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DECLARATION OF ORIGINALITY

1. I understand what plagiarism is and am aware of the University’s policy in this regard.
2. I declare that this treatise is my own original work. Where the work of others has been used, in whatever form, this has been properly acknowledged and referenced in accordance with the departmental requirements.
3. I have not used work previously produced by another student or another person to hand in as my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
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Chapter One

1. BACKGROUND AND RATIONALE FOR THE STUDY

1.1. Background

All employers at some point in time may find themselves under pressure, facing financial challenges, which may force them into contemplating some reductions in their operating costs. This could result in an exercise that may entail restructuring the wage bill. This in turn could eventually result in the dismissal of employees for operational reasons.

The concept of job security is a new phenomenon in the labour market and with globalisation and the economic crisis that have caused businesses to become competitive, workers face the threat of losing jobs daily. It must be stated that the International Labour Organisation (hereinafter referred to as ILO), which is an international body responsible for developing principles and guidelines which regulate labour relations in the world, had only in 1963 taken some steps to give due regard to the law that seek to promote employment security\(^1\). Until then, the common law dictated the nature of the relationship with regard to the rules that govern the termination of employment. The study will further investigate the international trends in the embedding of the Convention of Termination of Employment\(^2\).

Against this context, this treatise seeks to highlight the work done to further provide measures of employment security for workers facing dismissal based on operational requirements. The study will examine the role of the Commission for the Conciliation, Mediation and Arbitration (hereinafter referred to as CCMA), an impartial body in South Africa, whose main function is to prevent and resolve labour disputes, as well as to mitigate job losses in the context of operational requirements dismissals.

\(^1\)Termination of Employment Recommendation, 1963.
In discussing the background in which the CCMA’s function to perform this important role, an examination of the international public law framework and the role played by the ILO will be juxtaposed. The Recommendations and the Conventions published by the ILO on termination of employment will be discussed and analysed in detail.

The treatise shall explore the role the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) as an enabling legal instrument in transforming all aspects of legislation in the country in particular the common law and the employment law.³

The study will also discuss the structures, principles and processes the Labour Relations Act of 1995⁴ (hereinafter referred to as LRA) has put in place which contribute to the enhancements that give effect to the efforts and the role of the CCMA to mitigate job losses in the context of operational requirements dismissals.

The treatise will further unpack some cases⁵ that the courts had to deal with which gave rise to the need of for the changes in the legislation in order to address emerging jurisprudence. The selected cases on the whole deal with the essence of the dismissals for operational requirements, ranging from the reasons for dismissals⁷ and the nature and content of consultation⁸ which is now distinguishable from the small scale retrenchments to the larger scale. The reasons that gave rise to the Labour Relations Act Amendments of 2002 will be highlighted and the new provision that further regulates the dismissals based on operational requirements and its purposes will be discussed.

The treatise will also compare and contrast, how the LRA accommodates the compliance provisions of the ILO obligations and how far it has progressed to give effect to and for the compliance of the public international law standards.

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³Section 23(1) of the Constitution.
⁵*BMD Knitting Mills v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC).
⁷*Fry's Metals (Pty) Ltd v NUMSA & others* [2003] 2 BLLR 140 (LAC).
with regards to the principles of the conventions that encourage employment security.

The purposes of the Code of Good Practice on Dismissal based on Operational Requirements\(^9\) will be outlined and discussed in detail, especially the provision that provides for an employee who unreasonably refused to accept an offer of alternative employment\(^10\).

The study will further examine measures that are in place which are intended to provide job security to the workers who are facing dismissal for operational requirements. In concluding assessment of the measures that seek to mitigate job losses in the context of operational requirements dismissals, the study will briefly discuss the Framework for South Africa’s Response to the International Economic Crisis. The role of the CCMA to perform any other duties imposed, and may exercise any other powers conferred, on it by or in terms of the LRA will be investigated and how that could be used to improve its effectiveness to mitigate job losses\(^11\).

The treatise will substantiate the efficiency that the Facilitation Regulations\(^12\) published in terms of section 189A (6) which provides for focusing and directing the consultation processes engaged in for dismissal based on operational requirements and its enabling of the role of the CCMA to mitigate job losses in those consultation processes. The study will conclude with a critical examination of the consultation processes for dismissals of operational requirements where there is no facilitation\(^13\).

1.2 Problem statement

This research investigates the following problem: The role of the CCMA during the facilitation processes in terms of its job saving strategy to mitigate job losses in the context of operational requirements dismissal (s189A of Labour Relations Act)

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\(^10\) Code of Good Practice on Dismissal based on Operational Requirements item 11.

\(^11\) Section 115 (4) of LRA.

\(^12\) GN R1445 in GG 25515 of 10 October 2003.

\(^13\) S189A (8) of LRA.
1.3 Research questions

This research will investigate the following three main questions:

i. What is the legal framework governing the s189A of Labour Relations Act?

ii. How does the LRA regulate facilitation of the consultation for large scale retrenchments?

iii. What are the measures applied by the CCMA to mitigate job losses during the s189A facilitation processes?

1.4 Hypothesis

The common law offers the employee very little in terms of job security. During economic recession or meltdown the workers and business find themselves in distress which could result in termination of employment and business closures. The LRA also defines the dismissal for operational reasons as “requirements based on the economic, technological, structural, or similar needs of an Employer”14.

The minimum core defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological structural or similar needs of the employer. As a general rule, economic reasons are those that relate to the financial management of the enterprise15.

1.5 Research objectives

The objectives of this research are:

i. To outline the legal frame work regulating the dismissal for operational requirements.

