# WOULD AN EMPLOYER'S ABILITY TO RETRENCH EMPLOYEES CONSEQUENT UPON STRIKE ACTION UNDERMINE COLLECTIVE BARGAINING – A SOUTH AFRICAN PERSPECTIVE

*By Khomotso Makapane*

## 1. INTRODUCTION

1.1 This paper explores the question of whether or not an employer's ability to retrench employee consequent upon strike action would undermine collective bargaining. Further, this paper explores the question of whether and to what extent the employer's ability to retrench employees should be limited to in light of the importance of the right to strike to collective bargaining. This will involve an exposition of collective bargaining, the right to strike and the employer's right to retrench in the South Africa context which will be followed by an examination of the aforementioned questions posed and a proposed way forward.

## 2. COLLECTIVE BARGAINING

2.1 The Labour Relations Act 66 of 1995 ("LRA"), as amended, has as one of its aims the promotion and facilitation of collective bargaining at the workplace and at sectoral level.

2.2 Collective Bargaining can be described as-

> *"process in which workers and employers make claims upon each other and resolve them through process of negotiation leading to collective agreements that are mutually beneficial. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers on the other hand, free association enables firms to ensure that competition is constructive and fair in a effort to raise productivity and conditions of work."*[1]

2.3 Collective bargaining itself flows from the rights to freedom of association and fair

[1] Van Niekerk et al *Law@work* (2008) (LexisNexis, Durban) at 341 citing ILO Organising for Social Justice – Global Report under the Follow-Up to the ILO Declaration of Fundamental Principles and Rights at Work (2004).

labour practices entrenched under the Bill of Rights[2] as well as article 23(4) of the Universal Declaration of Human Rights.[3]

2.4 Although it was in reference to the previous Labour Relations Act, the exposition of the rationale behind collective bargaining in *Macsteel*[4] still finds favour in respect of the current statute:

> *"the LRA creates machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible, industrial strife and to maintain peace. Its operation is such that, if parties negotiate genuinely and in good faith, and their demands and offers are reasonable, settlement will be reached before disruption takes place, if not through agreement inter partes, then with the help of the machinery provided for in the Act. The legislature tried to create circumstances enabling the parties to negotiate freely as long as they do so diligently and reasonably. In the process it is necessary that the parties must be on an equal footing, and that the one party does not have an unfair advantage over the other, which will force it to capitulate to unreasonable offers or demands. That being so, I am of the view that any action aimed at creating an advantage for the one party over the other, disturbs the equality which the Act tries to establish, and is therefore unfair, if taken at a time when in terms of the Act, the parties are still to negotiate."*[5]

2.5 At a fundamental level, the philosophy behind collective bargaining is an understanding that it is the best means to achieve good labour relations and the resolution of labour disputes.[6] "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife."[7]

2.6 Save to state that Chapter 3 of the LRA sets out the law in respect to collective bargaining,[8] it is not necessary for the purposes of this paper to detail all provisions relating to collective bargaining. Rather, this paper requires that we broadly bear in

[2] Sections 18 and 23 of Constitution of the Republic of South Africa, 1996.
[3] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[4] *Macsteel (Pty) Ltd v National Union of Metalworkers of SA and Others* (1990) 11 ILJ 995 (LAC).
[5] Id at 1006.
[6] *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd* [1991] ZASCA 168; 1992 (1) SA 700 (AD); [1992] 4 All SA 78 (AD).
[7] *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).
[8] It deals with organisational rights, collective agreements and with bargaining and statutory councils.

mind the rationale behind collective bargaining. It is on this understanding that we can better quantify its importance and therefore weigh up one of its component parts, the right to strike.

## 3. THE RIGHT TO STRIKE

*The right to strike generally*

3.1 Section 23(2)(c) of the Constitution entrenches the right that every worker has to strike. The importance of the right to strike was expressed by the Constitutional Court in these terms:

> *"Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers enjoy collective power primarily through the mechanism of strike action."*[9]

3.2 The LRA gives effect to the right to strike but also recognises that this right is not absolute. As such the Act imposes a number of limitations on the right:[10]

> *"[T]he Act seeks to give effect to the fundamental right to strike by insulating participation in a protected strike from the legal consequences that might otherwise have followed in its wake. On the other hand, it regulates that right both procedurally and substantively. Procedurally it does so by requiring that certain formal requirements have to be met before protection follows. Substantively, it imposes limitations, one of which is to limit protected strikes to issues that are not arbitrable or justiciable in terms of the Act."*[11]

3.3 In general, the procedures set out in the LRA require that an attempt be made to resolve the dispute between employer and employees by referring such dispute to the appropriate forum. If the dispute cannot be resolved at that forum then notice of an intention to strike must be given before the proposed strike.

