Acta Universitatis Danubius
JURIDICA

The New Dawn Birthed by Amendments to Section 187(1)(C) of the Labour Relations Act 66 of 1995: A Reflection on National Union of Metalworkers of South Africa and Others v Aveng Trident Steel

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Abstract: This article assesses the challenges precipitated by the amendments to the South African Labour Relations Act concerning dismissals for operational requirements. The contribution analyses a seminal judgment by the Constitutional Court, which marked the first case to have been heard regarding the amended section 187(1)*(c)* of the Labour Relations Act. The methodology employed is that of a qualitative case study which is the most suitable approach as we discuss a Constitutional Court judgment. The research notes that section 187(1)(c) of the LRA created and will continue to create contention between employers and employees where employers view dismissal for operational requirements as a legitimate reason for dismissal, and employees see it as a guise to dismiss them unfairly. The article also finds that while the Constitutional Court made a definitive pronouncement on the legitimacy of the section as a reason for dismissal, it, however, created a vacuum in terms of the test to be used in determining whether section 187(1)*(c)* is the true reason for dismissal in a particular case. It concludes by emphasising the importance of certainty in the law and offers suggestions on which test should be applied moving forward. This contribution will be of critical importance to legal practitioners regarding future litigation on section 187(1)(c) and academics as it opens the potential for further research and legislative development.

Keywords: Labour Law; Employment; Dismissal; Operational Requirements; Constitutional Court

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1. Introduction

It is trite in South African law that an employment relationship may be terminated by the employer based on the employer's 'operational requirements. Operational requirements refer to factors that may affect the viability of a business, such as technological advances that result in posts becoming redundant, a downturn in the economy which necessitates cost-saving measures on the part of the employer or structural needs of employer business (see Collier, 2018, pp. 248-249). Where the employer contemplates termination of employment based on operational requirements, there must be a consultation with the affected employees in terms of section 189(1)-(2) of the Labour Relations Act (Act 66 of 1995, hereafter "the Act"). The purpose of such consultation is to meaningfully engage with employees and find alternatives to termination of employment and or ways to minimise the number of terminations. As part of the consultation process, the employer may suggest specific alternatives, which employees must consider and may either accept or reject.

Section 187(1)*(c)* of the Act provides that a dismissal is automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer. Because when considering dismissals for operational requirements, an employer may propose measures to employees to avoid such dismissals, and employees may reject such proposals, the interpretation of section 187(1)*(c)* of the Act comes into focus. The question of whether employees that are dismissed after a failed consultation in terms of sections 189(1)-(2) wherein they reject the employer's proposal(s) constitutes an automatically unfair dismissal in terms of section 187(1)*(c)* has been the subject of controversy in litigation over recent years. At the centre of this controversy is the fine line between an automatically unfair dismissal for refusing to accept changed terms and conditions of employment and a legitimate dismissal on the grounds of an employer's operational requirements.

The critical question emanating from this controversy is whether an employer may terminate employees' contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment. This question was recently considered by the Constitutional Court (CC), which handed down judgment on 27 October 2020 in *National Union of Metalworkers of South Africa and Others v Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) and Another* 2021 42 *ILJ* 67 (CC) (hereafter "*NUMSA v Aveng* (CC)"). In *NUMSA v Aveng,* the CC was tasked with interpreting and

applying the amended provision of section 187(1)*(c)* of the Act. The court set an important precedent on whether an organisational restructure, culminating in changes to terms and conditions of employment, will always be automatically unfair if dismissals ultimately ensue.

The judgment is noteworthy and of cardinal importance to labour law jurisprudence as it marks the first time that the courts have delivered a judgment relating to section 187(1)*(c)* of the Act post-amendment. In this contribution, we contend that while the CC made the correct decision, the different approaches adopted by the separate judgments leave more questions than answers concerning the interpretation of section 187(1)*(c)*. In this paper, we critique the different approaches adopted by the CC and seek to establish the correct test to determine whether a dismissal falls within the ambit of operational requirements or refusal of a demand in terms of section 187(1)*(c)*.

2. National Union of Metalworkers of South Africa and Others v Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) and Another

2.1. Facts of the Case

During 2014, Aveng Trident Steel (Aveng) faced a sharp decline in sales volume and sought to realign its cost structure to ensure its sustainability. It initiated a consultation process in terms of section 189A read with sections 189(1)-(3) of the Act to obtain employees' input regarding the realignment of its business and proposed, among other things, the review of its organisational structure and redefinition of certain job descriptions. It proposed to cluster jobs along the lines of the provisions of the Main Agreement of the MEICB[1], which would lead to a combination of job functions resulting in significant cost savings.