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14 Section 213 of the LRA.
15 Item 1 of the Code of Good Practice on Dismissal Based on Operational Requirements.
ii. To investigate the effectiveness of the measures that assist to mitigate job losses.

iii. To examine how the LRA regulates the facilitation of the consultation for dismissals for operational requirements.

iv. To test the effectiveness of the LRA facilitation processes.

v. To examine the legal implications for not following the facilitation process.

1.6 Literature review

The South African common law had offered the employee with no job security, fundamentally no protection against unfair dismissal during the period of law of master and servant\textsuperscript{16}.

The instrument to safeguard employment security is an international instrument to standardise the protection of the dignity of workers when it comes to termination of employment and the International Labour Organisation (hereinafter referred to as ILO) sought to regulate it since time immemorial\textsuperscript{17}.

The ILO developed guidelines known as the Recommendations on termination which were later adopted as the Convention in order for it to have a more persuasive and binding effect to the member states that have ratified it\textsuperscript{18}. The Convention provided that the employer must have a valid reason for a termination of employment and, it further distinguished a fault dismissals to a no-fault dismissals, like for example a dismissal for operational requirements\textsuperscript{19}.

The article 8(1) provides that a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body. This article in the Convention is synonymous to the provisions

\textsuperscript{16} Common law is an amalgam of principles drawn from Roman, Roman-Dutch, English and other jurisdictions.

\textsuperscript{17}Termination of Employment Recommendation, 1963.

\textsuperscript{18}Termination of Employment Convention, 1982 (No. 158).

\textsuperscript{19}Article 4, Termination of Employment Convention, 1982 (158).
of section of the Labour Relations Act (herein thereafter referred as “LRA”)) that deal with the referral of a termination of work dispute\textsuperscript{20}.

Article 9(3) suggests that in case of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons.

The Convention further provides that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out\textsuperscript{21};

(b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.\textsuperscript{22}

The Directive of the European Parliament and Council seeks to entrench the principle of informing and consulting employees in the European Community who may be facing retrenchment in conjunction with the impartial Commission. The following articles of the Directive strengthen these principles and further provide that:

(3) \textit{The Commission considered management and labour at the Community level on the possible direction of Community action on}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20}Labour Relations Act of 1995 as amended.
\item \textsuperscript{21}Article 13 (1) (a) Termination of Employment Convention, 1982 (158).
\item \textsuperscript{22}Article 13 (1) (b) Termination of Employment Convention, 1982 (158).
\end{itemize}
\end{footnotesize}
the information and consultation of employees in undertakings within the Community.

(8) There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggest that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.

The statutory concept of unfair dismissal was first introduced in the Industrial Relations Act 1971 in the United Kingdom is the part of UK labour law that requires fair, just and reasonable treatment by employers in cases where a person's job could be terminated. The Employment Rights Act 1996 regulates this by saying that employees are entitled to a fair reason before being dismissed, based on their capability to do the job, their conduct, whether their position is economically redundant, on grounds of a statute, or some other substantial reason. This enactment was in line and influenced by the ILO Recommendation on Termination of Employment. The measures to mitigate job losses in UK are also indicative of this advanced and progressive approach to job security.

In USA, there is still emphasis on the master and servant relationship in employment, which forms the basis of the employment-at-will-concept, which means that workers may be dismissed for any reason or no reason at all. The measures to mitigate job losses in USA are in line with the international trends and that can be attributed to the influence the ILO's Termination of Employment principles as conceived in the Model of Employment Termination

Act of the National Conference of Commissioners of Uniform State Laws of 1991. In some states, there is a labour legislation called The Worker Adjustment and Retraining Notification Act (WARN Act) which protects employees, their families, and communities by requiring most employers with 100 or more employees to provide 60 calendar-day advance notification of plant closings and mass layoffs of employees, as defined in the Act. This legislation is similar to some extent with the provisions of section 189A of LRA.

The Singapore termination of employment is governed by the Employment Act, 1970 as amended and the Industrial Relations Act. The principles underpinning the Singaporean labour laws on termination of employment are imported from the ILO’s Convention on Termination of Employment. The Singapore Ministry of Manpower published measures to mitigate job losses which must guide the process of consultation for dismissal for operational requirements.

The Constitution provides that “everyone has the right to fair labour practices” and if further gives provision for the Enactment of the Employment Laws. The LRA compels anyone who is subject to its jurisdiction to give effect and comply with the public international law obligations, which ILO conventions are part of.

The LRA in compliance with the ILO obligations provides for the establishment of impartial body, by the name of the Commission for the Conciliation, Mediation and Arbitration (hereinafter referred to as CCMA), to determine the alleged unfair termination of employment.

The LRA regulates the general dismissal based on operational requirements by outlining hierarchy of who to be consulted when the employer contemplates

25 ibid.
28 Section 23(1) of the Constitution.
29 Section 112 of the LRA.
30 S189 of LRA.
dismissing one or more employees for reasons based on employer’s operational requirements.  

The LRA further directs an employer who contemplates dismissing employees for reason of operational requirements to disclose in writing to the other consulting party all relevant information, including, but not limited to-

a. the reasons for the proposed dismissals;
b. the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
c. the number of employees likely to be affected and the job categories in which they are employed;
d. the proposed method for selecting which employees to dismiss;
e. the time when, or the period during which, the dismissals are likely to take effect;
f. the severance pay proposed;
g. any assistance that the employer proposes to offer to the employees likely to be dismissed; and
h. the possibility of the future re-employment of the employees who are dismissed.

The above provisions of s189 (3) of the LRA which outline the steps which the employer must adhere to when considering terminating employment for operational requirements are framed along the principles advocated by the ILO Article 33.

There are measures in place which are intended to provide job security to the workers who are facing dismissal for operational requirements. The Code of Good Practice on Dismissal based on Operational Requirements provides that if an employee unreasonably refused to accept an offer of alternative employment, the employee’s right to severance pay is forfeited.

