

Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond (2005) 26 ILJ 595 [†] ^{*}

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Introduction

This article revisits a vexed and much-debated question: when is it 'fair' for an employer, in the course of restructuring its business, to dismiss an employee for declining to accept changes in her or his terms and conditions of employment?

The background to this question is the fiercely competitive climate in which many businesses, exposed to the full force of global economic pressures, find themselves, giving rise to the need for constant adaptation and, conversely, the spectre of dismissal for many employees. ¹ The legal context is a lengthening series of Labour Court (LC) and Labour Appeal Court (LAC) decisions in which the meaning of substantive fairness under these circumstances has been considered in great

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detail, but in divergent ways. ² Though every judgment is case-bound to a greater or lesser extent, this article will try to extrapolate principles of general application.

The basic principles, at least, seem clear. Dismissal disputes are 'disputes of right', which are resolved by arbitration or adjudication; disputes about changes to terms and conditions of employment are 'disputes of interest'. Yet, in practice, there appears to be some scope for overlap. Tamara Cohen sums up the position as it stood in mid-2004:

'Interest disputes are intended to be resolved in the collective bargaining arena. Allowing an employer to undermine this process by unilaterally exercising the power to dismiss in order to compel an employee to accept a demand, would be in breach of s 187(1)(c) ³ and would constitute an automatically unfair dismissal. Nevertheless the wide scope of "mutual interest" disputes encompasses proposed changes to terms and conditions of employment as part of a business restructuring exercise.

Notwithstanding the clear demarcation of interest and rights disputes and their respective dispute-resolution forums, such disputes by their very nature also fall within the ambit of s 189. ⁴ Provided the employer is able to prove on the facts that the purpose of the proposed changes and resultant dismissals is motivated by operational requirements and is "not underpinned by ulterior motive to dismiss for not acceding to a demand", no conflict between s 187(1)(c) and s 189 need arise.' ⁵

Thus, two questions are involved: when dismissal in a restructuring dispute will be found automatically unfair in terms of s 187(1)(c), and when it may be justified by the employer's operational needs (assuming that a fair procedure is followed). This article deals with the first question only in passing and focuses on the second. ⁶

That the question is a sensitive one, involving a delicate weighing-up of employers' rights and interests against those of workers, is

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evident from the case law. In *SATAWU v Old Mutual Life Assurance Co SA Ltd*, ⁷ decided in February 2005, Murphy AJ drew the following balance sheet which is worth quoting at some length:

'It is trite to say that employers are entitled to reduce staff for a variety of reasons, including pursuing what they may consider to be a better cost structure. That said, this court remains duty bound to exercise an appropriate level of supervision and review in relation to employer's decisions regarding the need for retrenchment.... The debate about finding the appropriate level of scrutiny is well known, and has endured for the best part of two decades. Different judges have formulated the test differently at different times, introducing subtle variations and nuances.... The test formulated by the legislature in the 2002 amendments ⁸ harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective.... The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Discreto* ⁹ and *BMD Knitting Mills*.' ¹⁰

The 'subtle variations and nuances' alluded to by Murphy AJ, however, have been rather more than that. Between *Discreto* and *BMD Knitting Mills*, in relation to the 'appropriate level of scrutiny' of managerial decisions and the criterion to be used in exercising it, there was tension as well as continuity. And in *Algorax* ¹¹ and subsequent

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decisions, the LAC expressed itself in terms which, on the face of it, seem to lay a basis for a new and (potentially) far more stringent approach in determining the extent of the employer's freedom to dismiss. This evolution forms the focus of the article. In conclusion, it is also considered to what extent the new s 189A lays down a different (and less rigorous) criterion of substantive fairness in respect of dismissals falling within its ambit than that defined by the courts in terms of ss 188 and 189 of the LRA.

From *Discreto* to *Algorax*

In *SA Chemical Workers Union & others v Afrox Ltd* ¹² the LAC concisely summed up the law as it stood at the end of the 1990s. It held that, in dismissals based on operational requirements -

'an employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects (s 189(2)(a)). These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reasons'.

In reaching this conclusion the court was reasserting the dominant 'non-interventionist' approach, expressed by Froneman DJP in *Discreto* in the following much-quoted passage:

'The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The

manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.' ¹³

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At the time, this judgment was seen as putting paid to the more interventionist approach which, under previous Act, reached its high-water mark in the judgment of the former LAC in *NUMSA v Atlantis Diesel Engines Ltd* ¹⁴ where the court held as follows:

'Fairness in this context goes further than a bona fide and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.'

On appeal, the content of the duty to consult formed the crux of the argument and the Appellate Division (AD) was not called upon to consider the boundaries of substantive fairness in any depth. While emphasizing the importance of proper and timely consultation, and the need to consider alternatives to dismissal, the AD contented itself with observing that 'the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management'. ¹⁵ This might be seen as less than an endorsement of the above pronouncement by the LAC. Three years later, following the enactment of the current LRA, a differently constituted LAC in *Discreto* appeared to dispose decisively of the approach adopted by its predecessor, asserting in effect that the substance of an employer's decision to dismiss, provided it is based on actual operational reasons and complies with the requirements of procedural fairness, falls beyond the jurisdiction of the courts.

Five years later, however, the LAC in *CWIU v Algorax (Pty) Ltd* ¹⁶ appeared to revert to the position as stated in *NUMSA v ADE*. In *Algorax*, it should be noted, the dismissals were found to be automatically unfair; the comments quoted below were therefore obiter. Nevertheless, as will appear, the LC in subsequent matters tended to treat them as authoritative statements of the law. They must therefore be given their due weight.

Both the cardinal principles asserted in *Discreto* came in for significant revision. Firstly, dealing with the point that the court 'normally will not have the business knowledge or expertise which the employer as a businessperson may have to deal with problems in the workplace', Zondo JP qualified it as follows:

'This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this court is seised with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or

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should be fair.... Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic.' ¹⁷

Secondly, having noted that dismissal may be regarded as 'the death penalty in the field of labour', the court went on to draw a conclusion that appeared to fly directly in the face of earlier jurisprudence:

[Section 189 implies] that the employer has an obligation, if at all possible, to avoid dismissals of employees for operational requirements altogether or to "minimize the number of dismissals", if possible, and to consider other alternatives of addressing its problems without dismissing the employees and to disclose in writing what those alternatives are that it considered and to give reasons "for rejecting each of those alternatives". It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to *only resort to dismissing employees for operational requirements as a measure of last resort*. If that is correct, the court is entitled to intervene where it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to as a measure of last resort.' ¹⁸

Taken together, these pronouncements seemed to herald a more interventionist approach, which other members of the LAC bench enlarged on in subsequent decisions. In *Enterprise Foods (Pty) Ltd v Allen & others* ¹⁹ Davis AJA, referring to the above passage in *Algorax*, interpreted it as follows:

'The court must examine whether there is a fair reason to dismiss. If ... there are two rational solutions, one of which preserves jobs, fairness as mandated by the Labour Relations Act ... dictates that this is the solution that must be adopted by the employer.'