[1] According to the Labour Court (hereafter "the LC") at par. 5 "The union proposed a five-grade structure as an alternative to retrenchment. The employer was prepared to consider this proposal, provided that it would fulfil its operational requirements, but required a more detailed proposal from the union. The five-grade structure would necessitate the re-designing of job descriptions and the employer was concerned that it should not increase costs beyond those provided for in the Main Agreement of the Metal and Engineering Industries Bargaining Council (MEIBC)". According to the Labour Appeal Court (hereafter "the LAC") at paras. 23 and 27 and CC at par. 12 "Given that your members and other employees have performed the duties as per the new job descriptions in terms of the interim arrangement agreed to between the parties, we shall afford them the opportunity to be engaged in the new positions at the rate prescribed by the main agreement of the MEIBC for performing work in such positions. This reasonable offer of alternative employment is a further *bona fide* effort on our part to avoid the contemplated retrenchments."

NUMSA accepted the proposed realignment, which resulted in 249 employees opting for voluntary severance packages, four employees being retrenched and the termination of 257 limited-duration contracts (*National Union of Metalworkers of South Africa and Others v Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd* 2018 39 *ILJ* 1625 (LC) (hereafter *NUMSA v Aveng* (LC)), par. 6; *National Union of Metalworkers of South Africa & Others v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd) & Another* 2019 40 ILJ 2024 (LAC) (hereafter *NUMSA v Aveng* (LAC)), par. 8 and 9; *NUMSA v Aveng* (CC), par. 9). Aveng concluded an 'interim agreement' with NUMSA in terms of which consultations over job descriptions would continue whilst the remaining employees would perform the functions of those who had departed (*NUMSA v Aveng* (CC), par. 10).

On 13 February 2015, NUMSA prematurely terminated the interim agreement and demanded a pay increase for the employees performing the work performed by those who had departed. Faced with the inevitability of being unable to continue with its operations, Aveng agreed to the increase and engaged NUMSA in further consultation regarding redesigning job descriptions. NUMSA attempted to convert the consultations into a wage negotiation, and consensus could not be reached (*NUMSA v Aveng* (CC), par. 11). Aveng advised NUMSA that consultations on the job descriptions had been exhausted and that it would implement the new job descriptions. Affected employees were offered the positions with the amended job descriptions, without a reduction in pay, as alternatives to the retrenchment. In April 2015, 71 employees accepted the alternative offers and 733 employees were ultimately retrenched (*NUMSA v Aveng* (CC), par. 13).

NUMSA contended that the retrenchment of the 733 employees constituted an automatically unfair dismissal in terms of section 187(1)*(c)* of the Act. It argued that the reason for the dismissal was the refusal by employees to accept a demand regarding altered job descriptions, which fell under the purview of section 187(1)*(c)* of the Act. The dispute between NUMSA and Aveng was referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for potential resolution.

2.2. CCMA Consultation and MEIBC Referral

On 15 May 2014, Aveng initiated the consultation process by filing a notice with the CCMA in terms of section 189(3) of the Act. In the notice, Aveng indicated that about 400 jobs might be affected, and had hoped that some employees would

agree to work in the redesigned positions to avoid the necessity of initiating retrenchment proceedings (*NUMSA v Aveng* (CC), par. 6). A proper and lengthy consultation process, facilitated by the CCMA, followed (*NUMSA v Aveng* (LC), par. 27). The facilitated consultation was conducted during June to October 2014 (*NUMSA v Aveng* (LC), par. 8). The facilitator withdrew from the process, and there was no consensus reached by both parties. After the failed conciliation in the CCMA, NUMSA attempted alternative means of resolution and referred the matter to the bargaining council. In May 2015, NUMSA referred an unfair dismissal dispute to the MEIBC for conciliation. Again, the dispute could not be resolved, and the presiding commissioner issued a certificate of non-resolution. After that, NUMSA approached the Labour Court (LC) as was their right under the auspices of the Act (*NUMSA v Aveng* (CC), par. 15).

