

A critical analysis of operational requirement dismissal as governed by the South African Labour Relations Act (LRA) in the context of Neo-liberal Global Pressure

1 Introduction

With increased globalization employers competing on an international level are often required to reduce production costs. One of the more effective ways to do so and to thus encourage foreign investment is to reduce labour costs. In South Africa, however, the contrary has occurred with labour laws often quite stringent and in compliance with ILO standards. This is due to a number of factors, including the presence of COSATU within the ruling tripartite alliance and the historical significance of the labour movement within the country. In order to circumvent compliance with these stringent labour standards a number of employers in South Africa have privatized and outsourced services within their businesses. As a result these employers have retrenched a number of employees.

Generally one of the more effective ways to challenge employer prerogative and to protect employees is to provide employees with the right to strike. According to McIlroy: 'As long as our society is divided between those who own and control the means of production and those who only have the ability to work ... strikes will be inevitable because they are the ultimate means workers have of protecting themselves.'¹ While South African labour law is generally quite protective of employees, it does not provide employees with the right to strike when it comes to the retrenchment of some employees. The International Labour Organisation (ILO) also allows states to prohibit retrenched employees from striking. The purpose of this paper is to show weaknesses

1 J McIlroy Strike! How to Fight. How to Win (1984) at 15.

within both these approaches and to suggest reasons as to why retrenched employees should be allowed to strike.

2 Dismissal for operational reasons in terms of ILO and South African Law

In terms of the South African Labour Relations Act 66 of 1995 where employees challenge operational requirement dismissals the LRA distinguishes between large-scale and small-scale dismissals.² Where there is a small-scale dismissal employees must refer disputes (of substantive and procedural fairness) to conciliation followed by adjudication to the Labour Court. Where there is a large-scale dismissal and a challenge to its substantive fairness employees have a choice either to refer the dispute to the Labour Court or strike. If it is a challenge to procedural fairness this goes to the Labour Court.³ All these provisions are in accordance with ILO standards. Article 8 of ILO Convention 158 of 1982⁴ requires that workers who are unfairly dismissed be entitled to refer their disputes to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.⁵ This is also in accordance with the ILO Examination of Grievances Recommendation (No 130) of 1967, which allow rights disputes to be referred to adjudication. Thus the denial of the right to strike to employees dismissed for

2 The following have been recognized as large-scale dismissals

A dismissal of 10 employees where the employer employs between 50 and 200 employees.

A dismissal of 20 employees where the employer employs between 200 and 300 employees.

A dismissal of 30 employees where the employer employs between 300 and 400 employees.

A dismissal of 40 employees where the employer employs between 400 and 500 employees.

A dismissal of 50 employees where the employer employs between 500 and 600 employees.

Dismissals that do not fall within the above categories will be regarded as small-scale dismissals.

3 For an application of section 189A see NUMSA & Others v SA Five Engineering & others 2005 (1) BLLR 53 (LC) and RAWUSA v Schuurman Metal Pressing (Pty) Ltd 2005 (1) BLLR 78 (LC).

4 The Termination of Employment at the Initiative of the Employer Convention 158 of 1982 superseded ILO Recommendation 119 of 1963.

5 According to article 8(2) of the Convention where termination has been authorised by a competent authority the application of paragraph 8 (1) may be varied according to national law and practice. According to section 8(3) a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

small-scale operational requirements comply with ILO standards. By providing employees subject to large-scale operational requirement dismissals for substantive reasons with a choice either to refer disputes to the Labour Court or to go on strike the LRA goes further than what is required by the ILO. Even though South African law does comply with ILO standards both still provide inadequate protection to retrenched employees. The ILO allows the right to strike to be denied to employees who are retrenched, while South African law allows this right to be denied in the case of small-scale dismissals. This is problematic for the following reasons:

(a) Rights and interests disputes

The primary reason internationally for denying retrenched employers the right to strike is its categorization as a rights dispute. Disputes in general are classified as either rights disputes or interest disputes.⁶ A rights dispute involves the application or interpretation of rights under law or an existing provision set out in a contract of employment or a collective agreement.⁷ An 'interest dispute' is one, which arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining. It does not have its origins in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement, and the opposition of the other party to doing so.⁸

6 According to Clive Thompson the reason for the distinction is to try and keep judges away from economic issues. Such issues are better left to the market since judges do not have the expertise to deal with economic issues. Rights issues on the other hand can be decided by judges who are trained in dealing with rights disputes. See C Thompson South African Labour Law (2001) at AA1-323.