3.4 A strike that complies with all the statutory requirements prescribed by Chapter IV of

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[9] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) ("*Certification*") at para 66.

[10] Van Niekerk above n 1 at 371.

[11] *Ceramic Industries Ltd t/a Betta Sanitaryware & Another v NCBAWU & Others* [1997] 6 BLLR 697 (LAC).

the Act will be a protected strike whereas one that does not would be an unprotected strike. The terms protected and unprotected are in reference to the recourse that can be taken against employees participating in that strike.

3.5 If a strike is protected, in order words the statutory procedure has been followed, then employees who participate in the strike cannot in law commit a delict or a breach of contract by taking part in such a strike. Moreover, an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. Notably however, an employer is not precluded from fairly dismissing an employee for a reason based on the employer's operational requirements.[12]

*The right to strike in the context of collective bargaining*

3.6 The right to strike is recognised by our courts as an essential component of a successful collective bargaining system:[13]

> *"[T]he right to strike . . . is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system."*[14]

3.7 The right to strike is therefore seen as a necessary tool that employees should be able to exercise given the disparity in the bargaining positions between themselves and employers. Short of resignation, employees would virtually be powerless to bargain with employers in the absence of their right to strike. Employers on the other hand have a range of tools at their disposal including "dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace".[15]

3.8 In respect to foreign law, section 2(d) of the Canadian Charter of Rights and

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[12] Section 67 of the LRA.

[13] *South African Police Service v Police and Prisons Civil Rights Union and Another* [2011] ZACC 21; [2011] 9 BLLR 831 (CC); 2011 (9) BCLR 992 (CC); 2011 (6) SA 1 (CC); (2011) 32 ILJ 1603 (CC) at para 19.

[14] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) ("*Bader Bop*") at para 13.

[15] *Certification* above n 9 at para 66.

Freedoms states that everyone has the right to freedom of association. In *Saskatchewan Federation of Labour v Saskatchewan*[16], a case handed down by the Supreme Court of Canada this year, it was held that the constitutional right to strike contained in section 2(d) of the Charter is an indispensable component of participating meaningfully in the pursuit of collective bargaining. Essentially, the Court recognised the right to strike as being inextricably linked to collective bargaining.

3.9 This recognition that employers enjoy greater social and economic power than individual workers is for this reason that the Constitution protects the right to strike as a fundamental right without expressly limiting this right.[17] It follows that care must be taken against unduly limiting such a fundamental right by reading implied restrictions into it.[18] The right to strike, in its proper sense serves as a counter-balance to the greater social and economic power of employers.[19]

*The right to strike in international law*

3.10 Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") states that States Parties will undertake to ensure the right to strike, provided that it is exercised in conformity with the laws of the particular country.[20]

3.11 The right to strike is not explicitly set out in any International Labour Organization ("ILO") Conventions or Recommendations. The Freedom of Association and Protection of the Right to Organise Convention recognises the right of trade unions to further and defend their occupational interests while article 3 of the Convention states that:

> *"1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
>
> *2. The public authorities shall refrain from any interference which would*

[16] 2015 SCC 4.

[17] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) at para 14.

[18] Id at para 20.

[19] Id at para 90.

[20] *International Covenant on Economic, Social and Cultural Rights* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

*restrict this right or impede the lawful exercise thereof."*[21]

3.12 The aforementioned Convention along with the Right to Organise and Collective Bargaining Convention[22] have been recognised by the Constitutional Court as affording trade unions the right to recruit members and to represent those members at least in workplace grievances and also recognise the right to strike to enforce collective bargaining demands.[23]

3.13 At a regional level, article 15 of the African Charter on Human and Peoples' Rights states that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.[24] At a meeting held from 13 to 17 September 2004 in Pretoria, an effort was made to clarify the content of the social, economic and cultural rights in the African Charter by various parties including members of the African Commission, representatives of 12 African states, civil society organisations, national human rights institutions, academics and representatives of UN organisations and regional economic communities.