2.3 The Labour Court Judgment

In the LC, NUMSA argued that the reason for the dismissal was the employees' refusal to accept a demand in respect of the altered job descriptions and grade structure, which constituted matters of mutual interest and therefore, the dismissals were automatically unfair in terms of section 187(1)*(c)*. Aveng maintained that the dismissals emanated from a fair reason: its operational requirements in line with section 189 of the Act. The LC held that NUMSA had to produce credible evidence to show that there was a demand followed by a refusal to accept such a demand that led to an automatically unfair dismissal in terms of section 187(1)*(c)*. NUMSA failed to provide such evidence (*NUMSA v Aveng* (CC), par. 18, 120).

The LC held that a proposal for a change of terms and conditions of employment is not unfair if this is done as part of a restructuring process. The LC relied on the judgment of the LAC in *Mazista Tiles (Pty) Ltd v National Union of Mineworkers* 2004 25 ILJ 2156 (LAC) (hereafter "*Mazista Tiles"*). In *Mazista Tiles* it was held that of utmost importance is the purpose for that change in terms and conditions of employment and in this instance, where it was for cost saving and the preservations of jobs, it was not unreasonable (*Mazista Tiles*, par. 57). The LC decided that the proposal to alter the job descriptions was an appropriate measure aimed at avoiding or minimising the number of dismissals and thus the dismissal was for a fair reason. (*NUMSA v Aveng* (LAC), par. 31). It held that the dismissal of the employees was not automatically unfair and that the dismissals were substantively fair.

2.4 The Labour Appeal Court Judgment

In the LAC, NUMSA averred that Aveng made a demand relating to a matter of mutual interest when it informed the employees that it intended to implement the new structure as per the redefined job descriptions. It further averred that the employees refused to accept said demand, and the employees were dismissed as a direct consequence of their refusal to accept the demand made by Aveng (*NUMSA v Aveng* (LAC), par. 38). Aveng contended that the wording of section 187(1)*(c)* did not suggest that simply because a proposed change to terms and conditions was refused and a dismissal thereafter ensued, the reason for the dismissal would necessarily be the refusal to accept the proposed change (*NUMSA v Aveng* (LAC), par. 39).

To give a proper contextual meaning to the section, the LAC had to examine the history of the amendments to section 187(1)*(c)* of the Act. After such examination, the LAC held that this section ought to be read in the context of the Act's scheme for the protection against dismissal, and in particular, section 188, which provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove a fair reason, such as an employer's operational requirements under section 189 of the Act (*NUMSA v Aveng* (LAC), par. 62). Whether section 187(1)*(c)* is breached does not depend on whether the dismissal is conditional or final, but rather on finding what the true reason for the dismissal of the employees is. Thus, the true reason for the dismissal of the employees must be determined. The LAC, therefore, had to determine whether the true reason for the dismissal was a refusal to accept the proposed changes to employment or whether it was based on operational requirements (*NUMSA v Aveng* (LAC), par. 65).

The LAC applied a two-stage enquiry to causation in establishing whether the dismissals were automatically unfair. The court looked at the factual causation and stated that the question to be asked was whether the dismissal would have ensued but for the refusal of the proposal or demand (*NUMSA v Aveng* (LAC), par. 68). If the answer to that is yes, then dismissal is not automatically unfair as the dismissal would have inevitably ensued. However, if the answer is no, the court held that such does not automatically imply that the dismissals are automatically unfair, but this leads to the second stage of the enquiry, legal causation. In determining legal causation, the court held that even where there is evidence suggesting a credible possibility that dismissal occurred because the employees refused to accept a demand or proposal, the employer can still show that the dismissal was for a different, more dominant and proximate reason which was based on legitimate operational requirements (*NUMSA v Aveng*

(LAC), par. 64). The LAC applied the dominant cause test as laid down in *South African Chemical Workers Union v Afrox Ltd* 1999 20 ILJ 1718 (LAC) (hereafter "*SACWU v Afrox"*).[1] Where there is more than one possible reason for dismissal, the *SACWU v Afrox* test seeks to determine the true or dominant reason thereof through the application of a causation test (*NUMSA v Aveng* (LAC), par. 68). In applying these principles, the LAC found that the dominant reason or proximate cause for the dismissal of the employees was Aveng's operational requirements (*NUMSA v Aveng* (LAC), par. 75). The employees' dismissals accordingly fell within the zone of permissible dismissals for operational requirements. They did not fall foul of section 187(1)*(c)* of the Act (*NUMSA v Aveng* (LAC), par. 75).