31 S189 (1) of LRA.
32 S189 (3) of LRA.
33 Article 13, Termination of Employment Convention, 1982 (158).
34 GN 1517 in GG20254 of 16 July 1999.
35 Code of Good Practice on Dismissal based on Operational Requirements item 11.
In the matter of *BMD Knitting Mills*\(^{36}\), on appeal, the Labour Appeal Court considered if the reason for dismissal was fair reason. The starting-point is whether there is a commercial rationale for the decision. A court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the employees to be retrenched. To this extent, the court is entitled to enquire whether a reasonable basis exists for the decision to dismiss for operational requirements. The court is entitled to examine the content of the reasons given by the employer\(^{37}\).

In the *Chemical Workers Industrial Union v Algorax*\(^{38}\) case, the court considered itself to be entitled to scrutinize the employer’s business reasoning and decision-making in considerable detail. It further pointed out that the employer could have implemented the changes to the shift system without having to resort to retrenching the employees who refused to accept the changes. The approach followed by the court is a further certification of the ILO’s Convention on Termination of Employment.

In *United National Breweries v Khanyeza*\(^{39}\) case, the court held that, where a union is recognized as a consulting party in a collective agreement, it is entitled to consult on behalf of all employees, even those falling outside the bargaining unit for which the union is recognised. This decision affirms the principle of section 189 (1) of the LRA which are consistent with the ILO convention\(^{40}\).

In *Sikhosana v Sasol Synthetic Fuels*\(^{41}\), the court noted that the LRA contemplates a hierarchy of consulting parties, each if applicable excluding its successors. The courts apply section 189(1) strictly. It was held that, although appropriate measures to mitigate the adverse effects of the dismissals should be taken, employers are not required actively to seek alternative work for retrenched employees.

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\(^{36}\) *BMD Knitting Mills v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC).

\(^{37}\) *ibid*.

\(^{38}\) *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

\(^{39}\) *United National Breweries (SA) Ltd v Khanyeza & others* [2006] 4 BLLR 321 (LAC).

\(^{40}\) Article 13, *Termination of Employment Convention, 1982* (158).

\(^{41}\) *Sikhosana and others v Sasol Synthetic Fuels* (2000) 1BLLR 101 (LC).
The issue of consultation being meaningful and attempting to reach consensus is also confirmed by Grogan in the *Workplace*. He asserts that the courts contend that the requirement of section 189 (2) goes beyond the ordinary meaning of consultation.

The selection criteria as envisaged in the legal instruments regulating the dismissals for operational requirements is another measure to mitigate job losses, according to the authors of *Law@work*. Van Niekerk *et al* argue that, *It is not those employees who actually doing the job or occupying the post that identified as redundant who necessary form the group of employees selected for retrenchment. An employer may be expected, in appropriate circumstances, to widen the selection pool to include employees in other jobs that may potentially be done by employees whose own jobs have become redundant.*

According to the authors of *Labour Law in Context*, the purpose of consultation is clear that the employer cannot come to the process with a mind already set on dismissals. The issues that consultation must focus on, according to the writers, predominantly indicate that the purpose is to mitigate job losses or lessen the impact of job losses.

*In Fry’s Metals v National Union of Metal workers* case a new development which expanded the definition of operational requirements, saw a retrenchment for refusal to comply in a matter of mutual interest. The facts are that *Fry’s Metals* had retrenched a number of employees after they refused to agree to a revised shift system, which the company argued, necessary for the continued viability of the business. Grogan argues that, while the legislature does not intend to force employers to keep redundant workers on their books, section 189 of the LRA are designed to ensure that retrenchment is not resorted to while it can conceivably be avoided. This raised concerns as to

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43 Van Niekerk, Christianson, McGregor, Smith and Van Eck Law@Work (2008).
47 *Fry’s Metals v NUMSA & others* [2003] 2 BLLR 140 (LAC).
48 ibid
49Grogan J, Workplace Law 227.
whether the principles underpinned in the ILO Conventions are being undermine and this case caused the LRA amendments of 2002.

The Labour Relations Amendments Act of 2002, amongst other issues, wanted to clarify and revise of procedures for resolving disputes in respect of dismissals based on the employer’s operational requirements\(^50\). The Labour Relations Amendments Act introduced a new principle that dismissal for operational reasons need not be restricted to the cutting of costs and expenditure. Profit, or an increase in profit, or gaining some advantage such as a more efficient enterprise, may also be acceptable reasons for dismissal. If the employer can show that a good profit is to be made in accordance with a sound economic rationale, and it follows a fair process to retrench an employee, the dismissal is fair. The question was whether this concept that the Amendments were bringing would not further threaten job security?

The Amendments distinguish between the size of employers and also the size of dismissals when regulating substantive and procedural fairness of dismissal\(^51\).

In terms of s189A (1) (a) a large-scale dismissal would entail the employer's dismissing:

- ten employees, if the employer employs between 50 and 200 employees;
- twenty employees, if the employer employs between 200 and 300 employees;
- thirty employees, if the employer employs between 300-400 employees;
- forty employees, if the employer employs between 400-500 employees; and
- fifty employees, if the employer employs more than 500.

In terms of s189A(1)(b), a dismissal by a big employer of fewer than the prescribed minimum listed above still constitutes a large-scale dismissal if the number of employees to be dismissed, together with the number of employees

\(^{50}\) Labour Relations Amendments Act, Act 12 of 2002.