3.14 The parties adopted a statement which was to be considered for adoption by the African Commission on Human and Peoples' Rights at its next ordinary session. The statement read inter alia:

> *"The right to work in article 15 of the [African] Charter entails the right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights".*[25]

3.15 The aforementioned statement referred to as the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa was subsequently adopted by the African Commission at its 36th Ordinary session held from 23rd November to 7th December 2004 in Dakar, Senegal.[26]

3.16 In addition to the above at a regional level, article 4(e)(i) of the Southern African Development Community ("SADC") Charter of Fundamental Social Rights states that:

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[21] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
[22] The Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
[23] *Bader Bop* above n 14.
[24] *African Charter* adopted in Nairobi, Kenya on 27 June 1981 entered into force on 21 October 1986.
[25] Statement from seminar on Social, Economic and Cultural Rights in the African Charter (2005) 5 *African Human Rights Law Journal* at 182.
[26] ACHPR / Res.73 (XXXVI) 04: Resolution On Economic, Social And Cultural Rights In Africa (2004).

> *"Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that the right to resort to collective action in the event of a dispute remaining unresolved shall for workers, include the right to strike and to traditional collective bargaining."*[27]

3.17 South Africa is bound by the aforementioned conventions and charters and therefore any interpretation of the right to strike must be considered in light of the above legal instruments.

## 4. RETRENCHMENT

*Retrenchments generally*

4.1 South African law has always recognised operational requirements as a ground for dismissal.[28] This form of dismissal is regarded as a "no-fault dismissal"[29] and it is for this reason that the law is more prescriptive in relation to dismissals for operational requirements than is the case with dismissals for misconduct or incapacity.[30]

4.2 In this regard, section 189 of the LRA as amended provides, *inter alia*, that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

4.3 The Act further requires that the consultation envisaged above between the employer and other consulting parties be one that constitutes an engagement in a meaningful joint consensus-seeking process. Wherein the parties would attempt to reach consensus on a variety of issues prescribed by the section. In relation to employees to be dismissed, the Act requires that the employer must select the employees to be dismissed based on fair and objective selection criteria, in the absence of an agreement on selection criteria by the parties.

4.4 Section 189A regulates large scale retrenchments and imposes further procedural

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[27] Charter of the Fundamental Social Rights in SADC (2003).
[28] John Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2 ed (2007) (Juta & Co Ltd, Cape Town) at 426.
[29] *CWIU & others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).
[30] Van Niekerk above n 1.

steps that parties must comply with where an employer employing more than 50 employees contemplates retrenching-

> *"(i) 10 employees, if the employer employs up to 200 employees;*
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> *(ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;*
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> *(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;*
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> *(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or*
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> *(v) 50 employees, if the employer employs more than 500 employees".*

4.5 The provisions in relation to retrenchments "envisage that the employer will resort to dismissal as a measure of last resort."[31] Therefore, the employer has an obligation, "if at all possible, to avoid dismissals of employees for operational requirements altogether".[32] The employer must show the dismissal of the employee could not be avoided."[33]

*Defining Operational Requirements*

4.6 It is trite that in retrenchments, the real question is not merely the employer's *bona fides* and commercial justification but whether the dismissals were the only reasonable option under the circumstances. For the purposes of this paper, it is only necessary to discuss the commercial justification by the employer for the decision to retrench.

4.7 In order for a retrenchment to be fair, an employee must be consulted prior to a final decision on retrenchment. While this could be classified as a procedural step, it does have some substantive implications. For example, a consultative process can ensure that "the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business

[31] *Oosthuizen v Telkom SA Ltd* [2007] JOL 20249 (LAC).
[32] *CWIU* above n 29 at para 70.
[33] *County Fair Foods (Pty) Ltd v OCGAWU and Another* (2003) 7 BLLR 647 (LAC) at para 27.

rationale."[34] In the absence of a consultation process wherein the parties could have agreed to alternative measures to avoid the retrenchments, the subsequent dismissals for operational requirements would be procedurally and substantively unfair.[35]

4.8 It follows therefore that fairness requires that there be genuine reasons for a dismissal for operational requirements. In this regard, the LRA defines operational requirements as requirements based on the economic, technological, structural or similar needs of an employer.[36] The Code of Good Practice on Dismissal Based on Operational Requirements accepts that this definition does not contemplate all circumstances that might form the basis for retrenchment but states that in general:

> *"economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."*[37]

4.9 A court in scrutinising the commercial or business efficacy of the employer's ultimate decision should bear in mind that is, generally, not qualified to pronounce upon such issues. This does not mean however, that the court is to take a deferential approach to the determination of substantive fairness in the retrenchment context.[38] The deferential approach adopted in *Morester*[39] has been explicitly rejected by our courts.