7 Shauna L. Olney Collective disputes over health and safety issues available at <http://www.ilo.org/encyclopaedia/?print&nd=857400046>

8 ILO substantive provisions of labour legislation: Settlement of collective labour disputes <http://www.ilo.org/public/english/dialogue/ifpdial/lg/>

The basic principle underlying procedures for the settlement of interest disputes is that the parties should resolve the disputes themselves through negotiation, while still having the possibility to threaten, or if necessary to take, industrial action. The basic principle underlying procedures for the settlement of disputes over rights is that they should, unless settled by negotiation, be resolved by arbitrators, courts or tribunals rather than by industrial action, because they involve the determination of existing rights, duties or obligations which both parties are bound to respect. In such cases, the availability of adjudication for rights and obligations makes recourse to industrial action unnecessary and usually dysfunctional.⁹ Any dispute over retrenchments would be regarded as a rights dispute since employees are challenging their pre-existing right of employment and are not requesting any new rights. Thus it is believed that disputes pertaining to retrenchments could more readily be resolved by adjudication as oppose to industrial action. This is however not correct. While the South African Labour Court is more readily able to resolve rights disputes it is unable to do so when it comes to retrenchments since it does not have the capacity to make business decisions, which is often required when dealing with retrenchments. In many cases judges are not prepared to question employer perogative. For example in *Mamabolo & others v Manchu Consulting CC*¹⁰ Van Niekerk AJ held that it merely had to require the employer to provide substantive proof of a need to retrench in the form of a commercial rationale and not to question the commercial imperatives that underlie that decision unless some ulterior motive was established. In other words, it felt that it was not the function of the Court to second guess the employer's decision to retrench.¹¹ Again in *Benjamin & others v Plessey*

9 Ibid.

10 1999 (6) BLLR 562 (LC).

11 *Mamabolo & others v Manchu Consulting CC* 1999 (6) BLLR 562 (LC) at 566 para 18. A similar viewpoint was adopted in *SACTWU & others v Discreto* 1998 (12) BLLR 1228 (LAC) and *Van Rensburg v Austen Safe Co* (1998) 19 ILJ 158 (LC).

*Tellumat SA Ltd*¹² the Court refused to declare a dismissal on the grounds of financial difficulties unfair even though the financial difficulties were the result of mismanagement on the part of the employers. In *Hendry v Adcock Ingram*¹³ the Court held that the saving of profits is a good enough reason to dismiss on the basis of operational requirements.¹⁴

There were a few cases where judges were prepared to question the employer but these are few. For example, in *Manyaka v Van de Wetering Engineering (Pty) Ltd*¹⁵ Basson J held that an employer who dismisses for operational requirements must prove that the termination of employment was the only reasonable option open to him as a measure of last resort.¹⁶ In *BMD Knitting (Pty) Ltd v SA Clothing and Textile Workers Union*¹⁷ the Labour Appeal Court held that the true test is to determine whether the dismissal is fair for both parties.

Hence decisions on substantive fairness by the Labour Court are inconsistent. While judges in some cases were prepared to question employer prerogative, most judges were not. This inconsistency still applies to small-scale operational requirement dismissals. They are still susceptible to decisions of the Labour Court that give preference to employer prerogative.¹⁸ ILO standards that allow retrenchment disputes to be referred to

12 (1998) 19 ILJ 595 (LC).

13(1998) 19 ILJ 85 (LC).

14 In *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) it was held that 'when judging and evaluating an employer's decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in doing so, are entitled to restructure their business'.

15 1997 (11) BLLR 1458 (LC).

16 *Manyaka v Van de Wetering Engineering (Pty) Ltd* 1997 (11) BLLR 1458 (LC) at 1464 para B.

17 (2001) 22 ILJ 2264 (LAC).