\(^{51}\) s189A (1) of LRA 66 of 1996.
that have been dismissed for operational reasons in the twelve months previously, exceeds the number specified above.\textsuperscript{52} The purpose of the twelve-month rolling period is to ensure that employers do not manipulate the number of employees to be dismissed so that the dismissal always falls outside the ambit of section 189A. The Amendments further provide that, in any dispute referred to the Labour Court concerning the dismissal of the number of employees in terms of subsection (1), the court must find that the employee was dismissed for a fair reason if:

- the dismissal was to give effect to requirements based on the employer’s economic, technological, structural or similar needs;
- the dismissal was operationally justifiable on rational grounds;
- there was a proper consideration of alternatives; and
- selection criteria were fair and objective\textsuperscript{53}.

The purpose of the above sections in the amendments were to further strengthen measures to mitigate job losses in the context of operational requirements dismissal by complying with the ILO Conventions to subject the decision making of the employer to dismissal workers to an impartial body that would enquire reasons and the procedure followed.

The Amendments in section 189A provided for a new process for the CCMA, which would allow it to play in significant role in mitigating job losses in the disputes of dismissal for operational requirements affecting large employers. The provision state as followings:

(6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to –

a) the time period and the variation of time periods, for facilitation;
b) the powers and duties of facilitators;
c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
d) any other matter necessary for the conduct of facilitations.

\textsuperscript{52} Section 189A (1) of LRA 66 of 1996.
\textsuperscript{53} Section 189A (19) of the LRA of 1996.
The Facilitation Regulations$^{54}$ published in terms of section 189A (6) provide
direction as to how the facilitation envisaged by section 189A should be
carried out and guidelines in terms of time-frames for the process. The
facilitation is the vehicle which enables the role of the CCMA to mitigate job
losses in those consultation processes for dismissals of operational
requirements.

The CCMA must perform any other duties imposed, and may exercise any other
powers conferred, on it by or in terms of the LRA and is competent to perform
any other function entrusted to it by any other law.$^{55}$ This provision in the Labour
Relations Act is to enable the CCMA to work with other organisation in the
labour market which could assist it in its quest for mitigation of job losses in
whatever deemed appropriate in particular dismissals for operational
requirements.

In 2008 the world all over was affected by the financial crisis. South Africa which
is dependent on foreign trade and attracting foreign saving to prop up domestic
investment, was not immune to the impact which induced economic slowdown.
The most vital components of the domestic economy, which included
automotive, mining and retail sectors, went through a period of recession.$^{56}$ The
country labour market developed a multilateral response initiated by the
Minister of Economic Development called “A Framework for South Africa’s
response”, which entailed co-operation between businesses and labour
movement. The framework had strong principles that sought regard to potential
unemployment measures in the private sector, businesses had to avoid
retrenchments of workers and explore alternatives. Unions and employers were
expected to consider training layoffs as an alternative to retrenchment$^{57}$.

As a consequence, the National Economic Development and Labour Council
(NEDLAC), agreed on a package called Training Lay-off Scheme (TLS), which

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$^{54}$ GN R1445 in GG 25515 of 10 October 2003.
$^{55}$ Section 115 (4) of LRA.
would be administered by government agencies including the CCMA, which would assist workers and business facing distress. NEDLAC is a tripartite body established by the act of parliament which facilitate dialogue between the social partners in developing effective policies to promote the urgently needed economic growth, increased participation in economic decision making and social equity in South Africa. NEDLAC aims to promote consensus between the social partners on policy and legislation.

The Training Lay-off scheme is a temporary suspension of work of a worker or group of workers that is used for training purposes. The layoff depends on an agreement between an employer & a trade union on behalf of workers, or, in the absence of a trade union, between an employer & individual workers; who may otherwise be subject to dismissal for operational requirements. Participation in the training layoff is voluntary.

The CCMA role in the TLS process is that;

- A request for a training layoff may be made either directly to the CCMA by completing a form (workplace request), or it may emerge as an alternative to retrenchment during a CCMA process.
- A CCMA Advisory Committee evaluates eligibility of parties for participation in the training layoff scheme based on whether; the business is in financial distress; has the potential to turn around after the layoff period; and whether the workers are eligible to participate in the scheme.
- The CCMA Advisory Committee makes a recommendation in the form of an advisory award.

The TLS is a measure to mitigate job losses in the business that workers are likely to be retrenched due to the non-performance of the company. The CCMA, during the TLS process, engages with different government agencies that play a role in mitigating job losses which encourages collaborations of efforts.

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60 Ibid.
1.7 Significance of the study

It is hoped that this study will highlight, the role played by the CCMA’s job saving strategy; encourage social partners to fully make use of the facilitation process and further make recommendations to the CCMA on how to improve the effectiveness of its role in order to further expand the efficiency of the facilitators of consultation processes in matters of large scale retrenchments.

1.8 Methodology

A desktop research will be employed to assess ways and measures engaged to mitigate job losses of large scale dismissals bases on operational requirements. Case law, textbooks, journal articles and legislation will be consulted.

1.9 Scope and limitations of the study

The study will confine itself to the role play by the CCMA in the facilitation process to mitigate job losses in the context of operational requirements dismissal.

1.10 Delineations

The study does not concern itself with the job losses mitigated by the CCMA in other processes other than operational requirements dismissal processes and those occasioned by the social partners without the assistance of the CCMA in the operational requirements dismissal processes.
1.11 Chapter outline

The second chapter examines the international perspective with regards to how termination of employment for operational requires is conceived and managed. Chapter three is concerned with the analysis of s189A of the LRA, dismissal for operational requirements by examining the mechanisms which do not apply for the employees on small scale retrenchment processes. Chapter four will explore the role of facilitation and its basis, success and weaknesses. Chapter five substantiates the role played by the CCMA to mitigate job losses in the context of operational requirements dismissals. Chapter six concludes the study by giving a general account of the study and its recommendations.
Chapter Two