And in *General Food Industries Ltd v FAWU* ²⁰ Nicholson JA, without referring directly to *Algorax*, summarized the employer's position in very similar terms:

'After consultations have been exhausted the employer must decide whether to proceed with the retrenchments or not. The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that - even though reasons to retrench employees may exist - they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum.'

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This evolution in our case law should be viewed in a broader social context. The period 1999-2002 saw intense debate surrounding the proposed amendments to South Africa's labour legislation. Preceding and following the Presidential Jobs Summit held in October 1998, the rising tide of job losses emerged as the focus of trade union disquiet while in parliament, introducing his budget vote for 1999, Minister of Labour Membathisi Mdladlana described unemployment as 'the biggest challenge that confronts our young democracy'. ²¹ For the trade union movement, indeed, the greatest single problem which the amendments to the LRA needed to address was the perceived lack of protection it offered to employees against dismissal for operational reasons. ²² The introduction of s 189A, as heralded in the Labour Relations Amendment Bill 2001, reflected the main thrust of the legislative response. The extent to which the amendments addressed trade union (or employer) concerns falls beyond the scope of this article. The focus, instead, will be on the changing judicial response during the period when the Labour Relations Amendment Act 2002 was in the making - and since.

Can it be said that, following *Algorax*, our law has reached a new phase in which the courts will not only be 'less deferential' ²³ towards employers' decisions to dismiss but will not hesitate to set them aside when 'common sense or logic' (in the court's view) dictate otherwise, or when dismissal is anything but a 'last resort'? The position adopted in *Algorax*, it seems clear, goes further than the cautionary note sounded by Davis AJA in *BMD Knitting Mills*. In the latter case Davis AJA qualified his statement by adding that 'the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test'. ²⁴ In addition Davis AJA limited the purpose of the court's enquiry to establishing 'whether a reasonable basis exists on which the decision ... to dismiss for operational requirements is predicated'. ²⁵

Murphy AJ, indeed, mentions *Discreto* and *BMD* in one breath (above). In *Algorax*, *Enterprise Foods* and *General Food Industries*, on the other hand, the

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dividing line between 'fairness', as explained in *Discreto*, and 'correctness' is less clear-cut. No longer is the fairness of the decision judged essentially with reference to the employer's subjective intent (lack of bad faith or otherwise); the enquiry may now extend to the outcome of the decision (saving jobs or losing them). ²⁶

Does this mean that every dismissal for operational reasons must be found substantively unfair if it can be shown that the employer had a reasonable possibility of saving the job in question? Is business restructuring involving job losses effectively prohibited except as a measure of last resort? If not, what leeway remains for a business to change to less labour-intensive methods of operation in order to become more competitive? The remainder of the article will try to give a legal answer to these very practical questions.

'Fairness'

Section 188 of the LRA states that dismissal for operational reasons will only be fair if the employer proves 'that the reason for dismissal is a *fair* reason ... based on the employer's operational requirements' (emphasis added). The term 'operational requirements', as defined in s 213, is broad enough to include every conceivable business consideration that might lead an employer to consider dismissal in the context of restructuring. Had this been all the LRA said, employees would have been all but defenceless; every dismissal must, after all, impact in some way on an employer's operational requirements. As noted in *BMD Knitting Mills*, however, the word 'fair' introduces a vital qualification. Though seldom considered explicitly by the courts and frequently taken for granted, it is this concept - rather than the presence or absence of an 'operational' basis for the employer's decision - that lies at the heart of most disputes about substantive fairness.

The starting-point, therefore, is that an enquiry into the substantive fairness of an operational requirements dismissal is twofold: first, whether it was in fact based on 'the economic, technological, structural or similar needs of an employer' ²⁷ and, second, whether that reason was 'fair' in the sense of being adequate, when weighed up against the employee's basic right to fair labour practices, ²⁸ to justify dismissal. It is instructive in this regard to note the corresponding provisions of the United Kingdom Employment Rights Act 1996. Section 98(1) of that statute in the first place requires the employer to show that the reason for

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the dismissal is 'that the employee was redundant'. This, however, is not the end of the enquiry. Subsection (4) goes on to provide as follows:

'Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.' ²⁹
It is submitted that the qualifier 'fair' in s 188 serves a similar purpose as 'reasonably' in s 98(4)(a) of the ERA. ³⁰

A further aid to interpretation is to be found in s 3(a) of the LRA, which states that the Act must be interpreted 'to give effect to its primary objects'. These include (a) giving effect to and regulating the fundamental rights conferred by s 23 of the final Constitution, and (b) giving effect to obligations incurred by the Republic as a member state of the International Labour Organization (ILO). It is submitted that s 23 of the Constitution is of little assistance in the present context in that it contains no residual concept of fairness nor any more precise definition than that laid down by the LRA. ³¹ ILO Convention 158 likewise adds little, stating merely that '[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination ... based on the operational requirements of the undertaking, establishment or service'. ³² More light, however, is shed on the matter by ILO Recommendation 166, ³³ which contains the following:

'19. (1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned....

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21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, *inter alia*, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.'

While an ILO Recommendation does not have the force of international law, it may nevertheless be persuasive when seeking to interpret a requirement of the relevant convention or, in this case, the LRA. The abovementioned guidelines have entered our case law, ³⁴ and it has been noted that 'the Act and the Code follow the approach of the International Labour Organization concerning fair termination of employment' as manifested in Convention 158 and Recommendation 166. ³⁵ Section 189(2)(a) of the LRA, however, only stipulates measures to 'avoid' or 'minimize' dismissals as a topic of consultation. Recommendation 166 goes further, suggesting that an employer's decision to dismiss will only be 'fair' or 'valid' if the employer has sought to 'avert or minimize' the dismissals and that, in particular, the measures set out in article 21 of the recommendation (above) should be among those considered. This restriction on the exercise of managerial prerogative is, however, subject to the qualification that no measure prejudicial to the 'efficient operation' of the business need be taken. Business efficiency rather than necessity, in other words, is the yardstick.

This rather minimalist approach, akin to that enunciated in *Discreto*, is a far cry from the language adopted by the LAC in *Algorax* and subsequent cases (above). International law and constitutional values, of course, lay down a floor of rights, not a ceiling, and parliament as well as the courts are at liberty to give those rights a more generous interpretation provided this does not offend against any other basic right or (in the case of the courts) go beyond the meaning that may legitimately be ascribed to the provision in question. Is this what the LAC has done in its interpretation of a 'fair' reason for dismissal based on operational requirements? Has it, in effect, ignored the proviso contained in article 20 and given the measures listed in article 21 (assuming they are applicable) an all but obligatory nature? Is 'necessity' rather than 'effectiveness' the crux of the new definition of substantive fairness?

This question was answered in the affirmative by Zondo JP in *County Fair Foods (Pty) Ltd v OCGAWU & another* ³⁶ where, several months prior to the *Algorax* judgment, he ruled as follows:

'If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show that the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by s 189 of the Act to explore the possibilities of avoiding the employee's dismissal.'