In dismissing the appeal, the LAC concluded that NUMSA's interpretation of the section would undermine the fundamental purpose of section 189 of the Act, which encourages engagement between employers and employees in an attempt to facilitate the creation of alternatives to retrenchments and to avoid scenarios where employers are chained and unable to propose changes to the terms and conditions of employment in terms of section 189 consultations. Not satisfied with the outcome of the matter in the LAC, NUMSA approached the apex court in a bid to turn the tides in its favour and bring finality to the matter.

2.5. The Constitutional Court Judgment

Further aggrieved by the finding of the LAC, NUMSA approached the CC for an audience in a bid to have the previous decisions overturned. The overarching issue that arose on the merits was whether, on a plain reading of section 187(1)*(c)* of the Act, it could be understood to mean that a dismissal is automatically unfair even if employees are dismissed for rejecting a demand that arises as a result of the employer's operational requirements. Noting the facts before it and the legal question to be answered, the CC tried to establish which approach should be followed in determining the true reason for dismissal under section 187(1)*(c)* (*NUMSA v Aveng* (CC), paras. 81-92; 106)[2].

[1] In *SACWU v Afrox* the issue was whether the dismissal occurred as a result of the employees' participation or support (or intended participation or support) in a protected strike in terms of section 187(1)*(a)* or whether it was based on the employer's operational needs by virtue of sections 188(1) and 189.

[2] The approaches followed in conducting this enquiry caused dissent. Half of the judges were of the view that the correct approach is to follow the causation test set out in *SACWU v Afrox* (LAC), while

The CC delivered three judgments on the question. Although the three judgments differed regarding the test(s) used to determine the reason for the dismissal, the judgments all reached the same conclusion. The court confirmed that where an employer has dismissed employees as a result of their refusal to accept a proposed change to their terms and conditions of employment as an alternative to retrenchment and as part of a business restructuring to meet its operational needs, then such a dismissal will be for a fair reason and not constitute a contravention of section 187(1)*(c)* of the Act (*NUMSA v Aveng* (CC), paras. 97-99). The CC provided some closure on the matter by ruling that section 187(1)*(c)* of the Act does not preclude an employer from dismissing employees for refusing a demand as a result of its operational requirements (*NUMSA v Aveng* (CC), paras. 101-102). In the following subsections, we briefly discuss the separate judgments in respect of the test that should be used to determine the true reason for dismissal.

2.5.1. The Majority Judgment

In respect of the interpretation of section 187(1)*(c)* of the Act, the majority stated in no uncertain terms that the determination of the reason for a dismissal is a question of fact, and the enquiry to be followed is an objective one (*NUMSA v Aveng* (CC), par. 70). It confirmed that *SACWU v Afrox* is the correct approach to be utilised in establishing the true reason of section 187(1)*(c)* (*NUMSA v Aveng* (CC), para. 80).[1] It also supported the use of this test as it had been accepted and applied by the LAC in several cases in the context of section 187(1) (*Van der Velde v Business & Design Software (Pty) Ltd* 2006 10 BLLR 1004 (LC); *Long v Prism Holdings Ltd* 2012 33 ILJ 1402 (LAC); *TFD Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC)). Therefore, this judgment found no reason why it could not equally apply in the context of a section 187(1)*(c)* dismissal.

The majority held that when parties are engaged in collective bargaining, one of them should not lightly be allowed to threaten to pull the plug on the process resulting in the demise of the other if it does not get its way. The majority concurred with the LAC in that the proposals were the only reasonable and sensible means of avoiding dismissals and entailed no adverse financial consequences for the employees. Therefore, the dismissal of the employees for operational reasons was the main or dominant cause for the dismissals and constituted a fair reason for

the other half rejected support of the causation test. Instead, they opted to support the enquiry conducted in *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 24 ILJ 1917 (LAC).

[1] The legal principle laid down in *SACWU v Afrox* was causation. There are two stages to determining causation; the first is factual causation and the second is legal causation.

the dismissals (*NUMSA v Aveng* (CC), par. 98). The majority concluded by giving recognising the principle that it is in the best interests of society that an employer remains economically viable (*NUMSA v Aveng* (CC), par. 100). It thus found that the dismissal of the employees was not automatically unfair in terms of section 187(1)*(c)* of the Act.

2.5.2. The First Concurring Judgment

This judgment concurred with the outcome and order reached in the majority judgment that the dismissal in the matter was not automatically unfair in terms of section 187(1)*(c)* of the Act. Still, it differed with the majority's reasoning that the true reason for the employees' dismissal in terms of section 187(1)*(c)* could be determined by applying the causation test as propounded by the LAC in *SACWU v Afrox* (*NUMSA v Aveng* (CC), par. 106). On this aspect, this judgment held that the causation test, which is traditionally employed in delict and criminal cases for purposes of linking the wrongful conduct to the harm suffered, is not suitable in this context and has the potential to yield an unpredictable outcome (*NUMSA v Aveng* (CC), par. 118).