2. THE INTERNATIONAL PERSPECTIVE ON TERMINATION OF EMPLOYMENT

2.1. THE INTERNATIONAL LABOUR ORGANISATION

The International Labour Organization (hereinafter referred to as ILO) is a United Nations agency dealing with labour challenges, particularly international labour standards, social protection, and work opportunities for all. The ILO has 187 member states. Each member state has four representatives at the conference: two government delegates, an employer delegate and a worker delegate. All of them have individual voting rights, and all votes are equal, regardless of the population of the delegate's member state. The employer and worker delegates are normally chosen in agreement with the "most representative" national organizations of employers and workers. Usually, the workers' delegates coordinate their voting, as do the employers' delegates. All delegates have the same rights, and are not required to vote in blocs. 62

2.1.1 Background to Termination of employment

Prior to 1994, international standards played only an indirect role in the development of South African labour law63. The concept of job security is a new phenomenon in the labour market and with globalisation and the economic crisis that have compelled businesses to become competitive, workers face the threat of losing jobs daily. It must be stated that the International Labour Organisation, which is a an international body responsible for developing principles and guidelines which regulate labour relations in the world, had only in 1963 taken some steps to give due regard to the laws that seek to promote employment security64. Until then, the common law dictated the nature of the relationship with regard to the rules that govern termination of employment. The

63 Van Niekerk, Christianson, McGregor, Smith and Van Eck Law@Work (2008).
study will further investigate the international trends in the embedding of the Convention of Termination of Employment\textsuperscript{65}.

2.1.2. Current situation

The instrument to safeguard employment security is an international instrument which is aimed at standardising the protection of the dignity of workers when it comes to termination of employment and the International Labour Organisation has sought to regulate it since time immemorial\textsuperscript{66}.

The ILO developed guidelines known as the Recommendations on Termination which were later adopted as the Convention in order for it to have a more persuasive and binding effect on the member states that have ratified it\textsuperscript{67}. The Convention provided that the employer must have a valid reason for a termination of employment and, it further distinguished a fault dismissal from a no-fault dismissal. One example of a “no-fault” dismissal is, a dismissal for operational requirements\textsuperscript{68}.

Article 8(1) of the Convention of Termination of Employment provides that a worker who considers that his or her employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body. This article in the Convention is synonymous with the provisions of section 191 of the Labour Relations Act (herein thereafter referred as “LRA") that deals with referral of a dismissal dispute\textsuperscript{69}.

Article 9(3) suggests that in case of termination related to the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons.

\textsuperscript{66} Termination of Employment Recommendation, 1963.
\textsuperscript{67} Termination of Employment Convention, 1982 (No. 158).
\textsuperscript{68} Article 4, Termination of Employment Convention, 1982 (158).
\textsuperscript{69} 191(1) (a) Labour Relations Act of 1995 as amended.
The Convention further provides that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;  

(b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2.1.3 Extent of Ratification of the Convention

The intent of such standards, then, is to establish a worldwide minimum level of protection from inhumane labour practices through the adoption and implementation of the said measures. While the existence of international labour standards does not necessarily imply implementation or enforcement mechanisms, most real world cases have utilised formal treaties and agreements stemming from international institutions.

While the ILO recommendations take more of the role of providing mere guidance to member states, the stronger form, the ILO conventions, have the status of a treaty, which, in principle, is binding on the member countries that voluntarily ratify them. Despite the success that the ILO has had in the development of international labour standards, the extent of the ratification of the ILO conventions by member states is very low. The most contributing factor to the low ratification of the ILO’s convention, and the Termination of Employment Convention are the competing interests that the countries have to reconcile. The developing

70 Article 13 (1) (a) Termination of Employment Convention, 1982 (158).
71 Article 13 (1) (b) Termination of Employment Convention, 1982 (158).
73 Ibid.
countries in particular are confronted by the need to have direct foreign investment which necessitates a compromise of granting flexibility to the businesses at the expense of labour standards. The issue of national incomes and the standards of a country play a major role as it determines the country’s competitiveness and bargaining power when it deals with the foreign investors with regards to the labour standards it promulgates and enforce.

The power relations in the industrial relations of a member state also add to the noncompliance with the standards where the convention was ratified and incorporated to national legislation as governments either dismantle national laws that protect workers or weaken the enforcement of these laws.

Out of 187 ILO member states, only 36 member states have ratified the Termination of Employment. Brazil has subsequently denounced the convention.74

2.2. THE EUROPEAN UNION

The European Union (EU) is made up of 28 member states out of which only nine (9) member states have ratified the Convention 158 of 1982, the Termination of Employment Convention. The nine (9) EU member states are Cyprus, Finland, France, Latvia, Portugal, Slovakia, Slovenia, Spain and Sweden.

The EU, as a body, has not been able to reach a decision on embracing or ratifying the Termination of Employment Convention. This could be attributed to the fact that Business Europe registered its concerns when the Commission tasked to align conventions. These are some of the concerns that cause difficulty in finding common agreement in this aspect of international standards:

- Whether each ILO instrument is consistent with the EU or whether there are concerns that it is, in whole or in part, inconsistent with the EU acquis. For example, there is a huge disparity between the member states on the threshold requirements in determining which dismissals are categorised as large scale retrenchments.
- To what extent and in which areas the ILO instrument is coherent with and/or adds to the EU acquis, as the sources of law regarding the termination of employment and their hierarchy are incompatible to most member states.
- The legal rules concerning grounds for terminating employment relationship are mandatory in some countries and not mandatory in others.

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77Detailed analysis of each of the up-to-date ILO instruments in light of the EU acquis by Directorate of General Employment June 2013.

78Ibid.
2.2.1. The legal framework governing Termination of employment

The Directive of the European Parliament and Council seeks to entrench the principle of informing and consulting employees in the European Community who may be facing retrenchment in conjunction with the impartial Commission. The following articles of the Directive strengthen these principles and further provide that:

(3) The Commission considered management and labour at the Community level on the possible direction of Community action on the information and consultation of employees in undertakings within the Community.

