach adopted in the TUPE-Regulations and in the proposal to amend the current Regulations.


Bibliography

Books

Articles
* Schooling H., 'Does an employer have a constitutional right to fair labour practices?', [2003] 13 (5) CLL 45.
* Wallis M.J.D., ‘Section 197 is the Medium. What is the Message?’, [2000] 21 ILJ 1.

Articles from the UWC website
* ‘Coping with corporate re-organisation: Retrenchment or Dismissal Lockout – A fine distinction’, Beaumont Express (no. 18), 2003, [Electronic], Available: Butterworths.


**Articles from the World Wide Web**


* Auf der Heyde v University of Cape Town (Case No. 11/00), 2000, [Online], Available: http://wwwserver.law.wits.ac.za/labourcrt/judgments.CA1100.pdf


**Regulation**


**Cases**

* BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705.
* Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others (2) [1997] 18 ILJ 671 (LAC).
* Chemical Workers Industrial Union & others v Algorax (Pty) Ltd [2003] 24 ILJ 1917 (LAC).
* Diersk v University of South Africa [1999] 20 ILJ 1227 (LC).
* Eastern Rand Exploration Co v Nel [1903] TS 42.
* Foodgro (a division of Leisurenet Ltd) v Keil [1999] 9 BLLR 875 (LAC).
* Fry’s Metals (Pty) Ltd v NUMSA & others [2003] 2 BLLR 140 (LAC).
* Mthembu & others v Boland Houtnwyherhe [1986] 7 ILJ 563 (IC).
* National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner SA (Pty) Ltd [1991] 12 ILJ 549 (LAC).
* National Automobile & Allied Workers Union (now known as the National Union of Metalworkers of SA – NUMSA) v Borg-Warner SA (Pty) Ltd [1994] 15 ILJ 509 (A).
* NCBAWU v Hernic Premier Refractories (Pty) Ltd [2003] 1 BLLR 50 (LC).
* NEHAWU v University of Cape Town & others(1) [2000] 7 BLLR 803 (LC).
* NEHAWU v University of Cape Town & others(2) [2000] 7 BLLR 819 (LC).
* NEHAWU v University of Cape Town & others [2003] 24 ILJ 95 (CC).
* NEWU v CCMA & others [2004] 2 BLLR 165 (LC).
* Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 (HL); [1940] 3 All ER 549 (HL).
* Ntuli v Hazelmere Group t/a Musgrave Nursing Home [1988] 9 ILJ 709 (IC).
* NUMSA and others v Zeuna-Starker Bop (Pty) Ltd [2003] 1 BLLR 72 (LC).
* SACWU & others v Afrox Ltd [1999] 10 BLLR 1005 (LAC).
* SACWU & others v Discreto (a Division of Trump & Springbok Holdings) [1998] 12 BLLR 1228 (LAC).
* SA Municipal Workers Union & others v Rand Airport Management Co (Pty) Ltd & others [2003] 23 ILJ 2304 (LC); unreported case J49/03, 3 December 2004.
* Schoeman v Samsung Electronics (Pty) Ltd [1999] 20 ILJ 200 (LC).
* Setlogelo v Setlogelo [1914] AD 221.
* Transportation Motor Spares v NUMSA & others [1999] 1 BLLR 78 (LC).
* University of Cape Town v Thomas auf der Heyde [2000] 21 ILJ 1758 (LC).
* Western Cape Workers Association v Halgang Properties CC [2001] 22 ILJ 1421 (LC).

* ADI (UK) Ltd v Willer [2001] IRLR 542 (CA).
* RCO Support Services Ltd v Unison & others [2002] EWCA Civ 464 (CA).
* Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV [1999] IRLR 37 (ECJ)