This judgment further noted that applying the causation test as stated in *SACWU v Afrox* was not feasible from a plain reading of section 187(1)*(c)*. It argued that an interpretation of section 187(1)*(c)* viewed as imposing a causation test unduly strains the language of the section and misinterprets the rationale for causation as a legal requirement (*NUMSA v Aveng* (CC), par. 116). Consequently, this judgment held that the approach adopted by the LAC in *Chemical Workers Industrial Union v Algorax (Pty) Ltd* 2003 11 BLLR 1081 (LAC) (hereafter "*CWIU v Algorax*"), which entails the evaluation of evidence adduced to prove the true reason for the employees' dismissal where there are two conflicting reasons, is to be preferred (*NUMSA v Aveng* (CC), par. 109).[1] Be that as it may, using a separate line of reasoning, the judgment reached the same conclusion as the majority that the dismissal of the employees was not automatically unfair in terms of section 187(1)*(c)*.

[1] In *CWIU v Algorax* the court had to deal specifically with an alleged section 187(1)(c) automatically unfair dismissal. The employees were dismissed following their refusal to accept a proposal to change the shift system from working a straight-day shift to a rotating shift in the packing department. In *CWIU v Algorax* the key factor in determining whether the dismissal was automatically unfair was the employer's intention. Was the purpose or intention of the dismissal to compel the employees to accept the demand?

2.5.3. The Second Concurring Judgment

This judgment agreed with the majority insofar as the majority found that dismissal of the employees was not automatically unfair. However, it differed with the majority when it came to the interpretation of section 187(1)*(c)* of the Act and its approval of the LAC's decision in *SACWU v Afrox*. The judgment held that *SACWU v Afrox* proceeded from an incorrect premise in that it did not base its conclusion on the language of section 187(1) (*NUMSA v Aveng* (CC), par. 152). It provided additional reasons to those contained in the first concurring judgment and held that on its proper interpretation, the section does not incorporate causation as a requirement for determining whether a particular dismissal of employees by the employer constitutes an automatically unfair dismissal contemplated in that section (*NUMSA v Aveng* (CC), par. 138).

This judgment argued that the causation test defies the language of section 187(1)*(c)* (*NUMSA v Aveng* (CC), par. 148). It discussed the causation test as it applies to the law of delict, notably distinguishing between wrongful conduct and the reason or motive for the harm. (*NUMSA v Aveng* (CC): paras. 146, 147). The point that this judgment sought to make was that the application of the causation test would lead to an "absurdity" as "it would mean that by their refusal, the employees had caused their own dismissal." (*NUMSA v Aveng* (CC), par. 148). The absurdity seemingly arises because, in a delict, one assesses whether the defendant's wrongful conduct caused the harm suffered by the plaintiff. In the context of section 187(1)*(c)*, the harm is the dismissal. Therefore, one is assessing whether the harm was caused by the actions of the same party (employees). If accepted that the employees had caused their own dismissals, then they would have no recourse under the Act.

The remaining justices rejected the factual and legal causation test and instead applied the test adopted by the Supreme Court of Appeal (hereinafter "SCA") in *Stellenbosch Farmers' Winery Group Ltd and v Martell Et Cie* 2003 1 SA 11 (SCA) (*Stellenbosch Farmers' Winery)* in relation to resolving material disputes of fact. This involves an analysis of evidence, including assessing the credibility of the witnesses, their reliability and generally the probabilities or improbabilities of the contradictory versions (*NUMSA v Aveng (*CC*)*, par. 119). Although the judgment differed with the majority in its reasoning and interpretation of section 187(1)*(c)*, in the main, it concurred with the fundamental aspects being the finding that the dismissal of the employees was not automatically unfair.

3. Analysis

The CC critically evaluated section 187(1)*(c)* and distinguished it from dismissals for operational requirements in terms of ss 188 and 189 of the Act (*NUMSA v Aveng* (CC): para. 39-45). The court had the opportunity to revisit the interpretation and application of section 187(1)*(c)* of the Act concerning automatically unfair dismissals. In reaching its judgment above, the court had to embark on an enquiry to establish the true reason for the dismissal (*NUMSA v Aveng* (CC): paras. 69, 108).