(8) There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggest that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.

2.2.2 Consultation in the context of large scale retrenchments

Although the European Union does not have a uniform policy framework which regulates all aspect of termination of employment, it has issued directives that attempt to deal with some aspects given that only few of its member states had ratified the Convention.\(^7^9\) The EU Council issued Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, provide guidance on practical arrangements and procedures for such redundancies and to afford greater protection to workers in the event of collective redundancies.\(^8^0\)

The Directive further provides that the European Bank for Reconstruction and Development (herein referred to as EBRD) retrenchment guide of April 2010 must be applied in line with the national law and good industry practice and


must be based on principle of non-discrimination and consultation. The EBRD is an international financial institution founded in 1991 and as a multilateral developmental investment bank. The EBRD uses investment as a tool to build market economies.

The Directive regulates that any employer contemplating collective redundancies must consult with workers’ representatives, with a view to reach an agreement.

The European Union issued a directive on Consultation of Employees which requires the employers to inform and consult employees in the European Community through appropriate representative and disclose information concerning proposals that may result to employees being made redundant. This directive also enables employees to request employers to inform and consult regarding issues in the organisation that may lead to changes that may render their employment redundant.

The ILO convention prescribes that the consultations must at least cover ways and means of avoiding redundancies or reducing the number of workers affected and mitigating the consequences incorporated in the directive, and also in particular by recourse to accompanying social measures aimed at redeploying or retraining workers who are made redundant.

The EBRD guides its clients mainly made up of EU member states, that when facing retrenchment, the consultation must be preceded by a reasonable notice to the consulting party. There must be an engagement process with employees’ representatives, and relevant public authority with a view to mitigate the adverse effects of job losses to on the affected workers. The suggested guidelines, as requirements to the process, firmly entrench the principles of the Termination of Employment Convention.
The Directive and EBRD guides apply dominantly where the national legislation is not stringent. For example, the French dismissal law for large scale retrenchment is very strict and affords greater protection to workers in the event of collective redundancies compared to the Directive principles and EBRD guidelines and therefore may not be applicable in retrenchment processes in that country.

2.2.3. The measures applied by the EU to mitigate job losses in the context of retrenchments.

Article 1 of Directive 98/59/EC of 20 July 1998 provides that:

1. For the purposes of this Directive:

(a) “collective redundancies” means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:
  - at least 10 in establishments normally employing more than 20 and less than 100 workers,
  - at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,
  - at least 30 in establishments normally employing 300 workers or more,

(ii) or over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;\(^84\)

The above threshold stipulated by the EC Council is not fixed as each member is encouraged to have its threshold in defining the collective dismissal.\(^85\) This encourages each member state to have regulation of collective dismissal in its national law. The national law would further regulate the notification, consultation and measure to mitigate adverse consequences of job losses arising from retrenchment. For example, in Estonia, the failure to give adequate notice for intention to retrench does not render the dismissal unlawful but can result in payment of compensation. Also in Estonia, employees who acquired


occupational diseases or work injuries are protected and given preference when the employer is laying off employees.

In Lithuania, in the case of a dismissal for economic reasons, the employer has to offer the employee another job. The dismissal is only allowed if the employee cannot, with her consent, be transferred to another job.

In Denmark work-sharing was introduced as a short-term measure that could be used to mitigate the effects of the global financial crisis. It proved popular, with many companies preferring it to redundancy schemes when there was not enough work to keep staff fully employed, because they were able to retain staff in readiness for an economic upturn.86

The examples provided above illustrate that the European Union does not have a uniform approach on how to save jobs for retrenchment process. Incidentally all the three countries mentioned above have not ratified the convention. 87

2. 3. THE UNITED KINGDOM PERSPECTIVE
2.3.1 The legal framework governing Termination of employment.

The statutory concept of unfair dismissal was first introduced in the United Kingdom through the Industrial Relations Act 1971. It is the part of UK labour law that requires fair, just and reasonable treatment by employers in cases where a person's job could be terminated. The Employment Rights Act 1996 regulates this by providing that employees are entitled to a fair reason before being dismissed, based on their capability to do the job, their conduct, whether their position is economically redundant, on grounds of a statute, or some other substantial reason. This enactment was in line with and influenced by the ILO Recommendation on Termination of Employment. The measures to mitigate job losses in UK are also indicative of this advanced and progressive approach to job security.

2.3.2 Consultation in the context of large scale retrenchments.

The UK employment law dictates that when an employer is contemplating to retrench 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

2.3.3 The measures applied in the UK to mitigate job losses of retrenchment.

There are sometimes viable alternative strategies to redundancy that employers can adopt in order to avoid retrenchments. These could include questing applicants for voluntary redundancy or early retirement. The employers could seek applications from existing staff to work flexibly; laying off self-employed contractors, freelancers; avoid using casual labour, assist workers to consider transfers by filling vacancies elsewhere in the business with

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89 Section 188 of the Trade Union and Labour Relations Act 1992 as amended.
existing employees and engaging workers to work short-time working or
temporary lay-offs and natural attrition.\(^90\)

2.4. SINGAPOREAN FRAMEWORK
2.4.1. The legal framework governing Termination of employment.

Termination of employment in Singapore is governed by the Employment Act,
1970 as amended and the Industrial Relations Act\(^91\). The principles
underpinning the Singaporean labour laws on termination of employment are
imported from the ILO’s Convention on Termination of Employment. The
Singapore Ministry of Manpower (“herein after referred to as “MOM”) published
measures to mitigate job losses which must guide the process of consultation
for dismissal for operational requirements.