The position, then, would seem to be clear. A reason for dismissal based on operational reasons is 'fair' only if dismissal is 'a measure of last resort' or 'cannot be avoided'. This follows, above all, from the duty of the employer to consult about measures to 'avoid' dismissals and, possibly, to implement them proactively. What would be the purpose of such consultation if the employer is free to dismiss regardless of the outcome?

Indeed, did the LAC even in *Discreto* not qualify its rationale for non-interference with an employer's 'rational commercial or operational decision' by adding the rider 'properly taking into account what emerged during the consultation process'?

Before following the question to its conclusion it is necessary to consider a final piece of the legal jigsaw puzzle: the decision by the LAC in *Fry's Metals (Pty) Ltd v NUMSA*, ³⁷ unanimously approved by the Supreme Court of Appeal in *NUMSA & others v Fry's Metals (Pty) Ltd*. ³⁸

Fry's Metals: Dismissal for Profit

If in the *Algorax* line of decisions the LAC appeared to go to new lengths in protecting employees against dismissal for operational reasons, in *Fry's Metals* it appeared to lean in the opposite direction. The judgment is most noted for the distinction it drew between, on the one hand, the operationally justified dismissal of employees who decline to accept changes in employment conditions arising from business restructuring and, on the other, automatically unfair dismissal 'to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee'. ³⁹ That distinction, which has been the subject of much debate, will not be explored in this article except to note that, following the SCA decision and bar a successful appeal to the Constitutional Court, it must now be

considered settled law. In addition, however, Zondo JP went on to make an observation as to the extent of substantive fairness that was seen by many as significantly extending an employer's freedom to dismiss. Dealing with the proposition that an employer may not dismiss for operational reasons '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', Zondo JP disposed of it as follows:

'[T]hat argument has no statutory basis in our law. This is so because all that the Act refers to, and recognizes, 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.' ⁴⁰

In reality, this was nothing new. 'Increasing profits' is clearly an operational consideration, resorting under 'financial reasons' in the definition of 'operational requirements'. The same point had, in fact, been made in earlier judgments of the LAC without causing controversy.

⁴¹ Nothing was made of it on appeal, and the SCA had no occasion to consider it. But, though the notion of employers being free to dismiss workers 'merely to increase profit' may seem to open the floodgates to dismissal virtually at will, the causal nexus between a dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be 'fair' in the given circumstances to dismiss employees in order to increase profit or efficiency? At which point does the employer's right to seek 'more profit' outweigh employees' right not be dismissed unfairly, and how must it be measured? In *Fry's Metals* this question did not arise, and was thus left unanswered.

Far more significant in the present context is the apparent contradiction between the judgment in *Fry's Metals* and that in *Algorax*. In *Fry's Metals*, Zondo JP expressly rejected the contention that the 'survival of the business or undertaking' is the sole criterion of 'fairness' in relation to an operational decision to dismiss; in principle, an employer may also dismiss even if it 'is making profit and wants to make more profit'. But if this is so, how can it also be said (to quote *Algorax*) that an employer may 'only resort to dismissing employees for operational requirements as a measure of last resort'? Does *Fry's Metals* not mark a subtle reversion to *Discreto*? Once it is accepted that an employer may fairly dismiss employees to increase its profit, is the court not abandoning the criterion of 'necessity' and accepting that the 'commercial

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or business efficacy' of the decision to dismiss is (subject to the requirements of ss 189 and 189A) for the employer and not the court to determine?

These questions suggest, in the first place, that the contrast between *Discreto* and *Algorax* is less absolute than it may seem. In the remainder of this article it will be attempted to weave together the strands of the various judgments and arrive at a legally and practically consistent synthesis. To this end, important clues are to be found in a number of judgments following *Algorax* in which the same questions were directly or indirectly addressed.

NUMSA v Dorbyl

In *NUMSA & others v Dorbyl Ltd & another*, ⁴² the dispute - as in *SACWU v Afrox* (above) - involved the dismissal of employees who had been engaged in a protected strike. Following the test applied in *Afrox*, Fulton AJ was referred to the ruling in *Algorax* (above) and noted, correctly, that '[t]he decision ... appears to conflict with the decision in the *Afrox* matter'. ⁴³ The court then dealt with the conflict as follows:

'With respect, I think that the *Algorax* decision ... is somewhat anomalous if one considers that the Labour Appeal Court in [*Fry's Metals*] accepted that there is nothing in the LRA which precludes an employer from retrenching employees in order to increase its profits.... [The union's counsel] did not contend that an employer must be on the brink of insolvency before it is entitled to retrench employees. He said that he understood the "last resort" requirement in the *Algorax* decision to mean that an employer must show that retrenchments were *necessary*. Be that as it may, the court in *Algorax* did not mention, even obliquely, the *Afrox* decision and therefore in my view cannot be taken to have overturned that decision.' ⁴⁴ (Emphasis added.)

The court did not elaborate on its reasoning, and went on to rule that 'it is more probable than not that the dominant or main reasons for the dismissals were a variety of proper operational requirements and not the strike itself. I consequently find that the dismissals were substantively fair'. ⁴⁵ Implicitly, the court appeared to be saying that the test of 'last resort' used in *Algorax* must not be taken at face value and that, in particular, it does not

refer purely and simply to the survival of the business. At the same time, a test of 'necessity' appeared to be accepted. From the context it appears that 'necessity' is used in a different sense from that ascribed to it above. ⁴⁶ The notion of 'necessity' implies a purpose which, in the context of the *Algorax* decision, might have been taken to be the survival of the business. As relied on

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by Fulton AJ it clearly carries no such connotation. What the legitimate purpose of 'necessary' dismissals might be, however, was not explained and the question was rendered redundant by the finding that, in any event, the *Afrox* decision (and with it the *Discreto* approach) remained good law that could be applied irrespective of what *Algorax* - conflict or no conflict - might mean.

For an element of conflict undoubtedly remains, if only between the disclaimer in *Afrox* that 'fairness' implies dismissal as a measure of last resort, and the categorical assertion in *Algorax* that it does precisely that.

FAWU v SA Breweries

A different approach was followed in the controversial matter of *FAWU v SA Breweries* ⁴⁷ where the court was faced with the substantive fairness of dismissal in a 'spill-and-fill' operation (ie, declaring all positions redundant, redefining job descriptions and inviting former employees to reapply). In contrast to Fulton AJ in *Dorbyl* (above), Gamble AJ methodically addressed the contrast between *Discreto* and *Algorax* and endorsed the latter. *Algorax*, it was found, had superseded the earlier approach and was 'of general application'. ⁴⁸ The test of fairness to be applied in terms of *Algorax* was explained as follows:

40.1 Whether the dismissal is fair or not is a question which must be answered by the court and the court must not defer to the employer for purposes of answering that question (at para 69).

40.2 The court should not hesitate to deal with an issue that requires no special expertise or business knowledge. Some problems require simple common sense and do not involve any complicated business transactions or decisions (at para 70).

40.3 If there is a way in which the employer could have addressed the problems by using solutions which preserve jobs rather than which cause job losses (or which could lead to further job losses), the court should not hesitate to deal with the matter on the basis that the employer should have used that solution, rather than the one which causes job losses:

"This is especially so because resort to dismissal, especially so-called no fault dismissal, which some regard as the death penalty in the field of labour and employment law, is meant to be a measure of last resort' (at para 70).