The significant point from the judgment was the finding that the dismissal of applicants was not automatically unfair in terms of section 187(1)*(c)*. The reasoning for this finding was summarised succinctly by the majority, which proffered that in an ever-changing economic climate which includes, among other things, increased competition, operational reasons relate not only to downsizing but also to restructuring the company and its workforce in the manner it carries out the work. The court found that businesses that adapt quickly stand a better chance of survival (*NUMSA v Aveng* (CC): para. 99), and Aveng engaged with its employees through NUMSA to find ways of adapting to preserve its business as well as employees' livelihoods. However, NUMSA's narrow-mindedness, unfortunately, did not assist in making it possible to save jobs. The court found that wishing to prohibit Aveng from invoking provisions of the Act, and dismissing employees under such circumstances, undermined the Act's objectives of ensuring the viability and vitality of businesses (*NUMSA v Aveng* (CC): para. 99).

The judgment is also significant because while it was definitive about the applicability of section 187(1)*(c)* to this case, it inadvertently created substantial uncertainty in relation to the legal test that applies where disputes of this nature arise. Below we discuss some of the cardinal takeaways from the decision and conclude by offering some ideas on how labour law jurisprudence, particularly sections relating to automatically unfair dismissals, may be developed to create greater certainty.

The development of the concepts of "automatically unfair dismissal" and "dismissal based on operational requirements"

The concept of automatically unfair dismissal is found under the Constitution (Constitution of the Republic of South Africa, 1996 ("the Constitution")), the Act and the international labour standards. The concept, which finds its root in the International Labour Organisation Convention (Termination of Employment

Convention 158/1982: art. 5 (hereafter ILO Convention 158)), was only introduced in South African legislation by the promulgation of the Act.[1]

Section 187(1)*(c)* was amended with effect from 1 January 2015 to address and cure the anomaly that resulted in unintended consequences (*Labour Relations Amendment Act* 6 of 2014 ("Act 6 of 2014")). This section raised essential questions of law, as it brought to the fore the conflict that existed between this provision and sections 188(1)*(a)*(ii) and 189 of the Act, which permits dismissals for operational requirements. The court dealt with this dichotomy in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 (LAC), but the decision was controversial and faced criticism. The decision of the court was consequently rendered incorrect, resulting in the amendment to section 187(1)*(c)*, which now reads that "a dismissal is automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer" (Act 6 of 2014, section 31). This amendment was aimed at correcting the unexpected manner in which the courts interpreted the initial version (Grogan, 2017, p. 187; *Entertainment Catering Commercial & Allied Workers Union of SA v Shoprite Checkers t/a OK Krugersdorp* 2000 21 ILJ 1347 (LC); *Fry's Metals v National Union of Metalworkers of SA and Others* 2001 22 ILJ 701 (LC); *NCBAWU v Henric Premier Refractories (Pty) Ltd* 2003 24 ILJ 837 (LC); *Fry's Metals* (LAC); *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd* 2005 ILJ 689 (SCA) (hereafter *Fry's Metals* (SCA); *Mazista v NUM* (LAC); *CWIU v Algorax)*. In its original form, section 187(1)*(c)* of the Act rendered dismissals automatically unfair if its purpose was to "compel an employee to accept an employer's demand in respect of any matter of mutual interest between an employer and an employee".

After its amendment, section 187(1)*(c)* provides that a dismissal is automatically unfair if the reason for the dismissal is "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer." On a plain reading of the section and where it is accepted that any matter between an employer and employee is a matter of 'mutual interest', a conflict emerges between an employer's right to dismiss employees for operational reasons and the right of employees not to be dismissed for refusing to accept a demand, which demand may

[1] The concepts of "automatically unfair dismissal" and "dismissal based on operational requirements" were introduced into the South African jurisprudence by their incorporation into the LRA at section 187(1)(c).

very well form part of the negotiations to avoid dismissing employees in the first place.

After the amendment, the provisions in the Act, which regulate dismissals for operational requirements, remain unchanged. The definition of "operational requirements" has not been qualified to indicate that such dismissals are no longer permissible where employees refuse to accept a demand in respect of a matter of mutual interest (The Act, section 213). Nor have policymakers released employers from their statutory obligation to engage in a meaningful joint consensus-seeking process in an attempt to reach a consensus about measures to avoid, minimise or mitigate the number of dismissals before proceeding with dismissals on the ground of operational requirements (section 189(2) of the Act. In our view, such consultations are closely related to the process of collective bargaining). This could arguably include changing conditions of service during the process of dismissal on the ground of operational requirements to ensure the survival of a business.