The Ministry of Manpower as of 1 January 2017 issued new regulations
governing the termination of employment in particular arising from operational
requirements. The retrenchments are defined as dismissals on the ground of
redundancy or by reason of any reorganisation of the employer’s profession,
business, trade or work. This applies to permanent employees, as well as
contract workers with full contract terms of at least 6 months.

2.4.2. Consultation in large scale retrenchments.

The MOM issued a regulation that the employers who employ at least 10
employees are required to notify MOM if 5 or more employees are retrenched
within any 6 month period beginning 1 January 2017.\(^92\) The notification must be
submitted within 5 working days after the employee has been notified of his or
her retrenchment. For the first four employees to be retrenched, the notification
must be submitted within 5 working days after the 5\(^{th}\) employee is notified.
Thereafter, the notification must be submitted within 5 working days after each

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employee is notified. The failure to notify within the required timeline is an offence and may render liable on conviction to penalties, including a fine.93

2.4.3. Measures applied by Singapore to mitigate job losses of retrenchment.

The MOM encourages employers to consider alternatives such as redeploying employees to other jobs within the company while providing them with the relevant training. Employers may also want to consider temporary layoffs or implementing a shorter work week.94 The vacancies have to be filled from within the organisation unless present staff could not meet the requirements. The contract workers rather than full-time workers were recruited to meet the increased demand to provide flexibility when demand fluctuates. They are aimed at equipping workers to be multi-skilled so that workers would be able to handle a wider scope of duties.

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93Ibid.
2.5 Conclusion

It is very clear that the ILO has a poor record of ratification of Termination of Employment Convention by member states. It is also interesting to observe that most developed countries have opted not to ratify the Convention.

Despite the poor enforcement by ILO and lack of ratification, what is encouraging is the fact that there are other monitoring mechanisms that have been used and they have resulted in the countries are embracing the principles of embedding the convention. Most countries’ employment laws or practices have embraced the principle of notification of the employees by the employer prior being dismissed for operational requirements. Interestingly, this requirement is in accordance with the principles of Termination of Employment Convention.

In many national laws, there is a requirement of consultation with the employees’ representatives on the issues of mitigating job losses arising out of no fault of their own. The most developed countries have also underpinned a duty for the employer to provide alternative employment for the affected employees.

It is worth noting that in most national laws regulating the termination of employment for operational requirements, the aspirations of ILO expressed in article 8(1) of Termination of employment find expression. The requirement to have an impartial body is very important to the process of dealing with dismissals for operational requirements as it helps harness the industrial relations of the country.

There is hope that sooner than later, most countries will incorporate in their national laws the broad principles governing termination of employment in order to afford workers a more entrenched protection when facing dismissals of operational requirements. The existence of these broad principles, notification, consultation and involvement of the impartial body in this dismissal management process is on its own a mitigation to the job losses as it causes employers to act cautiously as they know that their decision making is subject to some scrutiny.
Chapter Three

3. THE LRA AND DISMISSAL FOR OPERATIONAL REQUIREMENTS

3.1. Background

This chapter will explore the origin of the dismissal based on operational requirements and how it relates to dismissals in general. Dismissals for operational requirements, commonly known as retrenchment, are regulated by Sections 189 and 189A of the LRA.95

The Termination of Employment Recommendation, 1963, contained in the international standards of the ILO, has some regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in the world.96 The Convention defined termination of employment to mean termination of employment at the initiative of the employer.97

The Convention further regulates supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons by providing for the requirement of consultation of workers' representatives98. Item 3 of Article 13 defines the term workers' representatives which should conform with the definition given in the Workers' Representatives Convention, 197199.

Article 3

For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or

(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of

national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

Regarding the meaning of dismissal\textsuperscript{100}, there is a dismissal which is caused by the employer by terminating a contract of employment with or without notice\textsuperscript{101}. The dismissal based on operational requirements finds expression within that definition, as it is a termination of a contract of employment by the employer with notice\textsuperscript{102}.

The LRA has provided the definition for dismissal based on operational requirements\textsuperscript{103} and explains it as a dismissal based on the economic, technological, structural or similar needs of an employer’.\textsuperscript{104} The LRA has also codified the provision of article 13 of the Convention but adapted it in accordance with the legislation.

The definition of operational requirements is further expanded in the Code of Good Practice on Dismissal for Operational Requirements\textsuperscript{105} by giving a close and concise meaning of each component of the definition. The first part of the definition is explained thus: economic reasons are those that relate to the financial management of the enterprise; the second part relates to technological reasons, that is, the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to new technology or a consequential restructuring of the workplace. The last part of the definition is about the structural reasons which relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.\textsuperscript{106} According to Basson, restructuring often follows upon a merger or an amalgamation between two or more businesses.\textsuperscript{107}

\textsuperscript{100} Section 186 of Labour Relations Act of 1995.
\textsuperscript{101} Section 186 (1) (a) of Labour Relations Act of 1995.
\textsuperscript{102} Section 189(3) of Labour Relations Act of 1995.
\textsuperscript{103} Section 189 of the Labour Relations Act of 1995.
\textsuperscript{104} Section 213 of the Labour Relations Act of 1995.
\textsuperscript{105} GN 1517 in GG 20254 of July 1999.
\textsuperscript{106} Item 1 of the Code of Good Practice on Dismissal Based on Operational Requirements.
In concluding the background, it is important to highlight some of the principles on which s189A is based on as expressed in the Explanatory Memorandum of the objects of the 2002 amendments\textsuperscript{108}. Trade unions felt that employers were not taking the consultation process seriously and argued that the consultation meetings are often formalities because the decision to retrench has already been taken. This led to the introduction of time-frames, as legislated in the s189A, which must be observed and adhered to before the issuing of termination notices\textsuperscript{109}.