18 In a number of recent cases the Labour Court has been prepared to judge the reasonableness of employer decisions when it comes to a section 189 retrenchment. E.g. in *SATAWU v Old Mutual Life Assurance Company South Africa Ltd* (2005) 26 ILJ 293 (LC) the Labour Court held that when determining substantive fairness it must consider the employer's reasons. These reasons must not be arbitrary or capricious. It must have a commercial objective and there must be a rational connection between the employer's scheme and this commercial objective. Although

adjudication will also be subject to the same difficulties with adjudicators incapable of questioning business decisions. Employees subject to unfair dismissals should have adequate recourse to justice and this is being denied to them when their only recourse to justice is a referral to a labour court that may not be prepared to question employer prerogative¹⁹.

this test gives employees greater protection from retrenchment there is no guarantee that the Labour Court would consistently apply this test. The Labour Court itself is not equipped to make business decisions.

19 In addition to referring the dispute to the Labour Court some employees who are dismissed for operational reasons can also use the civil courts. They can sue the employer for breach of contract. This right is however limited. In *Fedlife Assurance Ltd V Wolfaardt* (2001) 22 ILJ 2407 (SCA) where an employee, subject to a fixed term contract was dismissed for operational reasons the Supreme Court of Appeal held that the provisions of the LRA in relation to operational requirements do not prevent a party from using common law principles. According to the common law of contract a party to a fixed-term contract has no right to terminate such a contract in the absence of repudiation or a material breach by the other party, unless the contract makes provision for the early termination of such contract on notice. Therefore according to the Supreme Court of Appeal a party is only allowed to dismiss for operational reasons in terms of the LRA where the duration of the contract is indefinite. Since most teachers are on indefinite contracts, the application of the *Fedlife* case to them is limited and hence employees in small business are still susceptible to weaknesses of the LRA when it comes to operational requirement dismissals. In addition, to using the LRA and the common law teachers who are dismissed may also try to use the Administrative Justice Act 3 of 2000 (PAJA). Its application, however, is also limited. In *Police and Prisons Civil Rights Union v Minister of Correctional Services & others* (2006) 27 ILJ 555 (EC); [2006] 4 BLLR 385 the High Court ordered that an employee be reinstated since the employees dismissal was in violation of PAJA. The application of PAJA however is also restricted. It only applies to state employees or where decisions are made by state institutions. Also the application of PAJA to labour law is still unsettled and has been rejected by a number of labour courts. In *SAPU & another v National Commissioner of the South African Police Service & another* [2006] 1 BLLR 42 (LC) the court indicated that PAJA is not applicable to labour disputes. A similar viewpoint was adopted in *Western Cape Workers Association v Minister of Labour* [2006] 1 BLLR 79 (LC) Even though the High Court and the Supreme court of Appeal are prepared to expand their jurisdiction to labour disputes, this does not provide significant protection to employees dismissed for operational reasons in small scale businesses. These employees would still be denied the right to strike and would still have to refer disputes to courts where judges are unable or unwilling to interfere with employer discretion when it comes to business decisions.

(b) Compulsory adjudication is not a suitable alternative to strikes

It is argued that disputes on retrenchments should be referred to compulsory adjudication.²⁰ This would eliminate strikes and its harsh consequences.²¹ Employees would not lose wages and employers would not suffer service interruption. Adjudication would only involve legal costs and adjudication fees. Compulsory adjudication would also benefit union leaders and employers. With compulsory adjudication union leaders and employers face fewer risks. Unlike in bargaining where unions and employers determine agreements with compulsory adjudication the judge determines results and is thus accountable for them.

Despite these benefits compulsory adjudication is not a suitable alternative to strikes. In industrial relations where deep conflict exists there is often no fixed principle of justice that can guide a decision by a third party e.g. as seen above it is not always clear when it is fair to retrench.²² Employer profits and government policy are merely crude points of reference.²³ The judge may therefore not be able to make a rational decision about the merits of the dispute.²⁴ Judges are also usually drawn from legal circles and would find it difficult to make decisions that have financial implications.²⁵ Compulsory adjudication may also fail to take into account each party's constituencies.²⁶ Instead the judge will be influenced by the strength of each party's adjudicative and

20 R Bruno 'Alternatives to strikes' (1997) 48 Labour Law Journal 449 at 449; B McAll 'Interest adjudication and the incentive to bargain: A principal-agent approach' (1990) 34 The Journal of Conflict Resolution 151 at 151; J Clark 'Is authoritative adjudication inevitable' (1992) 17 Political Science Quarterly 553 at 553; M Thompson 'Compulsory adjudication: The case of British Columbia teachers' (1973) 27 Industrial and Labour Relations Review 3 at 3.