The proper meaning, interpretation, and application of section 187(1)(c)

It is important to note that the interpretation process begins with reading the legislation concerned. The ordinary meaning must be attached to the words. The principle that the ordinary meaning should be given to the words of the legislation is only the starting point of the interpretation process. It means that the interpreter should not attach an artificial meaning to the text (Botha, 2012, p. 112). However, the context of the legislation, including all the factors inside and outside the text, which could influence and qualify the initial meaning of the provision, must be taken into account right from the outset (Botha, 2012, p. 112).

The Approach Followed by the Constitutional Court to Determine the True Reason for Automatically Unfair Dismissal Under Section 187(1) of the Act

The CC was faced with more than one possible reason for dismissal. It confirmed that when this scenario arises, an enquiry must be conducted into the true reason for the dismissal (*NUMSA v Aveng* (CC), paras. 69, 108). Regrettably, the judges split across three separate judgments in relation to the legal test that applies to determining the true reasons for the dismissal. The majority of the judges believed that the correct approach was to follow the causation test set out in *SACWU v Afrox*, while the two concurring judgments rejected reliance on the causation test. Instead, they opted to support the enquiry conducted in *CWIU v Algorax*. The first concurring judgment placed a great deal of emphasis on the *CWIU v Algorax*

approach in determining whether a dismissal constitutes an automatically unfair dismissal in terms of section 187(1)*(c)*.

This judgment misinterpreted or confused the enquiry undertaken in *CWIU v Algorax* in determining whether a section 187(1)*(c)* dismissal had occurred (*NUMSA v Aveng* (CC), paras. 125-126). From these two paragraphs, it seems the judges regarded purpose and reason as synonymous and used them interchangeably. This judgment's assertions that *Kroukam v SA Airlink (Pty) Ltd* 2005 12 BLLR 1172 (LAC) followed *CWIU v Algorax* must be rejected. The SCA matter expressly referred to the application of the *SACWU v Afrox* causation test (*Kroukam v SA Airlink*, par. 27). This could not have been an oversight on the court's part, as it expressly stated that the court is required to determine what the "dominant" or most likely cause of the dismissal was based on the evidence presented (*Kroukam v SA Airlink*, par. 29; Cohen, 2007, p. 1465). Determining the dominant or primary reason for the dismissal entails applying a portion of the causation test outlined in *SACWU v Afrox*. Unlike in *CWIU v Algorax*, which was concerned with determining the true reason for the dismissal. As a result, *Kroukam v SA Airlink* cannot be said to have followed *CWIU v Algorax*. *Kroukam v SA Airlink* did, in fact, support the *SACWU v Afrox* test (Newaj, 2021, p. 15).

Both concurring judgments express the opinion that, given the wording of section 187(1)*(c)*, the use of *SACWU v Afrox* is either inappropriate or without foundation. However, section 187(1), as correctly argued in the majority judgment, states that a dismissal is automatically unfair only if the employer's reason for dismissing is one of those listed in section 187(1). Where there is more than one possible reason for dismissal, which has been prevalent in all the cases under discussion, it is the main or dominant reason that must be established. This then brings into play the decision in *SACWU v Afrox*, which state that the dominant or most likely reason must be determined using the causation test (Newaj, 2021, p. 15).

The concerns expressed in the second concurring judgment that applying the causation test would result in an absurdity are without merit. It is widely accepted that in delict, factual causation is used to determine whether the plaintiff's harm resulted from or was caused by the defendant's wrongful conduct. With this in mind, the second concurring judgment approached it from the standpoint that applying the causation test to section 187(1)*(c)* means determining whether the dismissal of the employees was caused by their actions in refusing to accept the demand. As a result, this would be inconsistent with the causation test used in delict (Newaj, 2021, p. 15).

The first concurring judgment appears to be of the opinion that if *SACWU v Afrox* is used, there is no evaluation or proper evaluation of evidence (*NUMSA v Aveng* (CC), par. 126). This interpretation, in our view, cannot be correct. The majority decision states unequivocally that determining the reason for a dismissal is a question of fact 9 (*NUMSA v Aveng* (CC), par. 70). When there are multiple reasons for the dismissal, the dominant reason must be determined through an examination of the facts (*NUMSA v Aveng* (CC), paras. 70, 73, 80). The facts and a determination of the true reason for dismissal based on those facts can only be established through the leading of evidence and the subsequent evaluation of that evidence. Although the first concurring judgment claims that the LAC did not consider the evidence, the Judge expressly stated that the LAC found that the dominant reason for the dismissal was the employer's operational requirements "after considering all the facts." (*NUMSA v Aveng* (CC), par. 121). For a court to decide the main or dominant reason for dismissal, it must consider the evidence presented. This is true whether the investigation is referred to as 'determining legal causation' or simply 'determining the true reason for dismissal'. The court must consider the credibility and dependability of witnesses and all the probabilities. As a result, using the causation test does not preclude a proper evaluation of the evidence.

