Automatically unfair dismissal of an individual employee under section 187(1)(c) of *the Labour Relations Act* 66 of 1995

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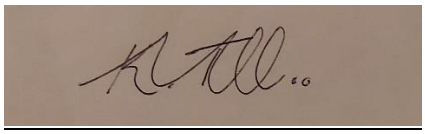
SOLEMN DECLARATION

I, Katlego Thatayaone Mothusi, duly declare that this study entitled, "Automatically unfair dismissal of an individual employee under section 187(1)(c) of the *Labour Relations Act* 66 of 1995", for the Degree Master of Laws in Labour Law at the North-West University (Mafikeng Campus) hereby submitted. This study has not been submitted previously by me or anyone else for a degree at this university or any other. Furthermore, I declare that this study is my own work in design, structure and execution and that all materials and sources contained herein have been duly acknowledged.



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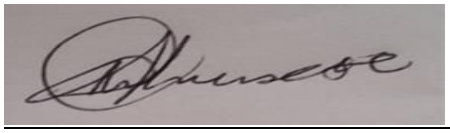

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"MOTHUSI, SEHUBA, MMINA TSHIPI, MOIKANYA THOLO"

DEDICATION

This study is dedicated to my parents for their forever unconditional support and love. To my brothers (Atlegang Mothusi and Reatlegile Mothusi). To the NWU Faculty of Law and all its subjects, for their support and assistance.

ABSTRACT

The right to fair labour practice is guaranteed in terms of section 23 of the *Constitution*. The right includes the rights of both employees and employers. In terms of the *Labour Relations Act* 66 of 1995, employees have the right not to be unfairly dismissed, on the other hand, employers have the right to dismiss for three of the recognised grounds, namely: misconduct, incapacity and operational requirements. If the right of the employer to dismiss is to be upheld, the right of the employee not to be dismissed unfairly should also be upheld. However, in *Jacobson v Vitalab* (2019) 40 ILJ 2363 (LC) the Labour Court when dealing with whether individual employees enjoy protection of section 187(1)(c) of the *Labour Relations Act* 66 of 1995, the court held that the provision does not apply to individual employees. The study determines whether the amended provision by the *Labour Relations Amendment Act* 6 of 2014 in section 31 is meant to exclude protection to individual employees or to merely promote an orderly collective bargaining process, by ensuring that employers do not use dismissal as an economic weapon. Moreover, the study aims to examine the primary aim and objectives of the *Labour Relations Act* 66 of 1995 to determine whether the Labour Court misdirected itself. This is done by examining the right to fair labour practice, how the right to operates to protect employees and employers in matters of mutual interests, i.e. disputes of rights and disputes of interests and the right not to be unfairly dismissed of employees.

Key Words - Automatically unfair dismissal – operational requirements – collective bargaining – mutual interest - disputes of rights – disputes of interests – unfair labour practice – individual employees – Amendment of Labour Relations Act (LRA) – lock-out – terms and conditions – termination.

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LIST OF ABBREVIATIONS

AD	Appellate Division
AJLL	Australian Journal of Language and Literacy
BLLR	Butterworths Labour Law Reports
BEMAWU	Broadcasting, Electronic, Media & Allied Workers Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CWU	Communication Workers' Union
DR	De Rebus
FAWU	Food and Allied Workers Union
HC	High Court
IC	Industrial Court
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
MEIBC	Metal and Engineering Industries Bargaining Council
NEHAWU	National Education, Health and Allied Workers' Union
NUMSA	National Union of Metalworkers of South Africa
PER/PELJ	Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SACTWU	Southern African Clothing and Textile Workers' Union
SACWU	South African Chemical Workers' Union

SADTU	South African Democratic Teachers Union
SALJ	South African Law Journal
SCA	Suprema Court of Appeal

CHAPTER ONE

RESEARCH OUTLINE

1.1. Introduction

The law of dismissal in South Africa creates a controversial legal issue when it comes to the definition of automatically unfair dismissal,[1] the right of the employer to terminate an employment contract for operational requirements[2] and the institution of collective bargaining.[3] When the *LRA* was enacted in 1995, in the new constitutional democracy, section 187(1)(c) of the *LRA* of 1995 read that a dismissal is automatically unfair if the reason for the dismissal is "to compel the employee to accept a demand in respect of any matter of mutual interest".[4]

The interpretation of the section in the *LRA* of 1995 received criticism due to the manner in which the Labour Appeal Court (LAC) and Supreme Court of Appeal (SCA) interpreted the section in the case of *Fry's Metals.*[5] In January 2015, the *Labour Relations Amendment Act* (*LRAA*)[6] came into effect, and section 187(1)(c) of the *LRA* of 1995 now reads, dismissal is automatically unfair if the reason for the dismissal is "a refusal by the employees to accept a demand in respect of any matter of mutual interest between them and their employer".[7]

In the case of *Jacobson v Vitalab* (hereafter *Vitalab*)[8] the Labour Court (LC) determined whether the newly amended section 187(1)(c) of the *LRA* of 1995 was applicable in matters involving individual employees. The LC held that section 187(1)(c) of the *LRA* of 1995 is not applicable to matters involving individual employees. Taking this into account, this study investigates whether the newly

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1 Section 187(1)(c) of *the Labour Relations Act* 66 of 1995 (hereafter *LRA* of 1995).
2 Section 188(1)(a)(ii) of *LRA* of 1995.
3 *Commercial Catering and Allied Workers Union v Game Discount World Ltd* 1990 ILJ 162 (IC). the Industrial Court (IC) created a seed of doubt when it grappled with the boundaries of "lock-out dismissal" and "collective bargaining".
4 Section 187(1)(c) of the *LRA* of 1995.
5 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 (LAC) (hereafter *Fry's Metals* LAC) and *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Ltd* 2005 *ILJ* 689 (SCA) (hereafter *Fry's Metals* SCA).
6 6 of 2015.
7 Section 31 of *LRAA*.
8 (2019) 40 *ILJ* 2363 (LC).

amended section 187(1)(c) of the *LRA* of 1995 was intended to exclude individual employees.

1.2. Research question

Under what circumstances can an individual employee claim protection under section 187(1)(c) of the *Labour Relations Act* 66 of 1995?

1.3. Problem Statement

Before the amendment of the *LRA* of 1995 in 2014, dismissal was rendered to be automatically unfair if the proximate cause of the dismissal was 'to compel the employee to accept a demand in respect of any matter of mutual interest between an employer and an employee'.[9] The definition of lock-out warrants the dismissal under section 187(1)(c) of the *LRA* of 1995 to be automatically unfair.[10] For purposes of section 187(1)(c) of the *LRA* of 1995, a dismissal does not have to be preceded by an actual lock-out.[11] The purpose or application of section 187(1)(c) of the *LRA* of 1995 is to protect employees when the employer uses dismissal as a weapon in order to compel employees to accept a demand made by an employer.[12]

The section was amended through the *LRAA* to provide that dismissal is automatically unfair if the reason for the dismissal is 'a refusal by the employees to accept a demand in respect of any matter of mutual interest between them and their employer'.[13] The purpose of the amendment is explained in the Explanatory Memorandum, which accompanied the *Amendment Bill*; and the aim was to remove an anomaly which arose from the way the section was interpreted in *Fry's Metals'* case at the LAC.[14] Moreover, the section would remedy lock-out dismissal which featured under the *Labour*

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9 Section 187(1)(c) of the *LRA* of 1995.

10 Section 213 of the *LRA* defines lock-out as "the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee...". See also *National Union of Metal Workers of South Africa & Others v Zeuna-Starker Bop (Pty) Ltd* (2002) 23 *ILJ* 2283 (LC).

11 Grogan *Dismissal, Discrimination & Unfair Labour Practices* (Juta Cape Town 2007) 195.

12 Van Niekerk A *et al Law @ work* 4th ed (LexisNexis Butterworths Durban 2016) 279.

13 Section 31 of the *LRAA*. See also 187(1)(c) of the *LRA* of 1995.

14 *Fry's Metals* LAC para 28 the court held that the purpose of the provision was to remedy the lock-out dismissal which featured before the 1995 labour relations practice. Read together with *CWUI & Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) (hereafter *Algorax* LAC) both had an effect of discouraging employers from offering employees to be re-employed who were subjected to dismissal due to refusal of accepting change to working conditions.

Relations Act (hereafter *LRA* of 1956).[15] Its true purpose of the section is to prohibit dismissal of employees by the employer when the reason for their dismissal is their refusal to accept a demand regarding a matter of mutual interest between employees and employer.[16]

Also, the amendment has an effect of limiting the application of the section to collective bargaining sphere. Although, pre-amendment version of section 187(1)(c) of the *LRA* of 1995 was invoked in several disputes involving individual employees;[17] clearly indicating that the section protects individual employees should the matter be of mutual interest between an employee and the employer.[18] However, in recent case law the court held that the amended version of section 187(1)(c) of the *LRA* of 1995 is limited to the collective sphere.[19] In other words, section 187(1)(c) of the *LRA* of 1995 is not intended for individual employees' dismissals; because of this, individual employees cannot claim protection under the section.[20]

1.4 Background of the study

Prior to the 2014 amendment, the *LRA* provided that dismissal is automatically unfair if it is found that the proximate cause of the dismissal was to compel an employee to accept a demand in respect of any matter of mutual interest between an employee and the employer.[21] In interpreting section 187(1)(c) of the *LRA* of 1995, courts have held that this section means that dismissal is automatically unfair should the employer use dismissal as a tactic to compel employees to accept a demand of mutual interest between the employer and the employees.[22] However, the courts also held that it was

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15 28 of 1956.

16 *Vitalab* para 17.

17 *Solidarity obo Wehncke v Surf4Cars (Pty) Ltd* (2014) 35 *ILJ* 1982 (LAC).

18 *Gauteng Provinstake Administrasie v Scheepers & Others* (2000) 21 *ILJ* 1305 (LAC); *SADTU v Minister of Education & Others* (2001) 22 *ILJ* 2325 (LC) para 43.2 the court stated that the term 'mutual interest' refers to issues which are not regulated by law, as opposed to issues which arise form conflict in assertion of legal rights. See also Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.

19 *Vitalab* para 17; *Hofmeyr v Saaiman t/a SA Endovascular Group Practice* (2020) 41 *ILJ* 659 (LC) [2019] ZALCCT para 39.

20 *Vitalab* para 17, the court stated that the wording of section 187(1)(c) of the *LRA* of 1995 as amended and clarification of its intended purpose in the Explanatory Memorandum, that the purpose of the section is to give effect to the intentions of the legislation.