21 O Hart 'Bargaining and strikes' (1989) 104 The Quarterly Journal of Economics 25 at 25.

22 McIlroy op cit note 1 at 25.

23 Ibid.

24 C Cooper 'Strikes in essential services' (1994) 15 I LJ 919.

25 Ibid.

26 P Feuille 'Selected benefits and costs of compulsory adjudications' (1979) 33 Industrial and Labour Relations Review 68.

economic arguments. Judges themselves can also never be independent. They themselves are subjected to their own values.²⁷ Not only are they influenced by personal biases but also by public interests, which are often equated with investment concerns that favour employers. Where judges are influenced by each party's bargaining power this is also problematic since it is difficult to assess bargaining power until it is used.²⁸ Adjudication thus holds workers and employers back from realising their own strength at the expense of vague incoherent influences.²⁹

Compulsory adjudication may also chill effective negotiations prior to the adjudication process. Once the two parties realise that the dispute will be referred to adjudication they would not bargain effectively.³⁰ Rather than taking responsibility for compromises reached during negotiations, compulsory adjudication enables parties to shift responsibility to judges.³¹ This is even more problematic when it comes to state employees since it affects democratic decision-making. It is unacceptable for a government to follow an unelected third party's decision on issues that affect the budget since it is the state's responsibility to make budgetary decisions.³² With third-party decision-making, parties to a dispute also have no ownership of the solution and are less likely to follow it than if they had agreed to the solution themselves.

27 McIlroy op cit note 1 at 25.

28 Ibid.

29 Ibid.

30 Freeman op cit note 17 at 74.

31 H Hyman 'Adjudication and the public employee: An alternative to the right to strike (1983) 3 Detroit College of Law Review 743 at 749.

32 This may also violate the concept of separation of powers. It is normally the executive or legislature that must make budgetary decisions. If an judge makes a decision that impacts on the state as employer this may affect the concept of separation of powers. In Harvey v Russo 71 L.R.R.M. a Pennsylvania court in the United States limited the finality of an adjudication award that appropriated funds from the state since it would have delegated legislative power to a non-legislative body.

(c) Denying employees the right to strike against small scale retrenchments violates constitutional rights

Denying small-scale employees the right to strike against retrenchments violate a number of constitutional rights including the right to equality, freedom of association, freedom of speech, the right to life, and the right to property.

Allowing employees subject to large-scale operational requirement dismissals to strike and denying this right to employees subject to small-scale operational requirement dismissals the LRA is in contravention of their right to equality protected by section 9 of the South African Constitution.³³ This is because employees subject to small-scale dismissals are not given the same protection as employees subject to large-scale dismissals. To challenge the substantive fairness of large-scale dismissals, employees could choose either to strike or to refer the dispute to the Labour Court. If they choose to refer the dispute to the Labour Court, the new section 189A(19) of the LRA requires the court to determine whether the dismissal was based on economic, technological, structural or similar needs; the dismissal was operationally justifiable on rational grounds; there was a proper consideration of alternatives and the selection criteria were fair and objective. These amendments make it difficult for the employer to prove substantive fairness in large-scale dismissals. The employer must not merely show a *bona fide* commercial reason to prove substantive fairness, but must do much more. He must show that his decision was rational, that he considered alternatives and that the selection criteria he chose was fair. Section 189A(19) criteria and the right to strike only apply to large-scale dismissals. They do not apply to small-scale dismissals. Employees who are subjected to small scale dismissals are thus given unequal protection.

³³ Act No 108 of 1996.