See also *WG Davey (Pty) Ltd v NUMSA* (1999) 20 ILJ 2017 (SCA) at 2024F.

40.4 Referring to section 189(2) and (3) the Judge President held as follows in the *Algorax* case:

"It seems to me that the reason for the lawmaker to require all of these things from the employer was to place an obligation on the employer to *only resort to dismissing employees for operational requirements as a measure of last resort*. If that is correct, the court is entitled to intervene when it is clear that certain measures could have been taken to address the problems without dismissals for operational reasons or where it is clear that dismissal was not resorted to as a measure of last resort' (at para 70) (emphasis added).'

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After referring to subsequent judgments (dealt with above) in which this approach was upheld, the court went on to cite the following passage from *BMD Knitting Mills* - apparently, as an amplification of the meaning of 'fairness':

'The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated.' ⁴⁹

Although the point is not elaborated further, the assumption appears to be that the above formulation of 'fairness' is consistent with the test laid down in *Algorax*. If this is so, the criterion of a 'reasonable basis' must be taken as meaning the same, for practical purposes, as a 'last resort'. While this stretches the limits of grammatical meaning, reliance was also placed on the approach laid down by Nicholson JA in *General Food Industries Ltd v FAWU* (above), to the effect that substantive reasons for dismissal 'will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum'. ⁵⁰ And, finally, Gamble AJ stated his intention of applying an approach similar to that of Davis AJA in *Enterprise Foods v Allen*, where it was held that if 'there are two rational solutions, one of which preserves jobs, fairness as mandated by the Labour Relations Act ... dictates that this is the solution that must be adopted by the employer'. ⁵¹

These statements give rise to similar speculation as in the case of *Dorbyl*. In both cases the court appears to be uncomfortable with the term 'measure of last resort' and the implications of applying it strictly. In both cases, accordingly, the court seems concerned to find an analogous term for expressing the essence of the test which, while remaining consistent with *Algorax*, will shift the enquiry to more familiar ground. Fulton AJ achieved this by relying on *Afrox* while noting 'necessity' as an equivalent to 'last resort'; Gamble AJ did so by asserting a 'reasonable basis' test while at the same time using the yardstick of 'all viable alternative steps' for measuring compliance with the mandated test. Having done so, Gamble AJ - like Fulton AJ -

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went on to note, with reference to *Fry's Metals*, that 'in a market-driven economy there can be no objection, in principle, to retrenching to increase profit margins (there is after all a duty to shareholders to do so)'. ⁵² Finally, the court accepted that 'the company's reliance upon [world-class manufacturing] as the primary factor motivating change in its workplace constitutes a valid "commercial rationale" ⁵³ which, on the facts of the case, was regarded as satisfying the requirements of substantive fairness.

More light is shed on the nature of the test by the manner in which Gamble AJ applied it. The individual applicants were divided into five categories according to the circumstances of their dismissal. One category, it was found, was dismissed 'because the company held the view that they were not capable of being trained' for new positions. In their case, it was held, the employer did not take 'adequate steps to assist these employees in obtaining [training]' and, therefore, failed to show that "'all viable steps' to avoid retrenchment had been considered and taken'. ⁵⁴

Another category was 'afforded an opportunity to enter into the training phase [and] evaluated thereafter'. In the absence of evidence to show 'that their subsequent retrenchment was not reasonably based on their failure to meet the criteria set down in that evaluation process', their dismissals were found to be substantively fair. ⁵⁵ Having trained the employees, in other words, the employer was deemed to have taken 'all viable steps' for purposes of the test. Although dismissal was not an absolute last resort - it was, presumably, possible to have given the employees more training - Gamble AJ appeared satisfied that the standard set in *Algorax* had been met.

The dismissal of yet another group of employees due to the outsourcing of their functions was held to be substantively unfair because, on the facts, 'no compelling reason [was] advanced by the company to explain why the decision to outsource in respect of this category of applicants was necessary to advance the interests of [world-class manufacturing]'. ⁵⁶ Lastly, the dismissal of employees who had failed to apply for positions in terms of the new dispensation, was held to be substantively fair. While it would have been possible for the employer to - for example - invite them to apply, it appears to have been accepted once again that the employer's duty to consider 'all viable alternatives' should not be interpreted too literally.

Conclusion: In Principle...

What answer does this survey of case law give to the question with which the article started: when is it 'fair' for an employer, in the course of restructuring its business, to dismiss an employee for declining to accept changes in her or his terms and conditions of employment?

Two propositions present themselves. The first is that the formulation of the court's role in *Algorax* and subsequent decisions undoubtedly allows greater scope for intervention with employers' decisions to dismiss than the more cautious formulation adopted in *Discreto*. This may be seen, at least indirectly, as a reflection of the acute societal concern about mass unemployment and job losses prevailing in the era of *Algorax*. On the face of it, certainly, the ruling that dismissal is only permissible as 'a measure of last resort' appears to arm the court with powers of prohibiting job losses along the lines demanded by labour during the negotiations leading up to the 2002 amendments to the LRA. But it may also be said to reflect an ongoing judicial concern to make sense of a complex requirement of law - the requirement that a dismissal based on operational needs must have a 'fair' reason, to be tested in the consultation process against criteria such as alternatives to dismissal - which, arguably, had previously been given insufficient weight. As such, the interrogation may be expected to continue.

This leads to the second proposition, which must be more tentative. Can it be said that, even in the brief period since the judgment in *Algorax* was handed down, the courts have set about qualifying it, softening its interventionist edge and bringing it more closely into line with the earlier law?

It is a fact that the courts have in no instance found occasion to interfere with an employer's decision to dismiss on the grounds that it was not 'a measure of last resort'. In *Algorax* itself, as noted already, the principle was stated obiter. In *Enterprise Foods v Allen* a drop in profits from 19% to 9%, combined with the union party's acceptance that there were 'justifiable economic reasons' for closing the plant in question, led the LAC to accept that the dismissals were substantively fair. ⁵⁷ Similarly, in *General Food Industries v FAWU*, the court accepted that a 5,9% profit level was not viable and the fact that costs at the employer's Salt River plant were significantly higher than at other plants, exacerbated by a general wage increase, created a situation where dismissals were justified.