4.10 Rather, our courts have advocated for a less deferential approach where the court is entitled to examine the content of the reasons given by the employer and not whether the reason offered is the one which would have been chosen by the court.[40] As the court remarked in *Discreto*:

> *"it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision,*

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[34] *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) ("*Discreto* ") at para 8.
[35] Grogan above n 28 at 483.
[36] Section 213 of the LRA.
[37] Code of Good Practice on Dismissal Based on Operational Requirements *General Notice 1517 in Government Gazette 20254 of 16 July 1999* at para 1.
[38] *NUM and Another v Black Mountain Mining (Pty) Ltd* [2014] ZALAC 78 at para 32.
[39] *Morester Bande (Pty) Ltd v NUMSA and Another* (1990) 11 ILJ 687 (LAC).
[40] BMD Knitting Mills (Pty) Ltd v SACTWU

*properly taking into account what emerged during the consultation process."*[41]

4.11 It follows that the court should not hesitate to intervene, especially where the commercial rationale behind an employer's decision does not involve "any complicated business transactions or decisions" or require "special expertise or business knowledge". In such a situation the court can determine the rationality of the employer's ultimate decision on retrenchment using common sense.[42] The test is objective. The employer must be motivated by "economic, technological, structural or similar needs" the factual existence of a genuine operational requirement for the retrenchments must be established.

4.12 In accordance with the above, unless there is a proper explanation of the reasons for the dismissal, supported by credible evidence, the employer will not discharge the onus to prove the existence of a substantively fair reason for the dismissal of an employee:

> *"Where an employer contends that the operational justification for its decision to dismiss is reduction of operating costs, it must at least put forward evidence showing the actual operating costs which it sought to reduce. This can be done by producing financial information which demonstrates the relevant operating costs. This should not been an onerous task. Any sensible employer wishing to reduce costs must first know what costs are to be reduced.*
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> *In addition, where an employer wishes to cut operating costs by reducing its headcount, it must at least produce evidence of the costs associated with the headcount and how this will meet the overall target of cost reduction. In the absence of this information, it is not possible for a court to decide if the decision is not arbitrary or capricious. Nor is it possible to decide if the decision is a rational or reasonable one, based on the information which was available to an employer at the time it decided to embark on a restructuring exercise."*[43]

4.13 Accordingly, the justification by the employer for the decision to retrench must be a genuine and a measure of last resort. Such a reason must be objectively ascertainable from evidence.

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[41] *Discreto* above n 34 at para 8.

[42] *Food And Allied Workers Union and Others v South African Breweries Limited* [2004] ZALC 65 at para 40.

[43] *Ndhlela v SITA Information Networking Computing BV (Incorporated in the Netherlands)* [2014] ZALCJHB 64; (2014) 35 ILJ 2236 (LC) at paras 33-4.

*Retrenchment under international law*

4.14 Article 4 of the Termination of Employment Convention[44] states that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

4.15 Article 9(3) read with articles 1 and 8(1) make provision for an appropriate forum, in cases of termination based on the operational requirements, to determine whether the termination was indeed for these reasons stated and whether these reasons are sufficient to justify that termination. The Termination of Employment Recommendation[45] sets out supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons.

4.16 In *Avril Elizabeth Home*[46] the Labour Court held that although South Africa has not ratified Convention 158-

> *"the Convention is an important and influential point of reference in the interpretation and application of the LRA . . . The observations and surveys by the ILO's Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of Chapter VIII of the LRA and the Code since they give content to the standards that the Convention establishes. This is particularly so in the present instance because both Chapter VIII and the Code draw heavily on the wording of Convention 158."*

## 5. THE EFFECTS OF A STRIKE AS A JUSTIFICATION FOR RETRENCHMENT

5.1 At the threshold level, this paper requires that we determine whether the effects following as a result of a strike can constitute the commercial justification that an employer requires to undertake the exercise of retrenchment.

5.2 The short answer to this question must be yes. There is nothing in statute or case law which precludes an employer taking such a stance. Our courts have found that the need to retrench may be necessitated by: financial needs which may result in an

[44] Termination of Employment Convention, 1982 (No. 158).