21 Van Niekerk *et al Law @ work* 278.

22 *SACWU & Others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC); *Fry's Metals* LAC; *Fry's Metals* SCA; *Algorax* LAC.

not automatically unfair to dismiss employees who refused to accept a demand if the employer has the intention to re-employ such dismissed employees and instead engaged new employees who had accepted the employer's demand.[23]

In *Fry's Metals*, the LAC held that if a dismissal is final, it cannot serve the purpose to compel an employee who is dismissed to accept a demand regarding a matter of mutual interest between the employer and an employee.[24] The court in its literal interpretation substantiated its decision by stating that: if an employee has been finally dismissed, the employment relationship discontinues and any form of agreement that existed between the employer and the employee becomes irrelevant; on the other hand, it will only be relevant if the employee is going to continue on the employers employ for section 187(1)(c) of the *LRA* of 1995 to apply.[25] The provision was amended in 2014 because based on case law, it is impossible to compel an employee to accept a demand by dismissing the employee.[26]

The primary aim of the legislature when enacting this provision was to prohibit a situation whereby employers threaten their employees with dismissal when they refuse to accept the demand of the employer.[27] In that case, section 187(1)(c) of the *LRA* of 1995 would apply if employees refuse to yield to the threat of the employer and as a result the employer dismisses them.[28] Under the *LRA* of 1956, these types of terminations were referred to as 'termination lock-outs'.[29] Termination lock-outs occurred when the employer made demands during the collective bargaining process, the employer could either make the demand independently from the collective bargaining process or as a response to the demands of an employee during the collective bargaining process.[30] The employer then refuses the demand made by the employees and keeps them locked out until they accept the demand made by the employer.[31] Termination lock-out would then occur when the employer gives employees the ultimatum to either accept the demand or either risk facing dismissal.

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23 Van Niekerk *et al Law @ work* 278.
24 *Fry's Metals* LAC para 28. See also *Algorax* LAC para 1929E-F.
25 *Fry's Metals* LAC para 28.
26 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 194.
27 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 194.
28 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 194.
29 *FAWU v Middevrystaaste Suiwe Kooperaise Bpk* (1990) 11 *ILJ* 776 (IC) para 789D.
30 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 194.
31 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 194.

The *LRA* of 1995 prohibit termination lock-out, they are regarded as automatically unfair due to the definition of lock-out.[32]

The amendment of section 187(1)(c) of the *LRA* of 1995 has shifted focus from the intentions of the employer to the refusal of employees to accept demands made by their employers.[33] The effect of the provision after the amendment is to prohibit employers from using dismissal as an economic weapon against employees. It does this by prohibiting employers from resorting to dismissal during a dispute due to the fact employees refuse to yield to the demands of the employer.[34]

In the past, section 187(1)(c) of the *LRA* of 1995 applied to individual employees who refused to accept a demands made by an employer.[35] The requirement was that the dispute must be one which concerns a matter of mutual interest between the employer and an employee.[36] What constitutes 'mutual interest' is not defined by the Act. Matters that are subject to terms and conditions of employment are regarded as matters of mutual interest.[37] In *SADTU v Minister of Education & Others*,[38] the court held that matters of mutual interest referred to issues that the law does not regulate, as opposed to those which arise from the conflicting assertions of legal rights; that is disputes of interests and not disputes of rights.

However, in *Vitalab*[39] when the LC had to determine whether section 187(1)(c) of the *LRA* of 1995 find application in dismissal dispute which concern an individual employee. The court held that from the wording of the amended section 187(1)(c) of the *LRA* of 1995 and the purpose of the amendment by the Explanatory Memorandum, application of the section is limited to the collective sphere. In other words, protection of section 187(1)(c) of the *LRA* of 1995 does not extend to automatic dismissal disputes which concern individual employees.[40]

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32 Section 213 of the *LRA*. See footnote 3 for the definition of lock-out.
33 Van Niekerk *et al Law @ work* 278.
34 Van Niekerk *et al Law @ work* 279.
35 *Solidarity obo Wehncke v Surf4Cars (Pty) Ltd* (2014) 35 *ILJ* 1982 (LAC).
36 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.
37 Van Niekerk *et al Law @ work* 279.
38 (2001) 22 *ILJ* 2325 (LC) para 43.2
39 *Vitalab* para 14.
40 *Vitalab* para 19.

1.5. Literature review

In their article *Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments*, Neway and Van Eck explore automatic unfair dismissal under section 187(1)(c) of the *LRA* of 1995, and the enacted versions of the 1995 *LRA* and 2014 *LRAA*.[41] The original version of section 187(1)(c) of the *LRA* of 1995 created issues in law. The section conflicted with section 188(1)(a)(ii) and section 189 of the *LRA* of 1995, and the conflict is that these two sections allowed employers to dismiss employees for operational reasons. This conflict was dealt with in the case of *Fry's Metals*; however, the decision of the LAC created controversy and was subjected to major criticism. The decision of the court was later rendered incorrect, and this resulted in the amendment of section 187(1)(c) of the *LRA* of 1995. Currently, the section states 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.[42]

Thompson argues that there should be a removal of statutory prohibition that is against dismissal which is tactical and temporary from dismissals that are automatically unfair. [43] Complimentary, Grogan states that the decision of the legislature to categorise conditional dismissals is a strange one, especially in collective bargaining context.[44]

Neway and Van Eck examine what constitutes matters of mutual interest; and they argue that the term must be "interpreted literally" to mean "any issue concerning employment".[45] In addition to Neway's and Van Eck's explanation of the concept, Thompson adds that matters of mutual interest differ from a disputes of rights, which concern a claim under the already existing contract of employment, a collective agreement, legislation or common law. In such instances, the dispute concerns a breach of a pre-existing right.[46] It is against this background that the powers of the employer to change terms and conditions of employment are limited when it concerns

41 Neway & van Eck *PER/ PELJ* 2016(19) 1.
42 Neway & van Eck *PER/ PELJ* 2016(19) 1.
43 Thompson 2006 *ILJ* 730.
44 Grogan 2003 *ELJ* 11.
45 *De Beers Consolidated Mines Ltd v CCMA* 2000 5 *BLLR* 578 (LC) para 16.
46 Thompson 1999 ILJ 757.

matters of mutual interest between the employer and employees.[47] Because this concerns a matter of mutual interest between the employer and an employee, consensus is required before affecting any form of changes, which can be hard to obtain even with the use of power play by the employer. In instances wherein there is no possible consensus, the employer will be left with no recourse but to lock-out workers to accept the demands to amend conditions of service.[48] The pre-amendment version of section 187(1)(c) of the *LRA* of 1995 has always applied in matters of collective bargaining, especially when the employer dismisses employees due to refusal to accept the demand of the employer regarding a matter of mutual interest. In such a case, the dismissal is seen as automatically unfair.

Prior to the amendment, section 187(1)(c) of the *LRA* of 1995 was applied in individual disputes concerning a matter of mutual interest between the employer and an employee. In *Solidarity obo Wehncke v Surf4Cars (Pty) Ltd* (hereafter *Solidarity obo Wehncke*),[49] the LAC had to determine whether the pre-amendment version of section 187(1)(c) of the *LRA* of 1995 applies in dismissal disputes involving individual employees. The LAC held that the pre-amendment version of section 187(1)(c) of the *LRA* of 1995 applies to cases of dismissal involving individual employees. The conflict that arises in how the LAC applied and interpreted the pre-amendment version of the provision in *Solidarity obo Wehncke* and how the LC applied and interpreted the post-amendment version of the provision in *Vitalab*, the uncertainty created by this conflict needs to be clarified. Did the amendment simply intend to protect the integrity of the collective bargaining process by prohibiting employers to use dismissal as an economic weapon, or was it also intended to prohibit extension of protection to individual employees? This will be examined in this study.

1.6. Scope and limitation of the study

This study will be limited to the scope and application of section 187(1)(c) of the *LRA* of 1995. It will evaluate whether the post-amendment version of section 187(1)(c) of the *LRA* of 1995 prohibit application of the provision to dismissal disputes involving individual employees. The study will further examine the historical background of

47 Neway & van Eck *PER/ PELJ* 2016(19) 8.
48 Neway & van Eck *PER/ PELJ* 2016(19) 8.
49 (2014) 35 *ILJ* 1982 (LAC).

section 187(1)(c) of the *LRA* of 1995 from the *LRA* of 1956 'termination lock-out', to the amendment of section 187(1)(c) of the *LRA* of 1995. Moreover, the study will critique how the Labour Court, in *Vitalab*, applied and interpreted the provision while referring to the Explanatory Memorandum of the amendment, this will be done while referring to the pre-amendment version of the provision and how courts applied it and how it should be applied.

1.7. Rationale and justification

The rationale of this study is to determine how the post-amendment version of section 187(1)(c) of the *LRA* of 1995 finds application in dismissal disputes involving individual employees. Another reason to conduct the study is to outline and to analyse what needs to be met in order for the provision to apply to individual employees. Furthermore, the aim is to examine how courts applied pre-amendment version of section 187(1)(c) of the *LRA* of 1995 to individual employees. Finally, the study seeks to examine how the Labour Court misdirected itself in its application and interpretation of post-amendment version of section 187(1)(c) of the *LRA* of 1995 in *Vitalab*.

1.8. Framework (structure) of the study

Chapter 1: Introduction and background of the study

This chapter introduces the study. Chapter One is compromised of the background to the study, the problem statement, research questions and other important components of research such as the research methodology that is employed as a framework for this study. In addition, the chapter outlines the aims and objectives of the study and the research questions that will assist in ensuring that the envisaged rationale of the study is achieved. The chapter goes on to examine a preliminary literature review, which explores some of the important discussions in the area of labour law. Finally, the chapter discusses the scope and limitations, as well as the rationale and justification of the study.

Chapter 2: Historical framework of section 187(1)(c) of the *LRA* of 1995

This chapter deals with the historical framework of section 187(1)(c) of the *LRA* of 1995. It discusses the concept 'termination lock-out', which was prohibited by the *LRA* of 1956. What purpose did the legislature intend for the original version of section

187(1)(c) of the *LRA* of 1995 to have. Furthermore, why the original version of section 187(1)(c) of the *LRA* of 1995 was amended and what does the post-amendment version of the provision intends to do.

Chapter 3: Scope and application of Section 187(1)(c) of the *LRA* of 1995

This chapter will examine circumstance in which section 187(1)(c) of the *LRA* of 1995, will be applied, as amended. In addition, the chapter argues that the provision as amended still applies to dismissal disputes involving individual employees. In order to determine this, reference is made to past case law involving the pre-amendment version of section 187(1)(c) of the *LRA* of 1995. Finally, the chapter explores what constitutes matters of mutual interest between employer and employees.

Chapter 4: Critique of the Labour Court *Vitalab* judgment

This chapter critique the judgment of the LC in *Vitalab.* This is done by studying the manner in which courts have always applied pre-amendment version of section 187(1)(c) of the *LRA* of 1995 to dismissal disputes involving individual employees. Lastly, the chapter examines the Explanatory Memorandum that which accompanied the Amendment Bill, and argues that the memorandum does not prohibit the protection of individual employees but rather just protects integrity of collective bargaining process by prohibiting employers from using dismissal as an economic weapon in collective bargaining.