Taking into account the views of the different judgments on the issue of employers attempting to hide the true reason for the dismissal and using operational requirements as a scapegoat, it is important to note that despite the application of the causation principle, in a situation of forcing acceptance of a demand to change terms and conditions of employment, unscrupulous employers may still attempt to use operational requirements as a reason for dismissal whilst in truth the actual reason is that of forcing acceptance of a demand. In order to catch out those wayward employers, the causation test requires perfection and tightening.

4. Conclusion

The main lesson learnt from an analysis of this case is that in applying the automatically unfair dismissal provision in section 187(1)*(c)* of the Act, courts are required to interrogate what the cause of the dismissal is and determine the most probable cause of the dismissal by examining the facts before them and assessing whether that cause is the main, dominant, proximate, or most likely cause of the dismissal. This is seldom an easy call. The threat of dismissal can be an axe held

over employees' heads to elicit an agreement to change in terms of employment. However, the threat of dismissal can equally be a statement that there is no other option to save the struggling company and preserve as many jobs as possible if employees do not accede to the proposed changes.

There is also a lesson for unions about negotiation strategies. Trade unions have a right to determine their strategy and tactics in dealing with employers concerning disputes of right or disputes of interest and, generally, on how to handle consultations, negotiations, discussions, and collective bargaining with employers. It is the unions' prerogative to decide how to handle those matters. The courts should not dictate how and at what stage tactics and strategies should be used (Van Niekerk et al., 2019, p. 281). The courts consistently accepted the argument that operational requirements were the main cause of the dismissal and were critical of NUMSA's approach to dealing with viable alternatives that would have saved jobs. This criticism should not be viewed as the courts' attempt to curtail the rights afforded to trade unions in terms of determining their own negotiation tactics. The emphasis in the CC judgment on employers' needs for quick adaptation to survive and to ensure the viability and vitality of businesses will be welcomed by businesses. However, others will see the judgment as a betrayal of the Act's central theme of protecting employees from unfair dismissal. This tension is unavoidable and requires balance and good faith.

In conclusion, we opine that the approach followed by the majority judgment, which endorsed the causation test set out in *SACWU v Afrox*, is correct. It is pedestrian that the determination of whether an automatically unfair dismissal occurred requires one to establish whether the employees' refusal to accept the employers demand was the true reason for the dismissal. The causation test is directed at establishing just this. Once a link has been shown between the dismissal and the impermissible reason, the test requires that the evidence be evaluated to establish the main or dominant reason for the dismissal. None of the reasons advanced by the first and second concurring judgments for rejecting the test warrants its displacement. Ultimately, the assistance provided by the causation test in this area of labour law overshadows the reasons for its rejection (Newaj, 2021, p. 18). The findings from this assessment should bring a level of certainty to this area of the law by convincing courts of the continued role, importance, and application of the *SACWU v Afrox* test. This test is important in rooting out unprincipled dismissals clothed and disguised as operational requirements. The application of

this test in all cases of this nature will aid the achievement of one of the primary objectives of the Act, which is rooting out unfair dismissals (Newaj, 2021, p. 18).

The fact that the CC split into three judgements means that there is presently no certainty concerning the test applicable in determining the true reason for the dismissal in terms of section 187(1)*(c)* or, more generally, in relation to automatically unfair dismissals as a whole. This uncertainty will have a critical impact on how automatically unfair dismissal cases are going to be pleaded and argued and how witness evidence will ultimately be presented and evaluated. This split on the interpretation of section 187(1)*(c)* and the approaches adopted by the different judgements render such disputes all the more complicated and fraught with risk. This will be the case until the CC revisits the issue and provides more clarity or until the Act is further amended to provide proper guidance on the application and interpretation of section 187(1)*(c)*. In the meantime, it is advised that competent advice regarding any automatically unfair dismissal dispute be sought to mitigate any risks of protracted and costly litigation appropriately.

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