[45] Termination of Employment Recommendation, 1982 (No. 166): Recommendation concerning Termination of Employment at the Initiative of the Employer

[46] *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* [2006] ZALC 44.

employer not being able to afford the salaries of its employees;[47] economic challenges arising from an economic recession;[48] and an employer's inability to pay certain benefits to its employees.[49]

5.3 The retrenchment of employees based on the economic needs of a Company does not mean that the Company is required to show that it faces the prospect of financial ruin. In *Van Rensburg v Austin Safe Company*[50] the Labour Court held that:

> *"An employee is entitled to fair labour practices. This right is protected by the Constitution as well. Unfortunately this does not mean that an employee has the right to permanent and indefinite employment with a particular employer in a particular position, or that an employer may only retrench an employee when it can show financial ruin. An employer is entitled to look for new areas to better itself."*[51]

5.4 Moreover, in In *Fry's Metals (Pty) Ltd*[52] the Labour Appeal Court rejected an argument that the employer could not dismiss for operational requirements when this was done for the purpose of making more profit as opposed to where it was resorted to in order to ensure the survival of the business or undertaking. The Labour Appeal Court found that such an argument had no statutory basis in our law:

> *"all that the Act 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 the survival of which is under threat and a business which is making profit and wants to make more profit."*[53]

5.5 It is not in dispute that strikes can have devastating effects on the commercial viability of businesses. Moreover, strike action can weaken a business making it more susceptible to changes in the prevailing market in which it operates. For example, the five month strike at Lonmin last year cost that employer 307 million dollars. Unsurprisingly, in an environment where commodity prices falling, the company has

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[47] *Stratford and Others v Investec Bank Limited and Others* [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) at para 28.

[48] *Bifawu & SACCAWU obo Mpanza and Others v Zurich Insurance Company of South Africa* [2015] ZALCJHB 141 at para 41.

[49] *NUMSA v Driveline Technologies (Pty) Ltd & another* [2000] 1 BLLR 20 (LAC).

[50] *Van Rensburg v Austin Safe Company* [1998] I BLLR 86 (LC).

[51] Id at 96.

[52] *Fry's Metals (Pty) Ltd v NUMSA and Others* [2003] JOL 10525 (LAC).

[53] Id at 23-4.

had to consider retrenchments in order to shore up its balance sheet.

5.6 In light of the above, it is apparent that the definition of operational requirements is wide enough to include economic, technological and structural needs occasioned by the effects of a strike. A fair reason for dismissal is not limited to efforts to save a business but may be related to any legitimate business objective, including *bona fide* attempts at improving its efficiency, profitability or competitiveness, provided that the dismissal is a measure of last resort.[54]

5.7 However, this cannot be the end of the enquiry. As is noted above, the right to strike is an essential component of a successful collective bargaining system. It constitutes a constitutionally protected "economic tool" aimed at addressing the inequality in social and economic power in employer/employee relations.[55] The aim of a strike is to inflict economic disruption; it follows that there will almost always be some economic consequence for an employer in such circumstances.[56] If this is accepted then it follows that the right to strike and therefore, collective bargaining would be undermined if an employer could simply retrench employees for operational requirements occasioned by the effects of a strike by those employees.

5.8 On the other hand, if the consequences of the strike do result in an employer being justified in pursuing retrenchments after exhausting all measures to avoid them, is it fair in such circumstances that the employer not be allowed recourse to retrenchments?

5.9 The above discloses the broader question that requires determination. That question being if and to what extent, in light of inextricable link between the right to strike and collective bargaining, an employer's recourse to retrenchments consequent upon strike action should be limited.

## 6. LIMITATION ON THE EMPLOYER'S RECOURSE TO RETRENCHMENTS CONSEQUENT UPON STRIKE ACTION

6.1 While the Constitution does entrench the right to strike an employer's right to retrench is not given a similar status. This is for a valid reason as if regard is had to

[54] Du Toit "Business restructuring and operational requirements dismissals: Algorax and beyond (2005) 26 *ILJ* 595 at 612.

[55] *Pikitup (Soc) Limited v SAMWU and Others* ([2014] 3 BLLR 217 (LAC); (2014) 35 ILJ 983 (LAC)) [2013] ZALAC 38; [2013] ZALAC 33 at para 27.