Chapter 5: Findings, recommendations and conclusion

This chapter includes the overall findings of the study, recommendations based on the study and the conclusion thereof.

1.9. Research methods

This study will be conducted using the *qualitative research method* suitable for legal research, as opposed to *quantitative research method*. The study will use both primary and secondary sources. Primary sources include the *Constitution*, legislation and case law, secondary sources include journal articles, academic books, internet sources *etcetera*. In addition, the style of referencing used by the Law Faculty of North West University is *PELJ/PER*.

1.10. Conclusion

This chapter of the study introduced the study, discussed the background to the problem noted in the study. This chapter provided a literature review of how there is a contrast in law when it comes to section 187(1)(c) of the *LRA* of 1995 and section 188(1) of the *LRA* of 1995. In addition, it gave the rational and justification of the study and outlines the structure of the study.

CHAPTER TWO

HISTORICAL FRAMEWORK OF SECTION 187(1)(C) OF THE *LRA* OF 1995

2.1. Introduction

When the *LRA* came into effect in 1995, it did not create or impose a duty to bargain.[50] Though, in section 1 of the *LRA* of 1995 does promote collective bargaining by stating that terms and conditions of employment and other issues of mutual interest must be determined. [51] Also, collective bargaining is promoted through the granting of organisational rights to trade unions and the right to strike.[52]

While engaged in the process of collective bargaining, the dismissal of employees by the employer is prohibited if the reason for the dismissal is to force employees to accept changes to the terms and conditions of employment.[53] However, if this occurs, it should be dealt with through the collective bargaining process and power-play; it should not be through threats of dismissal.[54] In this instance, employees have the right to strike, employers in response can enforce a lock-out and hire replacement labour.[55] This is the framework established for dealing with collective bargaining disputes.[56]

Despite the neat structure outlined above, there is a contrast in law regarding the right of the employer to dismiss employees for operational reasons as long as the dismissals are in line with the requirements of fairness, versus automatically unfair dismissal in terms of section 187(1)(c) of the *LRA* of 1995. The *LRA* of 1995 recognises three grounds for dismissal and these are subject to the procedure being followed.[57] These grounds are misconduct of the employee, the incapacity of the employee and the operational reasons of the employer; these can potentially constitute fair grounds for dismissal.

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50 Vettori 2005 *De Jure* 382.
51 Section 1 of the *LRA* of 1995.
52 Section 11 – 16 of the *LRA* of 1995 deals with 'organisational rights. See also section 64(1) of the *LRA* of 1995 on the recognition of the 'right to strike'.
53 Section 187(1)(c) of the *LRA* of 1995.
54 Neway & van Eck *PER/ PELJ* 2016(19) 4.
55 Neway & van Eck *PER/ PELJ* 2016(19) 4.
56 Neway & van Eck *PER/ PELJ* 2016(19) 4.
57 Section 188(1) of the *LRA* of 1995.

The *LRA* of 1995 in section 213 defines operational reasons (requirements) in broad terms. It is defined to cover the "economical, technological, structural or similar needs of the employer".[58] The *Code on Dismissal Based on Operational Requirements* (hereafter the *Code*)[59] states that economical reasons are reasons related to the "financial management of the enterprise"; technological reasons are reasons related to the "introduction of new technology that affects work relationships", and structural reasons relate to the "redundancy of posts consequent to a restructuring of the employer's enterprise".[60] Termination for operational reasons mentioned are often related to the economic subsistence of the employer.

The starting point is that in businesses there may be reasons which are legitimate for the changing of terms and conditions of employment in order to maintain the continued existence of the business.[61] However, when it comes to effecting these changes, it is not up to the unilateral decision of the employer. The power of the employer is limited due to the fact that changing the terms and conditions of employment falls within the ambit of disputes of interests; because of this, consensus is needed before changes can be applied on the terms and conditions. This is not easily attainable through power-play.[62] The only legal option available for the employer is to impose a lock-out to force employees to accept changes of the terms and conditions of employment.[63] The employer may not, in return, delegate another employee to perform the functions of the employee who is locked-out unless the lock-out is in response to a strike action.[64]

Furthermore, section 187(1)(c) of the *LRA* of 1995 states that a dismissal shall be regarded to be 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". However, with collective bargaining mechanisms

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58 Section 213 of the *LRA* of 1995.

59 Item 1 of the *Code on Dismissal Based on Operational Requirements* (Gen N 1517 in GG 20254 of 16 July 1999).

60 Du Toit *et al Labour Relations Law* 473.

61 Thompson 2006 *ILJ* 705 on the market economy driven by competition and businesses need to constantly adapt to stay afloat and this may entail changes to the terms and conditions of employment.

62 Neway & van Eck *PER/ PELJ* 2016(19) 8.

63 Section 213 of the *LRA* of 1995 defines what 'lock-out' entails.

64 Section 76(1)(b) of the *LRA* of 1995.

established in the *LRA* of 1995 and the protection of employees under section 187(1)(c) of the *LRA* of 1995, employers have often dismissed employees after refusal to accept changes on the terms and conditions of employment.[65] In these instances, they have used operational reasons to justify dismissal of employees. This raises a controversial legal issue; and the issue is whether such dismissals which are claimed to be for operational reasons are automatically unfair?

Therefore, this chapter of the study focuses on the historical framework of section 187(1)(c) of the *LRA* of 1995, from the *LRA* of 1956 concept 'lock-out' dismissals to the 2014 amended of section 187(1)(c) of the *LRA* of 1995. It goes on to discuss the interpretation of the section in the case of *Fry's Metals* by the LAC and SCA, as well as the amendment that has been made to section 187(1)(c) of the *LRA* of 1995. Furthermore, the chapter examines the contrast that exists between section 187(1)(c) of the *LRA* of 1995 and section 188(1)(a)(ii) of the *LRA* of 1995 – the primary focus of the examination is the extent to which the employer can effect dismissal for operational requirements.

2.2. The LRA of 1956: lock-out dismissal

In order to understand the decision of the LAC and SCA on the *Fry's Metals* cases and the amendment of section 187(1)(c) of the *LRA* of 1995 in 2014, one needs to understand the wording of the definition of 'lock-out' in the *LRA* of 1956. The *LRA* of 1956 defines a 'lock-out' as:

> "any one or more of the following acts or omissions by a person who is or has been an employer –
>
> (c) the breach or termination by him of the contracts of employment of anybody … in his employ; or
>
> (d) the refusal … by him to re-employ anybody … who have been in his employ, if the purpose of that … breach, termination, refusal or failure is to induce or compel any persons, who are or have been in his employ … –

[65] Employers have often relied upon section 188(1)(a)(ii) of the *LRA* of 1995 for dismissals.

(i) to agree or comply with any demands or proposals concerning terms or conditions of employment."[66]

The wording of the definition is wide to the point it encompasses the word 'termination' as long as termination has to do with the purpose of forcing employees to accept a demand made by the employer. It was acceptable practice of changing terms and conditions of employment as long as it could be proved that termination was well within the ambits of a lock-out. It was deemed acceptable because it was within the scope of 'power-play' and 'disputes of interests'.[67]

Under the *LRA* of 1956, the IC had a range of powers and one of them was the power to impose upon parties the duty to engage in collective bargaining.[68] The IC in *Commercial Catering and Allied Workers Union of SA v Game Discount World Ltd* (hereafter *Commercial Catering*)[69] made a confirmation that tactical dismissals as a way of persuading employees to accept changes to terms and conditions of employment fell within the statutory definition of lock-out under the *LRA* of 1956. In accordance to the IC, such tactical dismissals serve a purpose of persuading employees to accept changes to terms and conditions of employment and are to be scrutinised under unfair labour practices. However, the IC held that it is unacceptable in terms of law to say dismissals that are final and irrevocable, and those that do not advance collective bargaining are covered and part of lock-outs.[70] On one hand, the IC held that the final and irrevocable dismissals were unfair as they did not advance collective bargaining. On the other hand, the IC did not permit tactical dismissals to be part of the collective bargaining process.[71]

In its definition of lock-out, the *LRA* of 1995 removed all references to dismissals. Under the *LRA* of 1995, the definition of lock-out seem to only apply in instances where the employer excludes employees from the workplace for the purpose of compelling employees to accept a demand.[72] What the definition in the *LRA* of 1995

66 Section 1 of the *LRA* of 1956.
67 Neway & van Eck *PER/ PELJ* 2016(19) 9.
68 Vettori 2005 *De Jure* 382.
69 1990 ILJ 162 (IC).
70 Thompson 2006 *ILJ* 727.
71 Neway & van Eck *PER/ PELJ* 2016(19) 10.
72 Section 213 of the *LRA* of 1995.

does is to limit the collective bargaining power of the employer, which is used to force employees to accept a demand.

As stated above, section 187(1)(c) of the *LRA* of 1995 was amended in 2014 due to failure by legislative makers to clarify what is covered as automatically unfair dismissal under the provision. There is confusion as to whether it aimed to deal with dismissals emanating from collective bargaining, only dismissals that were final and irrevocable as it was done by the IC, or tactical dismissals as part of collective bargaining process. This was considered an oversight on the part of the legislature; hence, there was a great contrast in law. The LAC and the SCA in the *Fry's Metals* case resulted in a contrast in law, and for a long time, it could not be determined what section 187(1)(c) of the *LRA* intended to proscribe. The anomaly will be outlined below.

2.3. The pre-amendment version of section 187(1)(c) of the LRA of 1995

In the *Fry's Metals* case, section 187(1)(c) of the *LRA* of 1995 was tested when the continued existence of the business came under threat due to economic challenges. In order to survive and avoid the loss of jobs, the company proposed changing the terms and conditions of employment in the shift system. Employees rejected the proposed change in the shift system – in response, the company informed employees who rejected the proposed change in the shift system that they will face retrenchment. Employees approached the LC in order to obtain an interdict against the employer to prevent the dismissals.

The LC had two issues to deal with in order to determine whether the dismissals constituted automatically unfair dismissals. The first issue was to determine whether – for purposes of the *LRA* of 1995 – this was a matter of mutual interest. The second one was to determine whether the insistence of the company to adopt a new shift system had the tendency to compel employees to accept a demand in respect of a matter of mutual interest between the employer and employees or, in the alternative, whether the company can for legitimate purpose implement the new shift system for operational reasons.[73]

[73] *Fry's Metals* LC para 19-20.