These rulings, as much as the approach adopted by the LC in *Dorbyl* and *SA Breweries*, indicate that the 'last resort' principle cannot be interpreted in isolation and is, in practice,

closely related to the fact that 'operational needs' are not limited to saving a business from extinction. To the extent that the 'last resort' criterion suggests the contrary, it is undoubtedly in need of clarification. Viewed in this

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light, the difference between *Algorax* and *Discreto* becomes less stark and terms such as 'necessary' (*Dorbyl*) or 'reasonable basis' for dismissal (*BMD Knitting Mills*, *FAWU v SA Breweries*) find their place in helping to define the meaning of 'last resort' in this particular context. In principal the position arrived at by the courts may be summarized as follows:

- '(a) To be valid, a dismissal for operational reasons must be (i) based on an 'operational requirement' as defined in s 213 of the LRA and, within this framework, (ii) for a 'fair' reason.
- (b) 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.
- (c) However, not every reason related to a legitimate business objective will be fair. Dismissal will only be substantively fair if it represents 'a measure of last resort', or is 'necessary', to achieve the objective in question. The employer must show, in other words, that in pursuing that objective 'all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum'. ⁵⁸

Notwithstanding the assumption made by Gamble AJ in *FAWU v SA Breweries*, it is not obvious that a 'reasonable basis' for dismissal means quite the same as a 'necessary' reason for dismissal, let alone a 'measure of last resort'. ⁵⁹ It may be argued that the distinction between 'reasonable' and 'necessary' in this context is comparable to the distinction between a 'reasonable employer' and a 'fair employer' test. ⁶⁰ A 'reasonable basis' for dismissal implies that the decision to dismiss forms one of a range of decisions that the employer might reasonably take in order to achieve the business objective in question. ⁶¹ The

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decision in *Algorax*, it is submitted, marks a shift from this position to one more akin to a 'fair employer' standard. It implies that the court will not only require the decision to be one of a 'reasonable' range but will expect the employer to show that it was, in effect, the only viable option remaining after all other possible means of achieving its objective had been rejected on reasonable grounds or exhausted. ⁶²

... And in Practice

There is scope, however, for a significant degree of continuity with the earlier approach. In *Algorax* Zondo JP acknowledged that, while the court should not hesitate to substitute its judgment for that of the employer in relation to business issues that can be resolved by the simple application of 'common sense and logic', it will 'normally ... not have the business knowledge or expertise which the employer as a businessperson may have to deal with problems in the workplace'. ⁶³ To this extent the courts may be expected to continue to defer to employers' business instincts and judgment calls as to the necessity of business objectives and the viability or non-viability of specific measures for achieving them. Unless bad faith or irrationality is manifest - for example, in refusing to consider alternatives to dismissal proposed by a consulting party - it is submitted that courts are likely to continue to apply the approach set out in *Discreto* when weighing up the 'necessity' of the decision to dismiss.

This, it is suggested, describes the approach that was followed in *General Food Industries v FAWU* and *Enterprise Foods v Allen* in finding that the employer's decision to dismiss was in both cases substantively fair. So, too, in *Mazista Tiles (Pty) Ltd v NUM & others*⁶⁴ the LAC accepted the substantive fairness of dismissals in the context of restructuring - in this case, without any reference to the 'last resort' principle - for the purpose of making the employer 'competitive'.⁶⁵ The employees were dismissed, in essence, for refusing to relinquish their existing status and becoming independent contractors. While the dispute turned to a large extent on whether the dismissals were automatically unfair, the LAC unanimously rejected the finding by the Labour Court that the employer could have resorted to a lock-out as an alternative to dismissal.⁶⁶ The reasoning of the court in this regard is terse and, on the face of it, not persuasive. Given the

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complexity of the facts, perhaps, too much should not be made of this. However, it is suggested that the demands placed on employers to explore 'all viable alternatives' to dismissal may not be very high.

In contrast, the Labour Court in *Masilela v Leonard Dingler (Pty) Ltd*⁶⁷ was confronted with a set of facts which led it to conclude - again without reference to *Algorax* - that the employer's decision to dismiss, though based on operational needs, was substantively unfair. In this matter, involving the dismissal of the applicant from his position as industrial relations manager, the possibility of offering him a more junior post as an alternative to dismissal was canvassed during the consultation process but not explored further. Both the court's deference to the employer's judgment, and its preparedness to use 'common sense and logic' in faulting that judgment, are evident in the manner that Francis AJ resolved the issue:

'There is an obligation in terms of s 189(3)(b) of the Act for the respondent to consider alternatives to retrenchment. The junior post was an alternative that was not pursued. The applicant was the only person who was affected by the retrenchment. I fail to understand why the position if it were created, was not offered to the applicant alone....

[36] I accept that there was a duplication of skills that existed after Masina was employed.... I accept also that there was a need to make the position of the industrial relations manager's post redundant. I do however not accept that there was a need to retrench the applicant. The junior administrative position should have been created and offered to the applicant. This could have prevented his dismissal. The dismissal was therefore substantively unfair.'⁶⁸

Similarly, in *Springbok Trading (Pty) Ltd v Zondani & others*⁶⁹ the LAC - again without reference to its own earlier decisions - found that the employer's motive for dismissing its hourly paid workforce in order to transfer them to a labour broker was no more than the desire to rid itself of the 'inconvenience' of maintaining them on its payroll. There can be little doubt that this reason, such as it is, was based on the employer's 'organizational' needs and, therefore, technically within the definition of 'operational requirements'. However, as Jafta AJA observed, 'I do not think that that kind of inconvenience was a fair reason warranting [dismissal of] the employees'.⁷⁰

Also in *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & others*⁷¹ the employees' dismissal was found to be substantively unfair. Although it was 'common cause that there was a need for the appellant to retrench ... it was not common cause that there was a need for the appellant to retrench the particular employees that the appellant retrenched'.⁷² In the first place, new employees were employed at other

branches of the employer's business shortly before the dismissal of the respondents. Second, the employer had failed to 'bump' the dismissed employees into the positions of employees performing similar work, but with shorter service, at other branches. Although, once again, the court made no reference to its judgment in *Algorax* and subsequent decisions, it ruled in effect that the dismissal of the employees in question was not 'necessary' to achieve the employer's objective.

Most recently, in *SATAWU v Old Mutual Life Assurance Co SA Ltd*, ⁷³ the Labour Court again had occasion to consider the substantive fairness of the dismissal of employees in the context of a restructuring exercise. The cardinal fact in this matter was that the union did not challenge the fairness of the reason for the dismissal. As a result, Murphy AJ found, 'there is no evidence that the decision to outsource was not for a legitimate, commercially justifiable objective, or that it was arbitrary or capricious in any way'. ⁷⁴ More problematical is the reliance placed by the court on the test for substantive fairness as formulated in *Discreto* and *BMD Knitting Mills*. On this basis, the following conclusion is drawn:

'The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context.' ⁷⁵

In support of this conclusion, reference is made to s 189A(19)(b) of the LRA which states that, in the case of 'major retrenchments' subject to s 189A, dismissal is substantively fair if it is 'operationally justifiable on rational grounds'. It is, however, questionable whether consideration of this standard is appropriate in casu. The dismissals took place in 1999 and the case appears to have been referred to the Labour Court well before the promulgation of s 189A. To the extent that s 189A introduces changes of a purely procedural nature, there is no reason why it cannot apply to disputes that arose prior to its promulgation. To the extent that it affects 'rights actually vested at the time of [its] promulgation', however, it must be presumed not to operate retrospectively. ⁷⁶ If the interpretation of recent jurisprudence suggested in this article is correct, the standard laid down in s 189A(19)(b) is less rigorous than that developed by the courts in terms of s 188 and the protection of employees against dismissal correspondingly more limited.

If this is so, then s 189A(19) must be understood as applying only to disputes that arose subsequent to its promulgation in August 2002.