[56] *Ntimane and Others v Agrinet t/a Vetsak (Pty) Ltd* [1998] ZALC 98 at para 12-13.

the above. Employers have a far greater range of economic tools at their disposal in the context of collective bargaining:

> *"The strike in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitation and give teeth to the demands that they make at the bargaining table. For them it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour then at the expense of their employers. Those who believe in the free interplay of market forces would be quick to condemn this as wrong. What they forget, however, is how much employers are favoured by the legal and social institutions of our society."*[57]

6.2 However, the legislature has expressly conferred on all employers the right to retrench if their operational requirements dictate.[58] Subject to legislated procedural and substantive requirements employers are entitled to exercise this right. The legislature did not include an express limitation against the exercise of this right on the basis of operational requirements arising as a consequence of a strike. In fact, even during a protected strike an employer is not precluded from fairly dismissing an employee for a reason based on the employer's operational requirements.

6.3 In *Afrox Ltd*[59] the Labour Appeal Court held that operational requirements, even those caused by the protected strike or its consequences, may justify a dismissal for operational reasons provided that the requirements of the LRA in this regard are met. On this score the Court noted that:

> *"A right to strike is predicated on the very existence of an enterprise providing employment for the employees who wish to exercise that right. The employer's right to fair labour practices in the form of a right to a fair dismissal based on operational requirements . . . must come into play when the exercise of the right to strike threatens the continued operation of the employer's enterprise."*[60]

6.4 In reasoning as aforesaid the Court relied on *Johnson & Johnson (Pty) Ltd*[61] where it had held that the fundamental right to fair labour practices in section 23(1)(a) of the Constitution meant that an employer had the right to dismiss an employee for a fair

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[57] M Brassey "Sam's Missile: Entrenching Industrial Action in a Bill of Rights" *EL* (1993) 10-28.
[58] Grogan above n 28 at 435.
[59] *SACWU and Others v Afrox Ltd* [1999] 10 BLLR 1005 (LAC) ("*Afrox Ltd*").
[60] Id at para 29.
[61] *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC).

reason based on the employer's operational requirements and in accordance with a fair procedure.

6.5 With respect if regard is had to the express constitutional protection afforded to the right to strike, it integral nature in collective bargaining and the prevailing socio-economic circumstances in South Africa, the position expressed in *Afrox Ltd* cannot be accepted.

*Contextualising the debate*

6.6 The right to strike should always be considered in its historical context. South African labour law is relatively new and the equilibrium which the LRA seeks to establish in respect of collective bargaining is based on the many lessons learned during Apartheid.

6.7 The Apartheid system thrived on the exploitation of workers and cheap labour. Against the backdrop of a labour law regime which denied workers fundamental rights, workers had limited recourse to act against the migrant labour system, low wages and unacceptable terms and conditions of employment:

> *"For many decades the labour laws blatantly discriminated on the grounds of race. Recognition of (black) trade unions was a battle only recently won. In the process, this battle or struggle took its toll; the lives of many workers and trade union officials were lost. The courts resisted progress for many decades. Even after the 1956 Act was amended, the courts found reason to deny black workers and their unions rights we now take for granted. The rights found in our Constitution and in the Act are hard-earned and well-deserved. The right to organise, the right to engage in collective bargaining, and the right to strike are priceless."*[62]

6.8 The LRA was enacted with this historical context in mind. This is not to say that the Act was enacted to protect employees at the expense of employers. Rather, the Act should be seen as balancing the interests of employees in relation to the interest of employers.[63] In balancing these competing rights and interests that the parties to a collective bargaining relationship might have the LRA takes into account the unequal bargaining position that exists between employer and employee.

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[62] *Food & Allied Workers' Union and Others v Pets Products (Pty) Limited* [2000] ZALC 25.

[63] *Afrox Ltd* above n 59.

6.9 The logic in this is better understood when one considers the notion of substantive equality. The nature of the equality recognised by our Constitution is substantive as opposed to formal. While formal equality presumes that all persons are equal, substantive equality recognises that genuine equality can only be attained by taking into account societal imbalances.[64] Similarly, in the context of collective bargaining it must be accepted that employers have more social and economic power than individual workers. Against this backdrop it becomes apparent the Constitution and the LRA are not attempting to limit the bargaining strength of employers but rather to place workers in a position, as far as is possible, to negotiate with employers on equal terms.