The LC answered the first issue by stating that in terms of disputes of interests, the issue concerned a matter of mutual interest as it deals with the "creation of new rights or the diminution of existing rights."[74] In dealing with the second issue, the LC stated that the employer avoided conciliation and a subsequent lock-out in effort to persuade the workers to accept its proposal. Therefore, the court held that the dismissals were automatically unfair as the employer elected to conduct lock-out dismissals and labelled them as retrenchments.[75]

The matter went on appeal whereby the LAC followed an approach which was nuanced but later to be regarded as problematic. The LAC had to determine whether or not the employer had a right to dismiss employees who were not prepared to accept a demand in respect of a matter of mutual interest between the employer and employees, especially when such demand is critical for the operational requirements of the employer's business.[76] The LAC launched an enquiry between the relationship of the employer's right to retrench for operational reasons and the employee's right under section 187(1)(c) of the *LRA* of 1995 not to be dismissed for purposes of being compelled to accept a demand in respect of a matter of mutual interest between the employer and employee.[77]

The LAC held that section 188(1)(a)(ii) of the *LRA* of 1995 does give an employer the right to dismiss for operational requirements. The court went on to acknowledge that a real contrast comes when the employer terminates the employment contract of the employee for operational requirements as opposed to dismissing an employee in order to compel them to accept a demand as part of collective bargaining.[78]

In its decision, the LAC found no conflict of interest between section 187(1)(c) and section 188(1)(a)(ii) of the *LRA* of 1995. Instead of interpreting the section of the *LRA* of 1995 as it stood, the court referred to the *LRA* of 1956 'lock-out' concept. In doing so, the court second guessed what policy makers intended purpose for section 187(1)(c) of the *LRA* of 1995. The LAC relied on the decision of the IC which proscribe

74 *Fry's Metals* LC para 28.
75 *Fry's Metals* LC para 51.
76 *Fry's Metal* LAC para 1.
77 *Fry's Metal* LAC para 1.
78 *Fry's Metal* LAC para 23.

acceptable and unacceptable lock-out dismissal in the wake of collective bargaining process.[79]

The LAC referred to the decision of the IC in *Commercial Catering*, and it stated that in order for a dismissal to fall within the ambits of lock-out dismissal under the *LRA* of 1956, the dismissal had to serve the purpose of compelling employees to accept a demand. In addition, the dismissal had to be tactical in nature in order to be protected. The court at the end reasoned that, under the *LRA* of 1995, the legislature intended to prohibit such tactical dismissals through/under automatically unfair dismissals.[80]

The LAC went on to reason that final retrenchments do not fall within the ambit of lock-out dismissals under the *LRA* of 1956. Therefore, the court held that such retrenchments were permissible under section 188(1)(a)(ii) of the *LRA* of 1995.[81] Moreover, the court explained that the purpose of such retrenchments is to get rid of employees who are not suitable for the operational requirements of the employer; this is so that employees who suit the operational requirements of the employer can be employed.[82] In the end, the LAC found the difference between automatically unfair dismissal and dismissal for operational requirements is the fact that the former is prohibited and the latter is not.[83]

Fry's Metals finally reached the SCA on appeal, the SCA acknowledged that there are competing interests, which are both protected under the *LRA* of 1995. It noted that, on the one hand, the *LRA* of 1995 encourages collective bargaining; on the other hand, it permits employers to effect change to terms and conditions of employment for purposes of operational requirements.[84] In its examination, the court critiqued Thompson's the article. In the article, Thompson argues that the *LRA* of 1995 is premised on the distinction between disputes of interests and disputes of rights. He argues that in the sphere of collective bargaining, dismissal for operational requirements as a strategy to make employees to accept a demand should never be accepted. Dismissal for operational requirements should only be accepted in

79 See *Commercial Catering* para 38.
80 *Fry's Metals* LAC para 27.
81 *Fry's Metals* LAC para 28.
82 *Fry's Metals* LAC para 30.
83 *Fry's Metals* LAC para 31.
84 *Fry's Metals* SCA para 52.

circumstances where the continued existence of the business is under threat.[85] In this instance, there is an overlap between operational requirements dismissals, and which are based on rights, and collective bargaining, which is on disputes of interests. He further suggests that only when disputes have moved from collective bargaining sphere to disputes of rights should be allowed for the dismissal of employees. However, that should not be accepted without actually scrutinising whether there a real operational requirement and they should be accessed from case-to-case basis.[86] However, the SCA expressed disagreement with Thompson's arguments, the court argued that:

> "the core difficulty with this argument is that the dichotomy between matters of mutual interest and questions of "right" do not in our view form the basis of the collective bargaining structure that the statute has adopted. The unavoidable complexities that arise from the supposed "migration" of matters of mutual interest to matters of "right" demonstrate in our view that the dichotomy does not form the basis of the statutory structure, and s 187(1)(c) cannot, accordingly, be interpreted as if the legislation proceeds from that premise."[87]

In conclusion, the SCA supported the decision of the LAC by stating that an enquiry into section 187(1)(c) of the *LRA* of 1995 should always begin with what is meant by 'dismissal', which allows for termination of employment with or without prior notice for grounds of operational reasons or misconduct. It further stated that there is no overlap between dismissal for operational requirements and automatically unfair dismissal in terms of section 187(1)(c) of the *LRA* of 1995.[88] In the end, the court stated that the employer sought to dismiss employees for operational requirements and dismissed the appeal.

Fry's *Metals*, both the LAC and the SCA decisions, are precedence and were followed by numerous cases in which they had a subsequent effect in general.[89] The decision

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85 *Fry's Metals* SCA para 52.

86 *Fry's Metals* SCA para 51.

87 *Fry's Metals* SCA para 54.

88 *Fry's Metals* SCA para 55.

89 See for example on how the principle of *Fry's Metals* was enforced in *Mazista Tiles (Pty) Ltd v*

of both the LAC and SCA remained jurisprudence and acted as point of reference until 2014 when section 187(1)(c) of the *LRA* of 1995 was amended.

2.4. LRAA: Amendment of Section 187(1)(c) of the LRA of 1995

Section 187(1)(c) of the *LRA* of 1995 was amended in 2014 by the *LRAA* with the aim to remedy the contrast explained above. The amendment effected by the *LRAA* reads:

> "…a dismissal is automatically unfair if the reason is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer".[90]

The difference between the old and the new provisions is that the new provision replaces "to compel an employee to accept a demand" with "is a refusal by employees to accept a demand".[91] The reason for the amendment is explained in the *Memorandum of Objects: Labour Relations Amendment Bill,*[92] which was to remove an anomaly created by the interpretation of the old section 187(1)(c) of the *LRA* of 1995 and to further give effect to the intentions of the *LRA* of 1995, which are to protect the process and the integrity of collective bargaining.[93]

The amendment seems to have shifted focus from the intention of the employer regarding the dismissal, which was to compel employees to accept a demand.[94] Currently, the amendment focuses on all circumstances where an employee was dismissed due to refusal to accept changes in terms and conditions of employment, irrespective of the intention of the employer.[95] According to Grogan, the effect of the amendment is that automatically unfair dismissal can be ensued because the employer made a demand and the employee refused to accept such a demand by the employer. Whether or not the dismissal or threat of dismissal was for the purpose of inducing the employee to accept a demand has become an irrelevant factor.[96]

National Union of Mineworkers 2004 *ILJ* 2156 (LAC); *BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd* 2010 ILJ 2863 (LC); *Wilkin v Warwick Invest (Pty) Ltd* 2013 ZALCCT 10 (30 April 2013).

90 Section 31 of the *LRAA*.

91 See both the old section 187(1)(c) of the *LRA* of 1995 and section 31 of the *LRAA*.

92 *Memorandum of Objects: Labour Relations Amendment Bill*, 2012.

93 *Memorandum of Objects: Labour Relations Amendment Bill*, 2012 17.

94 Neway & van Eck *PER/ PELJ* 2016(19) 19.

95 Van Niekerk *et al Law @ work* 278.

96 Grogan *Workplace Law* 216.

The Constitutional Court (CC) handed down a judgement concerning the interpretation and the contradiction of section 187(1)(c) and section 188(1) of the *LRA* of 1995 in *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel & Another* (hereafter *Aveng*).[97] The background of the case is that in 2014, due to harsh economic conditions, Aveng experienced a decline in profits and in order to stay afloat and survive they had to reduce cost and restructure their business model; as a result, over 400 jobs were affected. When Aveng realised this, it initiated a consultation process in terms of section 189(3) of the *LRA* of 1995.[98] The company engaged in consultation with NUMSA with the view that the employees will agree to work in terms of the new system that redesigned jobs in order to avoid retrenchments. Aveng and NUMSA reached an agreement that employees will work under the newly redesigned jobs. In 2015, NUMSA went back on the agreement they had with Aveng and informed Aveng that its members will no longer work under the redesigned positions.[99] Aveng had an opinion that NUMSA had no desire to embark on a consultation which seek to find consensus between the parties; NUMSA used the consultation process to demand increase in wages.[100]

As a result, Aveng informed NUMSA that it cannot meet their demands and that consultation process had been exhausted. Furthermore, Aveng informed NUMSA that it will continue with the redesigned jobs in order to meet the operational requirements of the business. As such, Aveng offered employees to remain in their redesigned jobs, if not, they will face retrenchments. Several employees accepted the offer of Aveng while the majority of employees rejected the proposed jobs, and this led to termination of employment for alleged operational requirements for those employees who rejected the redesigned jobs. The dispute was referred to the Metal and Engineering Industries Bargaining Council (MEIBC) for conciliation – the dispute could not be resolved, and NUMSA approached the LC.[101]

97 (CCT178/19) [2020] ZACC 23 (27 October 2020).
98 See the *LRA* of 1995 on the requirement to embark on consultation process when a company contemplates retrenchments.
99 *Aveng* LC para 8.
100 *Aveng* LC para 8.
101 *Aveng* LC para 11.

In the LC, NUMSA argued that dismissal of its employees was automatically unfair in terms of section 187(1)(c) of the *LRA* of 1995. In response to the argument put forward by NUMSA in the LC, Aveng argued that the dismissals were for operational requirements as prescribed by the *LRA* of 1995.[102] The LC held that the employees were not dismissed because they refused to accept a demand by the employer, but because of operational requirements since they refused to accept the alternative proposed as opposed to dismissal during the consultation process. The LC further held that it would be practical to order Aveng to reinstate the employees who were dismissed. NUMSA aggrieved by the outcome, it appealed the decision of the LC with the LAC.