The point must be taken further. The above argument rests on the assumption that the standard laid down by s 189A(19)(b) applies only to major retrenchments' in terms of s 189A; but given the clear wording of subsection (19), there seems no reason for doubting that this is the case. No attempt is made to extend the test to all cases of dismissal for operational reasons. In principle, in other words, different criteria of 'fairness' may apply to different categories of employees in dismissal disputes, thus prima facie infringing their (and their employers') constitutional right to equal treatment. ⁷⁷ The differentiation, however, may well fall within the scope permitted by s 36(1) of the Constitution (the limitation clause) which permits the limitation of basic rights subject to stringent criteria. ⁷⁸ The effect of the differentiation, as argued above, is that employees not subject to s 189A enjoy greater legal protection against dismissal than those to whom the narrow criterion laid down in s 189A(19)(b) is applicable. This, however, may be justifiable by the fact that the latter have a right to strike against the reason for their dismissal, which is not available to other

employees.⁷⁹ From a purposive standpoint, this additional weapon may be seen as a quid pro quo for a lesser degree of legal protection. It must immediately be conceded that it is highly unlikely that the legislature intended s 189A to have such an effect. At the time of its enactment the judgment of the LAC in *Algorax* had not yet been delivered and, quite possibly, parliament was merely seeking - as suggested by Murphy AJ - to codify the law as it stood. But the ongoing development of case law by the LAC and the LC - notwithstanding, and in full knowledge of, the standard laid down by s 189A(19) - cannot be ignored. The combined effect, it is submitted, has been to introduce a new set of questions that has still to be addressed by the courts.

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Returning to the judgment in *SATAWU v Old Mutual*, it appears that Murphy AJ was referring to the wording of s 189A(19) not as a source of binding law (which would have meant applying it retrospectively) but merely as an 'indication [by the legislature] of the standard to be applied'.⁸⁰ Even so, it is respectfully submitted that the reference is inappropriate. Nowhere does the judgment consider the test for substantive fairness as formulated in *Algorax*, *Enterprise Foods* and *General Food Industries v FAWU* which - if this article is correct - must be considered an authoritative interpretation of the meaning of 'substantive fairness' in dismissals falling outside the ambit of s 189A. Although, on the facts, the employer's decision in this matter might well have met the criterion asserted in *Algorax*, it would seem that the approach adopted by the court in arriving at its finding is at odds with the precedent laid down by the LAC.

Is the new criterion excessively strict? A decade or two ago the answer might well have been 'yes'. In today's climate it is less clear. The Constitution, and the LRA, require a careful balancing of employers' and workers' rights in order to maintain a 'fair' proportionality between them. Global competition and the dismantling of trade barriers have significantly undermined employees' bargaining position. A more rigorous interpretation of substantive fairness to reinforce the position of employees facing dismissal as a consequence of restructuring, while far from redressing the balance, may well be consistent with the constitutional right to fair labour practices to which ss 188, 189 and 189A of the LRA seek to give effect.

The practical question, given the inconclusive trend of recent case law, is how far the courts will go in developing the principle enunciated in *Algorax*. Will this approach, like that of the LAC in *NUMSA v ADE*, be overtaken by the equivalent of a latter-day *Discreto*? Or will the LAC concentrate its mind and continue the work it has started? With global pressures relentlessly persisting, and the talk of strike action against ongoing job losses once again being heard from the trade union movement,⁸¹ the next year or two may well bring an answer.

[†] *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); [2003] 11 Bllr 1081 (Lac).

^{*} Certain of the views expressed in this article were first mooted by the author in 'Retrenchment - A Measure of Last Resort Only?' (2004) 13 *Labour Law News & CCMA Reports* (4). I am also indebted to Graham Giles for giving me access to some of the most recent judgments and commentaries, with unbelievable promptness.

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¹ See, for example, Clive Thompson 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' (1999) 20 ILJ 755; Alan Rycroft 'The Evolving (but Confusing) Law on Business Restructuring' (2003) 24 ILJ 68; Clive Thompson 'The Changing Nature of Employment' (2003) 24 ILJ 179; Jan Theron 'Employment Is Not What It Used To Be' (2003) 24 ILJ 1247.

² The case law up to and including *Algorax* is admirably summed up by Tamara Cohen 'Dismissals to Enforce Changes to Terms and Conditions of Employment - Automatically Unfair or Operationally Justifiable?'

(2004) 25 ILJ 1993 and by Chris Todd & Graham Damant. 'Unfair Dismissal - Operational Requirements' (2004) 25 ILJ 896 at 900-4. Later case law, including the key decisions dealt with in this article, is analysed by Clive Thompson in 'Retrenchments and Restructuring' in Cheadle et al *Current Labour Law 2004* (LexisNexis Butterworths 2004) at 51ff. See also John Grogan 'Termination Lock-out' *Employment Law Journal* vol 19 no 6 (December 2003); *SATAWU v Old Mutual Life Assurance Co SA Ltd* (2005) 24 ILJ 000 (LC) at paras 81-85.

- ³ Section 187(1)(c) states that a dismissal is automatically unfair if the reason is 'to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee'.
- ⁴ Section 189 deals with dismissals based on operational requirements.
- ⁵ Cohen at 1896.
- ⁶ The Supreme Court of Appeal, in *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 14 SCA 1.1.1, in refusing leave to appeal against the judgment of the LAC reported as *Fry's Metals (Pty) Ltd v NUMSA & others* [2003] 2 BLLR 140 (LAC), upheld the distinction between the two species of dismissal with reference to the specific purpose of the species of dismissal proscribed by s 187(1)(c). No clarity, it was held, is to be gained from the notion of the underlying dispute 'migrating' from the realm of interest to the realm of right; on the contrary, '[t]he conceptual impasse that the concept of "migration" of disputes creates drives us to the solution the LAC embraced' (at para 60).
- ⁷ (2005) 26 ILJ 000 (LC); [2005] 4 BLLR 378 (LC).
- ⁸ Section 189A(19) of the Labour Relations Act 66 of 1995 (LRA), introduced in August 2002, states that a dismissal based on operational requirements provided it is subject to s 189A will be substantively fair if-