Employees usually associate in the form of trade unions for the purpose of bargaining collectively.³⁴ Without the right to strike employees would not be taken seriously during bargaining. The right to strike is thus essential for the purpose of bargaining and for the freedom of association of workers. The European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a specific provision relating to strikes. Parties to the Convention have, however, argued that the right to freedom of association guaranteed in article 11 should be interpreted to provide employees with the right to strike.³⁵ The ILO Conventions also do not contain an express right to strike, yet the ILO Committee of Experts has interpreted ILO Conventions 87 and 98, which provide employees with a right to freedom of association, to include a right to strike.³⁶

Freedom of speech is also said to include the right to strike. A number of American cases have equated strikes with freedom of speech. In *NAACP v Clairborne Hardware Co*,³⁷ for instance, a consumer boycott was protected as freedom of speech. In *State v Traffic Telephone Workers Federation of New Jersey*³⁸ the court held that picketing amounts to freedom of speech. Denying employees the right to strike against small-scale retrenchments violate their rights to freedom of speech and expression.

34 R Wynn *Collective Bargaining: An Alternative to Conventional Bargaining* (1983) 7.

35 The European Court of Human Rights has been inconsistent in its application of article 11. In *Schmidt & Dahlstrom v Sweden* (1979) EHRR 632 it held that article 11 does not protect the right to strike. In the more recent case of *UNISON v UK* (Unreported decision of 2002) the court indicated that a prohibition on the right to strike violated article 11.

36 ILC Provisional Record (1992) at 27.

37 458 US 886 (1982).

38 66 A.2d 616, 1 N. J. 335, 9 A.L.R.2d 854 (1949).

The right to strike is also integral to the right to life. The right to life could either be interpreted narrowly to refer to the right to be physically alive and to breathe, or it could be interpreted broadly to include the basic necessities of life, such as housing, education, health care, etc. The Indian courts have used this broad definition of the right to life to provide Indian citizens with socio-economic rights. They have held that the refusal of the state to provide its citizens with socio-economic rights constitutes a denial of their basic necessities of life and therefore violates their right to life³⁹ in the Indian Constitution. One could take this argument further and state that the right to strike is essential to acquire the basic necessities of life. If workers are denied the right to strike against retrenchments they would not receive a salary since they would be unemployed and thus not be able to afford basic life necessities such as education, health care and housing, etc.

Labour rights have often been associated with property rights.⁴⁰ In terms of the concept of 'self-ownership' we are all owners of our own bodies and therefore should not be forced to do anything with our bodies against our will. We can do whatever we wish with our bodies, provided that we are not aggressive to others who also have 'self-ownership' over their bodies.⁴¹ Since we own our bodies, we also own the labour that we

39 Article 21 of the Indian Constitution provides 'Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law'. In the case of Francis Corallie Mullin v Administrator of Delhi AIR 1981 SC 746 the court interpreted the right to life broadly to include basic necessities. For a more thorough understanding of the broad definition that has been given by the Indian courts to the right to life, see A Gabriel 'Socio-Economic rights in the Bill of Rights: Comparative lessons from India' (1997) 1 Human Rights and Constitutional Law Journal of Southern Africa 8 at 8.

40 In the American case of Perry v Sindermann 408 US 593 (1971) the court used property rights to protect labour rights. In this case an employee was employed at a Texas university for a period of 10 years on consecutive one-year contracts. The college did not have a formal tenure system; instead it had an informal practice of tenure. The college refused to renew his tenth one-year contract. The court held that if the respondent could prove that there was an informal tenure system he would have a property interest protected by the fourteenth amendment of the American Constitution.

41 G A Cohen Self-ownership, Freedom, and Equality (1995) at 68.

can perform with our bodies just as we do any other property. Being denied the right to strike could therefore be seen as an infringement of one's property rights. Our body belongs to us and hence is our property. By striking we are withholding the use of our body and any prevention of the right to strike would thus be a violation of our property rights.

4 Conclusion

This article has shown that both ILO and South African law do not provide adequate protection for employees who are dismissed for operational reasons. The ILO allows states to prohibit retrenched employees from striking. The LRA prohibits employees subject to small-scale operational requirements from striking. In such circumstances employees can refer disputes to adjudication. This provides employees with inadequate protection since judges are not suitably qualified to make business decisions and hence often heed to employer prerogative when it comes to retrenchments and often at the expense of employees. Since adjudication does not provide retrenched employees with significant protection it was suggested that all employees facing retrenchments be given the right to strike. A refusal to do so would not only violate ones constitutional right to strike but also other rights integral to the right to strike including the right to equality, life, property, freedom of association and expression. It is suggested that ILO standards and the LRA be amended to provide all employees who face retrenchment with the right to strike.