The LAC upheld the decision of the LC and agreed that there was no demand made which falls under section 187(1)(c) of the *LRA* of 1995 by Aveng.[103] The court held that Aveng made a proposal to NUMSA, which would help in restructuring the business model of Aveng as per operational requirements and further ensure that Aveng survived the financial distress and avoid retrenchments altogether. The court further stated that NUMSA took advantage of the consultation process as they saw it as an opportunity to engage in collective bargaining and seek increase in wages.[104] As a consequence, the LAC held that employees were dismissed in terms of operational requirements of the employer and not as a matter of refusing to accept a demand in respect of a matter of mutual interest. The court made a remark in relation to section 187(1)(c) of the *LRA* of 1995, which is that the section does not prohibit the employer from dismissing employees for operational requirements. It went on to state that whether the section is contravened or not, it is not dependent on whether the dismissal is final or conditional, but the true reason why employees were dismissed. Because of this, there is a need for an enquiry to determine the true reason for the dismissals.[105]

In order to determine the true reason for the dismissals – whether it was due to the refusal to accept a demand by the employees or for operational requirements of the employer – the court applied the "true reason" or "dominant impression" test as

102 Section 188(1) and 189 of the *LRA* of 1995.
103 *Aveng* LAC para 31.
104 *Aveng* LAC para 35.
105 *Aveng* LAC para 65.

formulated by the LAC in *Afrox*.[106] The LAC held that based on the facts, the dismissals would have not occurred if there had not been a refusal of the alternative employment. Therefore, the true reason for the dismissals was the operational requirements needs of the employer.[107] The LAC dismissed the appeal and in doing so it concluded by stating that NUMSA's interpretation of section 189 of the *LRA* of 1995 undermines the purpose of the section, which is to encourage engagement between employers and employees and to further facilitate the creation of alternative employment as opposed to retrenchments.[108] Moreover, this would restrict employers from proposing changes on terms and conditions of employment in terms of section 189 of the *LRA* of 1995. Dissatisfied by the outcome, NUMSA approached the CC for leave to appeal.

In the CC, NUMSA sought for the judgement of the LAC to be overturned and reinstatement of dismissed employees.[109] NUMSA argued that the interpretation of section 187(1)(c) of the *LRA* of 1995 by the LC, which was endorsed by the LAC, was inconsistent with the "literal, purposive and contextual interpretation" of section 187(1)(c) of the *LRA* of 1995. Furthermore, NUMSA argued that from the proper reading of the section, it would be automatically unfair if the reason for dismissal is refusal to accept a demand by employees even if such a demand is due to the operational requirements of the employer. It further alleged that the LAC was wrong in applying the true reason or dominant test as stated in *Afrox* because the matters were clear, and application of the test was inappropriate. In addition, it argued that the demand which was made by Aveng fell within the scope of section 187(1)(c) of the *LRA* of 1995 because it had consequences attached to it.[110]

In response, Aveng placed emphasis on the amendment of section 187(1)(c) of the *LRA* of 1995. It supported the decision of the LAC by relying on the explanatory memorandum and the *LRAA* which explained the purpose of the amendment; and the purpose was to cure an anomaly which was created in *Fry's Metals.* The LAC in *Fry's Metals* prohibited employers to dismiss employees for operational requirements and to later re-employ some of the dismissed employees when circumstances permits. It

106 *Afrox* LAC para 106.
107 *Aveng* LAC para 39.
108 *Aveng* LAC para 42.
109 *Aveng* CC para 1.
110 *Aveng* CC para 27.

states that it engaged in a retrenchment consultation process in good faith and sought to find alternatives as opposed to retrenchments, it was only when NUMSA used the consultation process as a way to try to increase wages that Aveng retrenched employees as the consultation process had been exhausted. It argued that the interpretation of section 187(1)(c) of the *LRA* of 1995 by NUMSA undermines the right of employers to dismiss for operational requirements. Moreover, it undermines the right to fair labour practice of employers as contained in section 23(1) of the *Constitution*. The CC had three judgements, all agree and support the decision of the LAC that the dismissal of employees was not automatically unfair in terms of section 187(1)(c) of the *LRA* of 1995.

Mathope AJ agreed with the LAC in that the redesigning of jobs as a proposal by Aveng in order to avoid retrenchments was the only sensible mean available. The dismissal of employees for operational requirements was the main or dominant cause, and thus was a fair reason for dismissal. In respect of the interpretation of section 187(1)(c) of the *LRA* of 1995, the section requires that there should be an enquiry to determine, by taking into account different factors, what the true cause of the dismissal is and to further determine what could have been the probable cause of the dismissal by evaluating the facts before the court and assess whether that cause can be construed as the main or dominant cause or proximate cause of the dismissal.[111] Hence, the *Afrox* test applies in this instance; the test seeks to differentiate automatically unfair dismissals from dismissals which are not automatically unfair, there is no reason why the test cannot be applied in the context of section 187(1)(c) of the *LRA* of 1995. The wording of the section "if the reason of the dismissal is ..." creates a need for an enquiry to determine the reason for the dismissal, which can be done by causal analysis. Since the section implies the causation requirement, it is indeed justifiable to use the test in *Afrox*.[112]

2.5. Conclusion

In summary, this chapter outlined and discussed the historical framework of section 187(1)(c) of the *LRA* of 1995. This was done by looking at the term "lock-out"

111 *Aveng* CC para 72.
112 *Aveng* CC para 72.

dismissals in terms of the *LRA* of 1956, the post-amendment version of section 187(1)(c) of the *LRA* of 1995 and how it was applied and interpreted in different case law. Furthermore, the post-amendment version of section 187(1)(c) of the *LRA* of 1995 was discussed, the explanatory memorandum and the *LRAA* were analysed to determine the purpose of the amendment. The section prohibits dismissals due to refusal to accept demand by employees, but the section does not prohibit employers to dismiss for operational requirements if they can be proved.

CHAPTER THREE

THE SCOPE AND APPLICATION OF SECTION 187(1)(C) OF THE *LRA* OF 1995: THE *LRAA* AMENDEMENT

3.1. Introduction

In Chapter Two, the study examined the historical framework of section 187(1)(c) of the *LRA* of 1995, from the *LRA* of 1956 inception of the concept "termination lock-out", the original version of section 187(1)(c) of the *LRA* of *1995* when it was first enacted, and the amendment of the section in terms of the *LRAA*. It is evident that *LRA* of 1995 creates a dismissal which is automatically unfair if employers dismiss employees due to the fact that employees refused to accept a demand to alter terms and conditions of employment. However, it is clear from case law that section 187(1)(c) of the *LRA* of 1995 does not prohibit employers from dismissing employees for operational requirements should it become evident that there are true and genuine operational requirements.

The *LRAA* shifted focus from the intentions and motives of the employer to the refusal by employees to accept a demand by the employer. Reflecting from Chapter Two, it can be seen that the intention of the employer to dismiss employees duly for operational requirements is deemed to be irrelevant in terms of section 187(1)(c) of the *LRA* of 1995. However, recent case law clearly indicates otherwise.[113] The courts have acknowledged that there is a contrast in law regarding automatically unfair dismissals in terms of section 187(1)(c) of the *LRA* of 1995 and the right of the employer to dismiss for operational requirements.

In recent history, there has been concerns regarding section 187(1)(c) of the *LRA* of 1995. The issue involves the scope and application of the provision, whether or not it applies to dismissals involving individual employees.[114] By the wording of section 187(1)(c) of the *LRA* of 1995, the provision applies in respect to matters of mutual interest between the employer and the employees. As to what constitute mutual interest, the *LRA* does not define the concept, but it is generally defined to include

113 See CC on *Aveng*.
114 *Vitalab* para 14.

matters that are subject to the terms and conditions of employment.[115] Those matters are inclusive of remuneration, working hours, leave, and *etcetera*. If an employer dismisses employees due to employees' refusal to accept cut in wages, to work longer, for example, it would constitute automatically unfair dismissal.[116]

In this chapter, focus shall be given to the scope and application of section 187(1)(c) of the *LRA* of 1995. Importantly, the chapter outlines what constitute mutual interest, the difference between disputes of rights and disputes of interests. After outlining such a difference, the chapter goes on to determine the category that a demand made by an employer regarding matters of mutual interest between an employer and employee fall under. Lastly, the chapter determines whether section 187(1)(c) of the *LRA* of 1995 applies to individual employees or not.

3.2. The scope of section 187(1)(c) of the LRA of 1995: LRAA amendment

Section 187(1)(c) of the *LRA* of 1995 it applies in respect of matters of mutual interest between the employer and employees. As explained above, the *LRA* of 1995 does not define the term mutual interest; however, the *LRA* of 1956 does define the term. The *LRA* of 1956 defines mutual interest as:

> "(a) any matter affecting, or connected with, remuneration or other terms of conditions of employment, or
>
> (b) any matter whatsoever that is of mutual interest to employees and employers.[117]

The term mutual interest, from assumption, implies that there must be an existence of an employment relationship and there must also be mutuality when it comes to interests shared between an employer and an employee.[118] The term has also been defined in different case law, one being *Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for The Motor Industry (Transvaal), Minister for Labour and Minister Justice*,[119] which defined mutual interest as whatever that can be regarded as fairly and reasonable in the promotion of the well-being of the trade concerned.

115 Van Niekerk *et al Law @ work* 279.
116 Van Niekerk *et al Law @ work* 279.
117 Section 24(1) of the *LRA* of 1956.
118 Cheadle & Bamu *Strikes and Lockouts* 94 – 95.
119 1941 TPD 108 para 115.

This is a view that has been adopted and applied by the LC in matters concerning issues of mutual interest.[120] However, interests need not be identical because interests of employers can be completely different in nature compared to the interests of employees and trade unions. What is needed is existence of coincidence and the link between interest of the employer and employees must be ascertainable.[121] Moreover, the issue must have relation to the employment relationship of the employer and the employees.[122]

Of importance is the extensive view of the LC in *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA and Others*, which the court stated the following:

> "Mutual interest' in this sense may well refer to the well-being of the industry, given the purpose for which the term was employed. But the use of the term 'mutual interest' in the *LRA* is very different – it ultimately serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike of lock-out. In this sense, 'matters of mutual interest' serves to distinguish those disputes that concern the socio-economic interests of workers (see section 77, which permits protest action in support of such disputes) and what might be termed purely political disputes, for which the *LRA* does not afford any right to strike or lock-out. It is not necessary for present purposes to define the term 'matters of mutual interest' with any precision, but it seems to me that it requires, in broad terms, no more than that issue that is the subject of any term of any collective agreement, referral for conciliation or the subject of any strike or lock-out be work related, or as the court put it in the De Beers decision, it must concern the employment relationship."[123]

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120 See *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union & others (1)* (1997) 18 *ILJ* 716 (LC); *South African Society of Bank Officials v Bank of Lisbon International Ltd* (1993) *14 ILJ 394* (IC).

121 Manamela *SA Merc LJ* (2012) 24 111.

122 Mischke *CLL* 2001(10) 89.

123 (2014) 35 *ILJ* 3241 (LC) para 17.

Both disputes of interest and disputes of rights are the category under disputes which concern matters of mutual interests. This can include various factors essential to the terms and conditions of employment. In a more advanced approach, the term mutual interest is defined as matters that are not regulated by law, as opposed to those matters which arise from the conflict in assertion of legal rights. This refers to disputes of interests as opposed to disputes of rights.[124] For a dismissal to fall within the scope of section 187(1)(c) of the *LRA* of 1995, the refusal by the employees must relate to the demand made by the employer regarding changes on the terms and conditions of employment; the employer has no legal right to make such changes without the consent of employees.[125]

Considering the discussion on matters of mutual interest, disputes of rights and disputes of interests are discussed below as categories.