 - (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
 - (b) the dismissal was operationally justifiable on rational grounds;
 - (c) there was a proper consideration of alternatives; and
 - (d) selection criteria were fair and objective.
- ⁹ *SACTWU & others v Discreto (A Division of Trump & Springbok Holdings)* (1998) 19 ILJ 1451 (LAC).
- ¹⁰ *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC). The judgment continues: 'The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context.' This finding, and its application in casu, will be interrogated in the final part of this article.
- ¹¹ *CWU & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 1081 (LAC), discussed more fully below.
- ¹² (1999) 20 ILJ 1718 (LAC) at para 41. Though dealing with the dismissal of protected strikers, the court was here considering the general extent of the employer's freedom to dismiss for operational reasons.
- ¹³ at para 8. See also *Decision Surveys International (Pty) Ltd v Dlamini & others* [1999] 5 BLLR 413 (LAC) at para 27; *Steyn & others v Driefontein Consolidated Ltd t/a West Driefontein* (2001) 22 ILJ 231 (LC); [2001] 2 BLLR 239 (LC) at para 31. In *NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic* (2005) 26 ILJ 000 (LC); [2005] 1 BLLR 10 (LC), decided in September 2004 - ie, well after *Algorax* (see below) - the formulation adopted by Jammy AJ in *Steyn v Driefontein* resurfaced in the respondent's written submissions and was expressly approved by Potgieter AJ (at para 33).
- ¹⁴ (1993) 14 ILJ 642 (LAC).
- ¹⁵ *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A); [1995] 1 BLLR 1 (A) at 5.
- ¹⁶ (2003) 24 ILJ 1917 (LAC).
- ¹⁷ at paras 69-70.
- ¹⁸ at para 70; emphasis added.
- ¹⁹ (2004) 25 ILJ 1251 (LAC); [2004] 7 BLLR 659 (LAC) at para 17; followed by Gamble AJ in *FAWU & others v SA Breweries Ltd* (2004) 25 ILJ 1979 (LC); [2004] 11 BLLR 1093 (LC) at para 44. In addition, Gamble AJ noted that the court is 'enjoined by the ... Code of Good Practice to consider whether 'all possible alternatives to dismissal ... [have been] ... explored' (at para 45). Interestingly, the endorsement of *Algorax* by Davis AJA is seen as an endorsement of Davis AJA's own, rather more cautious, earlier ruling in *BMD Knitting Mills* (n 7 above at para 47). The decision in *FAWU v SA Breweries*, and the difference in approach between *BMD*

Knitting Mills and *Algorax*, are considered below. Tamara Cohen, in contrast, sees the approach adopted in *Algorax* as following that suggested in *BMD Knitting Mills* (n 4 above at 1893).

- ²⁰ (2004) 25 ILJ 1260 (LAC); [2004] 7 BLLR 667 (LAC) at para 55. Judgment was handed down on the same day as the judgment in *Enterprise Foods v Allen* (n 13 above).
- ²¹ Speech by Membathisi Mdladlana, Minister of Labour on the occasion of the 1999/2000 Labour Budget Vote in the National Assembly, 15 March 1999, at <<http://www.info.gov.za/speeches/1999/990401534p1005.htm>. Between 1994 and 1999, when the review of labour legislation was launched, unemployment increased from 20% in the narrow definition (33% in the broad definition) to 26% (36%): Wolfe Braude *South Africa Country Analysis* (NALEDI March 2004) <<http://www.naledi.org.za/cgi-bin/naledi/na-showfull.pl?1101841564> at 25.
- ²² See H Maenetje 'Consultation versus Negotiation in Operational Requirement Dismissals: The COSATU Proposals' (2000) 21 ILJ 1526. For comment on the negotiation process and its outcome from COSATU's perspective, see Neil Coleman 'Labour Relations and Basic Conditions of Amendment Bills' *COSATU Parliamentary Bulletin* no 4 (November 2001) at <www.cosatu.org.za/parlbull/pb200111.htm
- ²³ *BMD Knitting Mills* at para 19.
- ²⁴ *ibid.*
- ²⁵ *ibid.*
- ²⁶ See also Carl Mischke 'Operational Requirements and Substantive Fairness' *IR Network* 4 August 2004 at <<http://www.irnetwork.co.za/nxt/gateway.dll?f=templates&fn=default.htm>.
- ²⁷ s 213 LRA.
- ²⁸ s 23(1) of the Constitution of the Republic of SA (Act 108 of 1996). Such weighing up, it may be noted, is not the same as 'weighing up relative gains and hardships that result from dismissals': Todd & Damant *op cit* at 909 - although, as the authors accept, the *degree* of such gains and hardships may well be an indicator as to whether an underlying right has been infringed (see n 30 below).
- ²⁹ s 1(a) and (b), LRA.
- ³⁰ 'Cf the analysis by Todd & Damant who conclude that 'the absence of rationality on the part of the employer will almost certainly render the decision to dismiss unfair, *op cit* at 906, with reference to *Mkhize v Kingsleigh Lodge* (1989) 10 ILJ 944 (IC) where the dismissal of eight employees to effect a saving of R232 per month could, according to the authors, 'be characterised as unreasonable and irrational, and consequently could properly be described as unfair'.
- ³¹ As noted in *NEWU v CCMA & others* (2003) 24 ILJ 2335 (LC); [2004] 2 BLLR 165 (LC) at 168-9, the LRA does not exhaustively regulate the constitutional right to fair labour practices. This, however, does not apply to the right not to be unfairly dismissed: cf *3M SA (Pty) Ltd v SACCAWU & others* (2000) 21 ILJ 1657 (LC); [2001] 5 BLLR 483 (LAC) at para 17; *Baloyi v M & P Manufacturing* (2001) 22 ILJ 391 (LAC); [2001] 4 BLLR 389 (LAC) at para 21 for illustrations of the primacy to be accorded to the express provisions of the LRA in giving effect to basic labour rights.
- ³² art 4 of the Termination of Employment Convention 158 of 1982. 'Fair' in s 188 of the LRA, thus, must be interpreted to mean the same as 'valid' in art 4: see s 233 of the Constitution. The courts, however, have long assumed this to be the case, without reference to the convention: see, eg, *Burger v Alert Engine Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC).
- ³³ Termination of Employment Recommendation of 1982.
- ³⁴ *Manyaka v Van de Wetering Engineering (Pty) Ltd* [1997] 11 BLLR 1458 (LC) at 1464.
- ³⁵ *Smuts v Adair & others* (1999) 20 ILJ 931 (LC); [1999] 4 BLLR 392 (LC) at para 24. It is noteworthy that the Code of Good Practice regarding Dismissals Based on Operational Requirements (sch 8 to the LRA item 12) contents itself with restating that consulting parties must try to reach consensus on 'appropriate measures to avoid dismissals' (item 12(4)). No mention is made of the more detailed requirements contained in Recommendation 166; in particular, there is no suggestion that the employer is under a duty to consider or implement such measures of its own accord. But see *SACWU & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC); [1999] 10 BLLR 1005 (LAC) at para 36 where the LAC accepted that it is incumbent on the employer to 'take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals'.
- ³⁶ (2003) 24 ILJ 355 (LAC); [2003] 7 BLLR 647 (LAC) at para 27. This ruling - reinforced by that in *Algorax* and later decisions, discussed above - is not considered by Todd & Damant in their emphatic assertion that '[r]etrenchment need not be "necessary" in an absolute sense to be fair. Nor need it be "unavoidable" ' (*op cit* at 908 - although, as will be argued, the contrast between the two criteria is less absolute than it may seem: see discussion at n 61 below).