6.10 The importance of the right to strike is amplified when one considers the prevailing socio-economic conditions in South Africa. The unemployment rate in South Africa is 24,3% and approximately 45.5% of people live below the poverty line.[65] In such circumstances employers are in a greater bargaining position because the supply of workers far exceeds the demand that exists for such workers. At this point it must be remembered that collective bargaining is essential to good labour relations and the maintenance of industrial peace.

6.11 The power imbalance between employer and employee needs to be addressed before any reasonable measure of collective bargaining can be said to occur. The right to strike is the bridge that sweeps across this divide. Therefore, any measure which limits its potency can have serious ramifications on collective bargaining. The same cannot be said about the employer's right to retrench and it is for this reason that the former and not the latter constitutes an express constitutional right.

6.12 During strikes the very livelihood of individual employees is endangered. On the other hand, the continued viability of a commercial enterprise may be placed at risk. Both these interests are important to the well-being of society.[66] However, ultimately based on how inextricably linked the right to strike is with collective bargaining, it is reasonable to take the position that an employer's recourse to retrenchments consequent upon strike action should be limited.

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[64] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC).

[65] Statistics SA Quarterly Labour Force Survey Quarter 4, 2014; Statistics SA Poverty Trends in South Africa, in reference to the upper-bound poverty line (R620 per capita per month in 2011 prices).

[66] *Afrox Ltd* above n 59.

## 7. THE EXTENT OF THE LIMITATION ON THE EMPLOYER'S RECOURSE TO RETRENCHMENTS

7.1 At this point it should be pointed out that there is a distinction between protected and unprotected strikes. Although the right to strike is invaluable to collective bargaining the exercise of rights should not prejudice the rights and freedoms of others or the public interest. In this regard the LRA set limitations on the right to strike with this in mind. In circumstances where this right is exercised outside those parameters then any argument for a limitation of an employer's right to retrench falls away. The limitation being proposed in this paper is therefore only in relation to protected industrial action and its importance to collective bargaining.

7.2 The limitation proposed in this paper is one that flows from the contractual principle of the mitigation of damages. This principle can be expressed thus:

> *"This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence – neglect to do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such claim says 'admitting that in fact you suffered those damages, you have only yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me'."*[67]

7.3 The application of this principle, in my mind, strikes the balance of fairness between the right to strike and the right to retrench in the context of collective bargaining. It accepts the position expressed in *Afrox Ltd* that the employer's right to fair labour practices comes into play when the exercise of the right to strike threatens the continued operation of the employer's enterprise but give nuance to this position.

7.4 In circumstances where the effects of a strike have given an employer the right to exercise its right to retrench, such right should only be exercised where the employer took reasonable steps during the strike to mitigate the effects of the strike. Or it can better be expressed as follows. In circumstances where the employer's reliance on operational requirements for dismissal is based on the immediate consequences of a strike, the employer should only be able to exercise the right to retrench only if:

> *The employer took all the steps that a reasonable employer would have taken in the circumstances to mitigate against the effects of the strike.*

[67] *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 388.

7.5 It is not a legal leap to state that the duty identified above can be inferred from the LRA. Section 64(1)(b) of the LRA requires in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer. In *Ceramic Industries*[68] the Labour Appeal Court held that the purpose behind this notice requirement was:

> *"Firstly it is to enable the employer if it wishes to avoid the proposed strike by giving in to the employees' demands to avoid the strike by doing so. Secondly it is to afford the employer who does not intend to avoid the proposed strike the opportunity to make appropriate arrangements (e.g the employment of replacement labour) to protect his business during the strike."*[69] (My emphasis)

7.6 In circumstances where an employer has not fulfilled this duty, then their right to retrench should fall away until such a time that the employer can establish that the predominate cause of their right to retrench flowing from operational requirements is not the immediate effects of a strike.

## 8. CONCLUSION

8.1 The right to strike is an integral and important aspect of collective bargaining. An intrusion into its potency should be interrogated thoroughly. In light of inextricable link between the right to strike and collective bargaining, an employer's recourse to retrenchments consequent upon strike action should be limited. Whether this is effected by courts through an interpretation of the purposes and rights in the LRA and Constitution or by the Legislature, it is clear that the limits of the right to retrench against the backdrop of collective bargaining needs to be further interrogated.

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[68] *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC).

[69] Id at 677; *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of South Africa and Others* [1998] ZALC 86 at para 16.