3.2.1. Disputes of rights

Disputes of rights refers to disputes that arise due to the application and interpretation of an already existing legal right from a legal document such as statute, contract or collective agreements.[126] Normally, because they concern a disputes of rights already established, they are settled in court without the need to resort to strike actions.[127] Moreover, disputes of rights are based on facts because they are in a form of agreement and can be determined objectively by courts.[128] For purposes of this study, relevance and focus shall be given to disputes of interests.

3.2.2. Disputes of interests

Disputes of interests are disputes that concern the creation of new rights. When that happens, trade unions and employers are seeking to further their own interests which they have no existing legal rights under employment contract or legislation.[129] In such cases, disputes are settled through negotiations (collective bargaining) and if no

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124 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.
125 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.
126 Blanpain & Engels *Comparative Labour Law and Industrial Relations in Industrialized Economies* 470.
127 Blanpain & Engels *Comparative Labour Law and Industrial Relations in Industrialized Economies* 470.
128 Blanpain & Engels *Comparative Labour Law and Industrial Relations in Industrialized Economies* 281.
129 Manamela *SA Merc LJ* (2012) 24 112.

agreement can be reached, if the correct procedure has been followed, employees can exercise their right to strike.[130] It is against this background that it will be argued that a demand made for the change in terms and conditions of employment by the employer falls within the realm of disputes of interests.[131]

As explained earlier in the study, an employer does not have the unilateral power to amend the terms and conditions of service freely without the consent of employees in all issues of mutual interest. Instead, parties need to enter into collective bargaining and if all fails and employees do not agree to the employer's demands, the employer can use power-play as a tactic to induce employees to accept the demand but consent is not easily attainable even through the use of power-play. Such disputes are classified as disputes of interests because both parties are seeking to further their own interests. The only possible play in this instance is for the employer to enforce a lock-out to force employees accept the demand which seeks to amend the terms and conditions of employment.[132] In a case where the employer enforced a lock-out, and the employer and the employees are in a disputes of interests, the employer cannot employ any person to perform the work of the employees who are locked-out unless the lock-out is a direct response to a strike action.[133]

3.2.3. Why the distinction is important

In labour law, the contrast between disputes of rights and disputes of interests is a settled one as both form part of mutual interest.[134] The foundational logic of the difference between the two is inferred from employment relations between the employer and the employees. The employment relationship is characterised by co-dependency and antagonism. In relation to antagonism, it is employees whose economic interests are at the variance with those of the employer. However, in order to attain their economic interests, there needs to be cooperation between the employer and the employees. For this reason, disputes of interests, by their nature,

130 Botha 2014 https://regsdienste.solidariteit.co.za/benefits-a-dispute-of-right-or-interest/.
131 Neway & van Eck *PER/ PELJ* 2016(19) 6.
132 See section 213 of the *LRA* of 1995 regarding the definition of lock-out and its purpose.
133 Section 76(1)(b) of the *LRA* of 1995.
134 *Department of Home Affairs v Public Servants Association and Others* [2017] ZACC 11 para 7.

are about the process of resolving the clashing economic interests of the employer and the employees.

When employers and employees resolve disputes regarding their interests through collective bargaining, the legitimacy of the use of economic power ceases in the eyes of the law. At that stage, the rights that are created through collective bargaining must be enforced. Economic power plays no further role as it has been included by the creation of rights through collective bargaining.

The distinction of dispute of rights and dispute of interests forms part of an integral part of labour laws.[135] Notwithstanding this, the fundamental purpose of the distinction is that when a claim by employees is rights-based, the rights can be contained in a contract or statute, post this, resorting to economic power play is prohibited. In order to resolve disputes, mechanisms created by contract or statute must be used to resolve disputes and enforce rights. When the claim is based on a non-existing right and seeks to establish a new right, the use of economic power play is permitted. The difference between disputes of rights and disputes of interests is often clear; however, there are instances where a dispute can fall in both categories. How the matter should be dealt with in those instances is not something that can be decided in abstract. The court must adopt a pragmatic approach and deal with each case based on its own facts.

Among other issues, the scope of section 187(1)(c) of the *LRA* of 1995 is that a demand made in respect of the provision is of matters of mutual interest, specifically is a dispute of interest as the employer seeks to amend the terms and conditions of employment which s/he has no power to amend without the consent of the employees concerned. Such disputes are settled through bargaining or the use of economic power play to reach a consensus between the involved parties.

3.3. Application of section 187(1)(c) of the LRA of 1995: LRAA amendment

When the *LRA* of 1995 was originally amended, section 187(1)(c) of the *LRA* of 1995 used the word "employee", and the provision applied to individual employees and collective groups of employees – the reason is that the dismissal should be because

135 Provis 1993 *AJLL* 227.

individual employees refused to accept a demand made by the employer.[136] The section found application if the demand involved a matter of mutual interest between an employer and employee.[137] There are numerous cases, which were decided on the basis of the same notion or principle. When the *LRA* of 1995 was enacted, the section found application in matters of mutual interest between employers and employees as well as individual employees.

The LAC had to determine two issues in *Solidarity obo Wehncke v Surf4Cars (Pty) Ltd* (hereafter *Solidarity obo Wehncke*)[138], the issues were whether section 187(1)(c) of the *LRA* of 1995 applied to individual employees and whether dismissal of the employees who refused to accept a demand regarding a matter of mutual interest was automatically unfair. In the first issue, the court held that the provision, as originally enacted when the *LRA* of 1995 was enacted, is meant to include individual employees if the matter concerned matters of mutual interest between the employer and the employees. That has always been settled law and section 187(1)(c) of the *LRA* of 1995 was applied in automatically unfair dismissal involving individual employees. Reflecting from the jurisprudence of this provision, it seems that the main issue that had to be determined, in all instances, was whether the matter fell within the scope of the section; or whether the matter is of mutual interest between the employer and the employee; or that it is a dispute of interest as opposed to dispute of right. When the court determined that the matter is of mutual interest and fell within the scope of provision, it had to determine whether dismissal was automatically unfair or not.[139]

However, section 187(1)(c) of the *LRA* of 1995 was amended under the *LRAA* in 2014 to resolve the anomaly created by the LAC and SCA in the *Fry's Metals* and *Algorax* cases. The pre-amended version of the section did not only amend the word if the reason for dismissal is to "compel"; but also, it amended the word "employee" to "employees".[140] In *Jacobson v Vitalab* (hereafter *Vitalab*)[141] the LC was faced with the question of determining whether the provision as amended still protects individual

136 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.
137 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 195.
138 (2014) 35 *ILJ* 1982 (LAC).
139 Van Niekerk *et al Law @ work* 279.
140 Section 31 of the *LRAA*. Also see the new section 187(1)(c) of the *LRA* of 1995.
141 (2019) 40 *ILJ* 2363 (LC).

employees.[142] Referencing from the Explanatory Memorandum which accompanied the Amendment Bill, the court held that the provision is limited to a collective sphere and does not extend and afford protection to individual employees.[143] The court held that the amendment was to protect the integrity of collective bargaining processes by prohibiting the use of dismissal as an instrument in order to evade collective bargaining process. The court went on to state that application to individual employees is prohibited by the wording of the section itself. The section uses words such as "employees", "them" and "their" and that was taken as indication by the court that the section was intended to exclude individual employees.[144] The court in its concluding remarks went on to say the following:

> the use of the plural makes clear that the extent of the prohibition against dismissal applies only where an employer seeks to extract a concession by employees to demands made in a collective context.[145]

In *Hofmeyr v Saaiman t/a SA Endovascular Group Practice*,[146] the employee made a contention that he was automatically unfairly dismissed due to refusal to accept a demand made by the employer regarding a matter of mutual interest between the employer and employee. The LC held that, following *Vitalab*, section 187(1)(c) of the *LRA* of 1995 as amended was meant to preclude individual employees and it is not applicable in cases involving individual employees. Reflecting from the two cases which have recently been decided by the LC and the wording of the *LRAA* amendment of the provision, one can conclude that the provision was not intended to include individual employees.[147] In determining whether section 187(1)(c) of the *LRA* of 1995 applies to individual employees, the LC has been clear, and their decisions have become law to be followed; the decision include that section 187(1)(c) of the *LRA* of 1995 as amended through by the *LRAA* does not extend protection to individual employees, and it is rather limited to a collective sphere as the court held in *Vitalab*.[148]

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142 *Vitalab* para 18.
143 *Vitalab* para 19.
144 *Vitalab* para 19.
145 *Vitalab* para 19.
146 (2020) 41 *ILJ* 659 (LC)
147 Section 31 of the *LRAA* and section 187(1)(c) of the *LRA* of 1995.
148 *Vitalab* para 19 the LC explains that the provision is limited to a collective bargaining sphere and collective bargaining sphere entails participation by more than one employee for the

3.4. Conclusion

In summary, this chapter outlined and discussed the scope of section 187(1)(c) of the *LRA* of 1995 and determined it applies in matters of "mutual interest. The term entails various terms and conditions of employment and it categorized by disputes of rights and disputes of interests and in cases where an employer makes a demand to amend terms and conditions of employment which requires the consent of employees, the parties need to embark in collective bargaining process to resolve their dispute to form new rights. Such dispute of seeking to establish new rights is known as dispute of interest. Furthermore, the chapter determined how section 187(1)(c) of the *LRA* of 1995 as amended by *LRAA* is applicable to collective bargaining process and exclude or does not extend protection to individual employees.[149]

provision to apply.

149 Section 31 of the *LRAA*.

CHAPTER FOUR

CRITIQUE OF THE LABOUR COURT *VITALAB* JUDGMENT

4.1. Introduction

In Chapter Three, the study discussed the scope of section 187(1)(c) of the *LRA* of 1995. In terms of the study, it has been established that section 187(1)(c) of the *LRA* of 1995 applies in matters of mutual interest between the employer and employees.[150] Furthermore, matters of mutual interest are categorised into disputes of rights and disputes of interests and a demand made by the employer in terms of section 187(1)(c) of the *LRA* of 1995 falls under disputes of interests since it seeks to create new legal rights. These are some of the finding in the previous Chapter. Taking this into account and reflecting from the LC judgment in *Vitalab*, it can be seen that the *LRAA* amendment of section 187(1)(c) of the *LRA* of 1995 was intended to apply in the collective bargaining sphere.[151] As a result, the amendment does not extend protection to individual employees who are dismissed for refusing to accept a demand.[152]

This Chapter assesses the judgement of the LC in *Vitalab* in order to determine whether section 187(1)(c) of the *LRA* of 1995, as amended, was meant to exclude individual employees; or whether the amendment was meant to cure an anomaly created in the *Fry's Metals* and *Algorax* judgments, or to protect the integrity of the collective bargaining process. This will be done by looking at the primary aims and objectives of the *LRA* of 1995 in conjunction with the Explanatory Memorandum. Moreover, the right to fair labour practice along with the right of the employees not to be unfairly dismissed will be evaluated in order to determine whether the court reached the correct decision when it interpreted section 187(1)(c) of the *LRA* of 1995, as amended.