- [37](#) (2003) 24 ILJ 133 (LAC); [2003] 2 BLLR 140 (LAC).
- [38](#) (2005) 26 ILJ 689 (SCA), application for leave to appeal against the judgment of the LAC was refused. See also n 7 above.
- [39](#) s 187(1)(c) of the LRA.
- [40](#) at paras 32-3.
- [41](#) And was followed subsequently: see, for example, the minority judgment of Hlope AJA in *Algorax*: 'The necessity to effect changes in order for a business to be more viable or to improve efficiency therein falls within the ambit of operational requirements' (at para 46).
- [42](#) (2004) 25 ILJ 1300 (LC); [2004] 9 BLLR 914 (LC).
- [43](#) at para 4.1.5.
- [44](#) *ibid.* Nor, it may be noted, did the court in *Algorax* refer to the *Discreto* judgment.
- [45](#) at para 5.1.12.
- [46](#) See the discussion at 36 above.
- [47](#) (2004) 25 ILJ 1979 (LC); [2004] 11 BLLR 1093 (LC).
- [48](#) at para 43.
- [49](#) at para 47. The words 'has been taken in a manner which', which would limit the enquiry to procedural fairness, appear to be out of place in the present context and, it is submitted, need to be disregarded in order to make sense of the reasoning.
- [50](#) at para 44.
- [51](#) at para 47. Though this ruling is said to be a confirmation of Davis AJA's earlier 'reasonable basis' test in *BMD Knitting Mills* (quoted above), Davis AJA was in fact following the judgment in *Algorax* (at para 70). It is respectfully submitted that the resemblance between the 'reasonable basis' test and that applied in *Enterprise Foods* is not obvious enough to be asserted without more.
- [52](#) at para 51. In addition, the court stressed the caveat by Davis AJA in *BMD Knitting Mills* that 'fairness, not correctness is the mandated test' (at paras 47, 83). This would seem to further distance the court from *Algorax* in which, as noted above, the court unambiguously asserted its jurisdiction to overrule an employer's business decisions under appropriate circumstances.
- [53](#) at para 53.
- [54](#) at paras 76 and 167.
- [55](#) at para 169.
- [56](#) at para 182. On this basis, the employer's defence might be said to have failed the first leg of the test - that is, the existence of a reason based on its actual operational requirements - rather than the fairness of such a reason.
- [57](#) *Enterprise Foods v Allen* at paras 14-6.
- [58](#) per Nicholson JA in *General Food Industries v FAWU*. Todd & Damant arrive at a similar conclusion: 'If the employer's objection is one that is legitimate in the sense that it is motivated by genuine commercial considerations, then retrenchment need be unavoidable only in the sense that the employer's objective cannot otherwise reasonably be achieved by consensus': *op cit* at 908. 'Commercial considerations', in this context, would seem to mean the same as 'operational requirements'. Similarly Grogan states that '[e]mployees are not precluded from retrenching merely to increase profits, provided that retrenchment is the only rational way to secure that end.' Food for thought: retrenchment to enforce demands' *Employment Law Journal* vol 20 no 5 (October 2004).
- [59](#) The assumption, in other words, appears to be that a 'reasonable' employer will not dismiss employees unless it is 'necessary'. If this is accepted, it leads to the same practical conclusion as that suggested below.
- [60](#) As discussed in *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC); [2000] 3 BLLR 243 (LAC) at paras 45-50.
- [61](#) Todd & Damant seek to resolve the contradiction between the two approaches by arguing that '[t]he court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair': *op cit* at 907. This is based on the premise that '[t]here is seldom, if ever, a right or wrong answer to the question whether an employer should take a particular decision that it considers to be in the business interests of the enterprise': *op cit* at 904. Although it is argued that the employer, therefore, 'enjoys the ultimate discretion to determine which decisions are in the best interests of

the business' (*ibid*), the authors nevertheless accept that the court must 'satisfy itself of the commercial rationality of the decision' and 'will . . . not defer to the employer on the question whether or not the dismissals in question were fair' (*op cit* at 906, 908).

- ⁶² The non-interventionist approach upheld in *Discreto*, on the other hand, would imply that it is not for the court to 'second-guess' an employer's decision to dismiss provided it is *prima facie* reasonable and taken in good faith. It is suggested that Todd & Damant go too far in concluding as a general proposition (based on their analysis of s 189A(19)) that '*SACTWU v Discreto* establishes (correctly in our view) the applicable test. It has not been substituted or amended' (*op cit* at 910).
- ⁶³ *Algorax* at para 70.
- ⁶⁴ (2004) 25 ILJ 2156 (LAC); [2005] 3 BLLR 219 (LAC).
- ⁶⁵ at paras 51-58.
- ⁶⁶ at paras 51, 53. 'It seems to me', Jafta AJA concluded, 'that the alternative options suggested by the court a quo as having been available to the appellant were not viable options' (at para 53).
- ⁶⁷ (2004) 25 ILJ 544 (LC); [2004] 4 BLLR 381 (LC).
- ⁶⁸ at paras 35-36. See also *Springbok Trading (Pty) Ltd v Zondani & others* (2004) 25 ILJ 1681 (LAC); [2004] 9 BLLR 849 (LAC).
- ⁶⁹ (2004) 25 ILJ 1681 (LAC); [2004] 9 BLLR 864 (LAC).
- ⁷⁰ at para 69; emphasis added. See also *Cutts v Izinga Access (Pty) Ltd* (2004) 25 ILJ 1973 (LC); [2004] 8 BLLR 755 (LC).
- ⁷¹ (2004) 25 ILJ 1655 (LAC); [2004] 9 BLLR 849 (LAC).
- ⁷² at para 13.
- ⁷³ (2005) 26 ILJ 293 (LC); [2005] 4 BLLR 378 (LC).
- ⁷⁴ at para 88.
- ⁷⁵ at para 85. Grogan, without offering comment, explains the ruling in unmistakably 'reasonable employer' terms: 'The employer's chosen course need not be the best or least drastic; it must merely fall within the range of reasonable options available in the circumstances': 'Fair retrenchment' in *Labour Law Sibergramme* 3/2005 (7 April 2005) at 2-3.
- ⁷⁶ See *Curtis v Johannesburg Municipality* 1906 TS 308 at 311, where Innes CJ held as follows: 'The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away any rights actually vested at the time of their promulgation': cited in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) BCLR 151 (C) at para 121. See also *Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 26.
- ⁷⁷ section 9(1) reads: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'
- ⁷⁸ section 36(1) states that 'rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose'.
- ⁷⁹ s 189A(2)(b). Such an interpretation is implicit in Thompson's argument that the imposition of a more rigorous standard of 'fairness' by the courts was justified by the absence of a right to strike against dismissal: 'The strike prohibition . . . is specifically counter-balanced by the power of the court to assess that fairness [of dismissal] . . . If [the courts] both adopt a hands-off position and maintain the strike prohibition, the legitimacy of that prohibition will be seriously undermined': 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' (1999) 20 ILJ 755 at 770. While this may be said to foreshadow the reasoning behind the enactment of s 189A, the question remains - and the argument retains its validity - in respect of dismissals not subject to s 189A.
- ⁸⁰ at para 84. Todd & Damant discuss it in similar vein: at 909. This approach, it is submitted, fails for the reason noted in the previous footnote: the definition of substantive fairness in s 189A cannot be separated from the right to strike which s 189A permits. If a 'hands-off' stance is fair in a context where workers may choose whether to take strike action or seek adjudication, it does not follow that it is equally fair if adjudication is the only option.

81 *Cape Times* 2 May 2005.