In terms of the *LRA*, section 187(1)(c) of *LRA* of 1995 prohibited dismissal of employees who refused to accept a demand in terms of a matter of mutual interest between the employer and employees, the provision also applied to individual

150 Section 187(1) of the *LRA* of 1995.
151 Section 31 of the *LRAA*.
152 *Vitalab* para 19.

employees.[153] In the case of *Solidarity obo Wehncke*, the LAC held that the pre-amendment version of section187(1)(c) of the *LRA* of 1995 applies in automatically unfair dismissal involving individual employees. The LAC also held that the section applies in dismissals of individual employees who refused to accept a demand made by the employer in *HOSPERSA v Norther Cape Provincial Administration & Others*;[154] and it added that the demand has to fall within the scope of matters of mutual interests between the employer and the employee. This constitute disputes of interests as opposed to disputes of rights, as stated earlier in the study. Prior to the amendment, courts have always adopted and applied the provision in automatically unfair dismissals; therefore, ensuring protection of the right not to be unfairly dismissed of employees under the *LRA* of 1995 and the right to fair labour practice under the *Constitution*.[155]

The provision, as originally enacted in 1995, was amended in 2014 due to the legal contrast created in the *Fry's Metals* case by the LAC and the SCA and to further cure an anomaly which was created.[156] The provision now reads that dismissal is automatically unfair if the reason is "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer."[157] The purpose of the amendment is made clear by the Explanatory Memorandum, which accompanied the Amendment Bill. The purpose of the amendment of the section is explained as follows:

> This section is amended to remove an anomaly arising from the interpretation of section 187 (1) (c) in [*Fry's Metals*] which held that the clause had been intended to remedy the so-called 'lock-out' dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with decisions such as [*Algorax]* is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions. The amended provision seeks to give effect to

153 See the wording of the pre-amendment version of section 187(1)(c) of the *LRA* of 1995, on how it uses 'employee' instead 'employees'.

154 (2002) 21 *ILJ* 1066 (LAC) para 1070I – 1071D.

155 Section 23(1) of the *Constitution*.

156 See the Explanatory Memorandum which accompanied the Amendment Bill. See also *Vitalab* para 17.

157 Section 187(1)(c) of the *LRA* of 1995 as amended by section 31 of the *LRAA*.

> the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept the demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the *LRA* and is consistent with the purposes of the Act.[158]

In *Vitalab*, the LC had to determine whether the section, as amended, applies to automatically unfair dismissals involving individual employees or whether the amended version of section 187(1)(c) of the *LRA* of 1995 does not afford protection to individual employees.[159] The LC held that the amended version was not meant to apply in cases involving individual employees, but it was meant to apply in the collective bargaining sphere. Collective bargaining involves the participation of two or more employees.[160]

4.2. Primary objects of the LRA of 1995

In its primary aims and objectives the *LRA* states that the purpose of the *LRA* of 1995 is to give effect to section 23 of the *Constitution* and to promote collective bargaining.[161] The Explanatory Memorandum that accompanied the Amendment Bill states that the purpose of the amendment of section 187(1)(c) of the *LRA* of 1995 is to promote the process of collective bargaining by prohibiting dismissal of employees because they refused to accept a demand from their employer concerning a matter of mutual interest. In this instance, the amendment wanted to ensure compliance with the purpose of the Act in order to promote the collective bargaining process. In order to understand this, one has to understand the *Fry's Metals* and *Algorax* cases.

In both *Fry's Metals* and *Algorax* cases, the employer dismissed employees for purposes of compelling employees to accept a demand regarding a matter of mutual interest. A demand under section 187(1)(c) of the *LRA* of 1995 seeks to create new legal rights, and this is classified as a dispute of interests and such disputes are resolved through collective bargaining. Instead of resorting to threats (using economic power play) and ultimatums (accepting the demand or face dismissal), the *LRA* of

158 *Vitalab* para 17.
159 *Vitalab* para 18.
160 *Vitalab* para 19.
161 Section 1 of the *LRA* of 1995.

1995 requires the employer and employees to resolve disputes of interests within the collective bargaining framework established for matters of mutual interest. The employer may enforce a lock-out in order to force employees to accept a demand to amend the terms and conditions of employment.[162] At such a time, the employer may not employ another person to perform work of the employee who is locked-out, unless the lock-out imposed by the employer is in response to a strike action.[163]

The approach of LC to examine the Explanatory Memorandum literally without the context of what happened in *Fry's Metals* and *Algorax*, specifically, using economic power play and dismissal to compel employees to accept a demand and say the provision is limited to collective bargaining sphere was an error by the LC. The effect of the amendment regarding the promotion of collective bargaining is to prohibit employers from using dismissal as an economic weapon.[164] An employer is not allowed to resort to dismissal of employees in the course of a dispute because employees refused to accept the demand of the employer. The provision is meant to promote the process of orderly collective bargaining by ensuring that employers fully engage in collective bargaining and use the framework established for collective bargaining for the resolution of disputes of interests instead of resorting to dismissal.[165] The provision, as amended, does not seek to preclude individual employees from the realms of its protection.

Furthermore, the LC examined the wording of the provision and concluded that the amendment using "employees", "them" and "their" is a clear indication that the provision only applies when an employer seeks to extract a concession from employees for the demands made in a collective context; hence, this excludes application to individual employees.[166] This conclusion from the court is inconsistent with the correct application of the section and the general structure of the interpretation of the section and the *LRA* of 1995. The original section 187(1)(c) of the *LRA* of 1995, when it was first enacted, used the word "employee" instead of "employees".[167] If the

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162 Section 213 of the *LRA* of 1995 describes the term 'lock-out' and the purpose of a 'lock-out'.

163 Section 76(1)(b) of the *LRA* of 1995.

164 Van Niekerk *et al Law @ work* 279.

165 *Gauteng Provinsiale Administrasie v Scheepers & Others* (2000) 21 *ILJ* 1066 (LAC) para 9.

166 *Vitalab* para 19.

167 See the wording of the original section 187(1)(c) of the LRA of 1995 when it was first enacted, how it used the word "employee" instead of "employees".

interpretation of the new provision by the LC was to adopted and used retrospectively in disputes concerning section 187(1)(c) of the *LRA* of *1995* in its original form, before the amendment, the claims of NUMSA in *Fry's Metals* would have been under a different section and a different conclusion would have been reached by the LAC and SCA. This is so because the wording of the former provision used the word "employee" and that implies a single employee and not a group of employees. That conclusion would undermine the purpose of the *LRA* of 1995 to promote collective bargaining. Instead the courts have often used an interpretation that is contextual and purposive in order to adhere to the primary aims and objectives if the Act.[168] Also, the *LRA* of 1995 provides a framework for the resolution of disputes which concern matters of mutual interest.[169] Upon the reading of the *LRA*, specifically section 134(1)(a)(ii) of the *LRA* of 1995, an inference can be made that matters that fall within the scope of matters of mutual interest can include one or more employees, and this include individual employees and collective employees in a collective sphere. Once again, this highlights the application of section 187(1)(c) of the *LRA* of 1995 being applicable to not only apply in the collective sphere; but also, intends to provide protection to individual employees who are automatically unfairly dismissed.

4.3. The right not to be unfairly dismissed

The right not to be unfairly dismissed is a core right and receives the same guarantee and protection as the rights contained in the Bill of Rights.[170] When it comes to the law of unfair dismissal, the starting point is always the *Constitution*, which states that everyone has the right to fair labour practice, and the *LRA* of 1995 provides that every employee has the right not to be unfairly dismissed.[171] There are two important questions that need to be asked in cases of dismissals. Firstly, is the employee who claims protection under the *LRA* of 1995 in fact an employee.[172] Secondly, is the disputed dismissal prohibited in terms of contract or statute?[173] Once these questions have been answered, it is up to the court to determine the unfairness of the dismissal.

168 Section 1(c)(i) of the *LRA* of 1995.
169 Section 134 of the *LRA* of 1995.
170 Section 23(1) of the *Constitution* provides that everyone has the right to fair labour practice.
171 Section 23(1) of the *Constitution* and Section 185(a) and (b) of the *LRA* of 1995.
172 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 3.
173 Grogan *Dismissal, Discrimination and Unfair Labour Practice* 3.

The right not to be unfairly dismissed is a right provided for in terms of section 185(a) of the *LRA* of 1995 and applies to every employee, as the wording of the provision states. The CC, in *NEHAWU v University of Cape Town & others* (hereafter *NEHAWU*),[174] held that by everyone, for purpose of fair labour practices, extends to both the employer and the employee.[175] The practises of fair labour practice that are covered by section 23(1) of the *Constitution* as unfair include automatically unfair dismissals, discrimination, victimisation for activities of a trade union and *etcetera*.[176] The practises that are mentioned have since been codified in the *LRA* of 1995 under the scope of unfair dismissals.[177] It can be inferred that every employee, from the unfair labour practice scope, is covered from the unfair labour practices which violate their rights in terms of contract or statute.[178]

The right to fair labour practice is a term that is incapable of a definition which is precise. The scope of fair labour practice includes a number of practices. Firstly, the right should provide protection for unfair labour practices in relation to the work security of employees as included in the *LRA* of 1995; the protection should be of a substantive and procedural nature.[179] Secondly, the right should apply in disputes of rights as opposed to disputes interests; this refers to disputes from already existing legal rights from contract of statute (the right not to be unfairly dismissed in the *LRA* of 1995).[180] Thirdly, section 23 of the *Constitution* contains various subsections, which are distinct since they all address different terrains; In addition, the right to fair labour practice is regarded as a catchall right, with the capability of applying in any matter and any person. In *SA National Defence Union*, the High Court (HC) held that the right to fair labour practice is an overreaching right and it is capable of encompassing various other rights in section 23 of the *Constitution*.[181]

Automatically unfair dismissals are codified in section 187 of the *LRA* of 1995 which provide a comprehensive list of such conducts or practises by the employer. If it is

174 (2003) 24 *ILJ* 95 (CC).
175 *NEHAWU* para 39.
176 Van Niekerk *et al Law @ work* 43.
177 See section 185 to section 197 of the *LRA* of 1995.
178 Van Niekerk *et al Law @ work* 44.
179 *SA National Defence Union & another v Minister of Defence & others* 2003(9) BCLR 1055 (T) (hereafter *SA National Defence Union*).
180 Van Niekerk *et al Law @ work* 45.
181 *SA National Defence Union* para 48.

found that an employee is dismissed for any of the listed reasons under the section, it has to be proven that dismissal was one or more reasons listed under. One of those conducts is the dismissal of employees if they refuse to accept a demand regarding a matter of mutual interest between employer and employees. The section had in the past, before the *LRAA* amendment, applied in cases involving individual employees. However, the section was amended in 2014, and the LC was asked to determine whether the provision applies or provides protection to automatically unfair cases involving individual employees in *Vitalab*.[182] The LC held that the section applies in the collective sphere and does not apply to individual employees.[183] That was an error by the LC in its interpretation of the section, as amended.

The right not to be unfairly dismissed is a core right in terms of the *LRA* of 1995 and it must be given the same protection as the right in the *Constitution*.[184] If the right not to be unfairly dismissed is taken away from the employee, that leaves an employee without any legal recourse and will render the purpose of dismissal law established by the *LRA* of 1995 redundant. As a result, this violates, not only the right not to be unfairly dismissed in terms of section 185 of the *LRA* of 1995, but also, it violates the fundamental right to fair labour practice in terms of the *Constitution*. In terms of the *Constitution*, the right to fair labour practice applies to everyone. Arguably, the LC's stance to take the wording of the provision and conclude that the use of plural words can be taken as reference by the legislature to exclude individual employees from the protection of section 187(1)(c) of the *LRA* of 1995, as amended, was a misdirection by the court. The right to fair labour practice encompasses different competing interests and one is balanced against the other.[185] The right to fair labour practice seeks to regulate the relationship between the employer and the employee, as well as to further regulate the continued existence of that relationship.[186] In giving content to the right, one must bear in mind that there are competing interests between the employer and the employee, which is inherent in the labour relations. As a result, fairness needs to be excised where possible; this may assist all parties involved to

182 *Vitalab* para 18.
183 *Vitalab* para 19.
184 Section 185 of the *LRA* of 1995.
185 *NEHAWU* para 40.
186 *NEHAWU* para 40.

arrive at an acceptable balance required by the *LRA* of 1995 and the concept of fair labour practice. In other words, if one is going to uphold the right of an employer to dismiss an employee for acceptable ground in terms of section 188(1) of the *LRA* of 1995, the right of the employee not to be unfairly dismissed must be upheld. This is the context that the *LRA* of 1995 must be interpreted.[187]

The decision of the LC in *Vitalab* was inconsistent with the statutory framework established under the *LRA* of 1995; the court disregarded several factors when it comes to the law of dismissal. Most importantly, it disregarded its duty to develop law in line with the *Constitution*. In its interpretation, the *LRA* of 1995 requires that everyone or a court must give effect to the primary aims and objectives of the Act in consistent with the *Constitution* and public international law obligations of the Republic.[188]

4.4. Conclusion

In summary, this chapter reviewed and gave criticism to the decision of the LC in the *Vitalab* case. The primary objects and purpose of the *LRA* of 1995 were outlined and discussed in order to determine the intention of the legislature regarding the protection of individual employees under section 187(1)(c) of the *LRA* of 1995. After an exhaustive discussion, by examining the Explanatory Memorandum, which accompanied the Amendment Bill, it was established that the LC made an error by limiting section 187(1)(c) of the *LRA* of 1995, as amended, to collective sphere. Lastly, it was established that the right not to be unfair dismissed applies to every employee and disregard of that by the LC was violation of fair labour practice.

187 *NEHAWU* para 40.
188 Section 1(b) 0f the *LRA* of 1995.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Findings of the study

The primary aim and objective of the study was to determine whether section 187(1)(c) of the *LRA* of 1995, which was amended by section 31 of the *LRAA*, applies in automatically unfair dismissals involving individual employees. The reason for the objective is because of the judgment of the LC in *Vitalab*, which held that section 187(1)(c) of the *LRA* of 1995 does not provide protection to an individual employee who was dismissed for refusing to accept a demand regarding a matter of mutual interest between the employer and employee. In Chapter Two the study outlined and discussed the historical framework of section 187(1) of the *LRA* of 1995. It did so by examining the concept of lock-out dismissals under the *LRA* of 1956, the pre-amendment version of section 187(1)(c) of the *LRA* of 1995 and the post-amendment version of section 187(1)(c) of the *LRA* of 1995, which was amended by the *LRAA*.[189] Furthermore, the study established that there is a contrast in law when it comes to the right of the employer to dismiss for operational requirements and automatically unfair dismissal under the *LRA* of 1995.[190]

In terms of the study, with reference to the decision of the CC in Aveng, it was determined that the *LRA* deemed it to be automatically unfair for an employer to dismiss employees for refusing to accept a demand regarding a matter of mutual interest between an employer and employees in terms of section 187(1)(c) of the *LRA* of 1995 but does not prohibit employers from exercising their right to dismiss for operational requirements in terms of the *LRA* of 1995. In terms of the CC in Aveng, it will undermine and violate the employer's the right to fair labour practice. Therefore, dismissal for operational requirements as a right of the employer can still be exercised.

In Chapter Three, the study discussed the scope and application of section 187(1)(c) of the *LRA* of 1995. The provision applies in matters of mutual interest between the employer and employees. Matters of mutual interest is a term that consists of disputes of rights and disputes of interests. In terms of the study, given that the provision is

189 Section 31 of the *LRAA*.
190 Section 187(1)(c), 188(1) and 189 of the *LRA* of 1995.

concerned with a demand to alter the terms and conditions of employment and the employer has no legal right to do so and is seeking to create new legal rights, the study established that the dispute in such instances is of interests since there are competing interests between the employer and the employees to create rights which are more advantageous to either. Furthermore, the study found that section 187(1)(c) of the *LRA* of 1995 applies is dismissals which concern two or more employees. In other words, in the collective sphere and excludes the protection of individual employees, that was the decision of the LC in *Vitalab*.

In Chapter Four, the study critiques the decision of the LC in *Vitalab*. The study examined the objectives and the purpose of the *LRA* of 1995 in conjunction with the Explanatory Memorandum, which accompanied the Amendment Bill. The purpose was to determine the intention of the legislature regarding the application of section 187(1)(c) of the *LRA* of 1995 to individual employees. Whether the legislature intended to exclude the protection of individual employees under the provision, when it was amended, or the amendment intended to cure an anomaly and protect the integrity of the collective bargaining process by prohibiting employers from using dismissal as an economic weapon. The study established that the amendment did not intend to exclude individual employees from the protection of the provision, but it sought to ensure collective bargaining process is respected and there is compliance within the established collective bargaining framework.

Furthermore, the study established that the right not to be unfairly dismissed applies to every employee and taking away such a right from an employee violates a constitutional right to fair labour practice; the right to fair labour practice is a right that applies to everyone; this includes both the employer and the employee. Finally, the right to fair labour practice applies to different competing interests of the employer and employee is being violated too. As a result, where it is possible, fairness needs to be exercised in order to arrive at an acceptable balance of the interests, as required by the *LRA* of 1995 and the concept of fair labour practice. If such an approach is to be adopted, the right to dismiss of the employer for various grounds under section 188(1) of the *LRA* of 1995 is complementary with the right not to be unfairly dismissed of the employee under section 185 of the *LRA* of 1995.

5.2. Recommendations

An inference that can be made from the study is that the LC errored in its judgment in *Vitalab*; as result, a precedent which goes against the primary aims and objectives of the Act and the core establishment of law of dismissal.[191] The precedent established by the LC has started to have a negative impact on the right of employees not to be dismissed unfairly and that error needs to be corrected before it can defeat the purpose of the Act.[192]

In order to correct the decision of the LC, the study recommends that courts, forums and tribunals should exercise a contextual approach of interpreting rights in the *LRA* of 1995, in compliance with the *Constitution* and public international law standards which South Africa is bound by.[193] Furthermore, the use of the employees in the wording of section 187(1)(c) of the *LRA* of 1995 needs to be taken in conjunction with section 185 of the *LRA* of 1995 and section 23(1) of the *Constitution* to include individual employees in the application of section 187(1)(c) of the *LRA* of 1995. Moreover, the Explanatory Memorandum which accompanied the Amendment Bill need to be read as a measure to ensure an anomaly created by the LAC and SCA in *Fry's Metals* and *Algorax* and to further promote collective bargaining process, and not to exclude individual employees.

Finally, the study recommends that the use of the employees from the wording of the section to be removed due to the impression that out of all provisions in section 187 of the *LRA* of 1995, section 187(1)(c) of the *LRA* of 1995 creates an impression that by the wording of the provision individual employees are excluded from the realms of protection of the provision upon the literal reading of the provision. Furthermore, the legislature needs to clarify that the use of the word employees does not seek to prohibit but seeks to promote the primary aims and objectives of the *LRA* of 1995.[194] By doing so, the confusion and the violation of the right not to be dismissed unfairly of employees and the right to fair labour practice will avoid violation of rights similar to *Vitalab*'s case.

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191 *Vitalab* para 19.
192 Section 23(1) of the *Constitution* read together with section 185 of the *LRA* of 1995.
193 Section 1(b) of the *LRA* of 1995.
194 Section 1(d) of the *LRA* of 1995.

5.3. General conclusion

In summation, the study outlined how recommendations provided by the study can be used to address the findings of the study. By adopting a contextual approach of interpretation of the *LRA* of 1995, specifically section 187(1)(c), it will help avoid any future confusion that section 187(1)(c) of the *LRA* of 1995 does not apply to individual employees. Instead, we will go back to how the same section had always been interpreted to include and protect individual employees in cases of automatically unfair dismissals. Secondly, by adopting such interpretation will ensure that there is compliance with the primary aims and objectives of the *LRA* of 1995, to interpret the provision of the *LRA* 1995 in compliance with the *Constitution* and public international law obligations.

The duty of different forums, tribunals and court, is to determine whether a dismissal claimed to be automatically unfair under section 187(1)(c) of the *LRA* of 1995 concern a matter of mutual interest. Once that has been established, unfairness of the dismissal has to be determined. The duty of courts is not to second guess and assume what the intention of the legislature is, but is to give an interpretation which is consistent with the primary aims and objectives of the relevant statute in question and ensure compliance with the *Constitution* and public international law.

Finally, the right not to be unfairly dismissed is a core right and available to every employee under the *LRA* of 1995 and the word every employee in section 185 of the *LRA* of 1995 includes both individual and collective employees. The right not to be unfairly dismissed is a right that falls under a number of conducts or practises, which are regulated by the unfair labour practice. The law of unfair labour practice applies to everyone and that includes individual employees in the context of section 187(1) of the *LRA* of 1995. Taking away the right of individual employees not to claim automatically unfair dismissal due to refusal to accept a demand regarding a matter of mutual interest between the employer and employee is a violation of the right to fair labour practice, especially when employers still maintain the right to dismiss under section 188(1) of the *LRA* of 1995.

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