The trade unions further argued that the consultation proceedings often become highly adversarial and the parties fail to explore options that could assist to mitigate job losses when interrogating the size of the proposed retrenchment.\textsuperscript{110} In addition, the parties often become pre-occupied with disputes about the disclosure of information rather than seek to avoid or minimise dismissals.\textsuperscript{111}

The economic severe consequences in large-scale retrenchments to the labour market where thousands of jobs are at stake resulted in the enactment of the facilitation process under the auspices of the CCMA. The legislation also created an opportunity where the option of a facilitator is not utilised, unions are entitled to strike after certain formalities complied with\textsuperscript{112} or to approach the Labour Court\textsuperscript{113} option where facilitation procedure is ignored.

The Explanatory Memorandum of the objects of the 2002 amendments envisaged that the new section 189A was to enhance the effectiveness of consultations in large-scale retrenchments through the involvement of a skilful facilitator with the brief of assisting the parties to endeavour to reach consensus where a certain number of employees are likely to be retrenched by the employer who has employed 50 or more employees.\textsuperscript{114}

\textsuperscript{108}Labour Relations Amendment Bill, 2000 Explanatory Memorandum.
\textsuperscript{109}Section 189A (2) of Labour Relations Act of 1995.
\textsuperscript{110}Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.1.
\textsuperscript{111}Ibid.
\textsuperscript{112}Section 189A (8) (ii) (aa) of Labour Relations Act of 1995.
\textsuperscript{113} Section 189A (8) (ii) (bb) of Labour Relations Act of 1995
\textsuperscript{114}Labour Relations Amendment Bill, 2000 Explanatory Memorandum at par 42.2.
Finally, the Memorandum of the objects anticipated that the amendment is to seek to resolve these disputes through consultation in a manner that promotes job retention and job creation, rather than by adjudication.\textsuperscript{115}

\textsuperscript{115}Labour Relations Amendment Bill, 2000 Explanatory Memorandum at 42.4.
3.2 Section 189 of the LRA

Section 189 applies to small-scale retrenchments where an employer employs fewer than 50 employees\textsuperscript{116} but contemplates dismissing because of the employer’s operational requirements of less than 10 employees\textsuperscript{117}.

189. Dismissals based on operational requirements:

1) When an employer contemplates dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult-

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation –

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

2) The employer and the other consulting parties must, in the consultation envisaged by subsections (1) and (3), engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –

(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

\textsuperscript{116} Labour Law in context: edited by JA van der Walt et al, Pearson Education South Africa (Pty) Ltd 2012 page 141 para 10.1.

\textsuperscript{117} Section 189A (1) (a) (1) of Labour Relations Act of 1995.
the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

(4)

a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4), as well as any other matter relating to the proposed dismissals.

(6)

(a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing, the employer must respond in writing.

(7) The employer must select the employees to be dismissed according to selection criteria-

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.

3.2.1. Application

The dismissal for operational requirements is triggered by the employer contemplating after management had assessed that the business is ailing and where he/she has recognised that retrenchment has been identified as a possible remedial measure.\footnote{Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa [1995] 1 BLLR 1 (AD).}
The process of retrenchment must be initiated through a consultation notice letter which must, to a large extent, address issues or remedial actions that the employer has considered when contemplating the action, which is not an exhaustive list. This process of contemplation and commencement of consultation is not a science as difficulties of early consultation arose from time to time.

3.2.2. Recourse

The system to challenge termination of employment has been designed in such a way that the employee has recourse for both the procedure and reasons for embarking on the process of retrenchment and is subject to scrutiny. To add, the employer has a right to go ahead with retrenchment processes where a consulting employee party intentionally stalls the process through delaying tactics.

The employee party that feels that the dismissal for operational requirements was not effected in terms of the international standards that his country of employment has codified must approach the relevant authority body.

The process of retrenchment must not be used to dismiss an employee purely because the employee has refused to accept a demand in respect of any matter of mutual interest between the worker and the employer as this might constitute an automatic unfair dismissal.

In the context of the Labour Relations Act, the employee who feels that his termination of employment based on operational requirements has been outside the procedure enacted may approach the CCMA. The issues that the employee may approach the CCMA for are the severance pay or failure to

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119 Section 189(3) (a)-(j) of Labour Relations Act of 1995.
120 Kotze v Rebel Discount Liquor Group (Pty) Ltd [2000] 2 BLLR 138 (LAC).
121 Labour Law in context: edited by JA van der Walt et al, Pearson Education South Africa (Pty) Ltd 2012 page 146 para 10.3.2.
124 Commission for Conciliation, Mediation and Arbitration.
consult in the manner prescribed or the refusal to disclose the information relevant for engaging in a meaningful joint consensus-seeking process.\footnote{Section 189 (4) (b) of Labour Relations Act of 1995.} The CCMA, for procedural irregularity, may attempt to conciliate the dispute and if unresolved, may arbitrate on the matter and issue an award which is binding and legally enforceable.

3.3 Section 189A of the LRA

The insertion of section 189A was occasioned by the cases which were adjudicated by the courts on retrenchments during the period of 1998 to 2002. These arose from the court’s decisions that caused NEDLAC\footnote{National Economic Development and Labour Council of Act 35 of 1994.} to initiate a policy framework that gave rise to the amendment of 2002\footnote{Section 45 of Act 12 of 2002.} which addressed and clarified issues that were unclear in the industrial relations arena. The inclusion of section 189A amplifies the section 189 process and further distinguishes the processes to be followed based on the extent of the retrenchment process.

189A. Dismissals based on operational requirements by employers with more than 50 employees

(1) This section applies to employers employing more than 50 employees if –

(a) the employer contemplates dismissing by reason of the employer’s operational requirements, at least –

(i) 10 employees, if the employer employs up to 200 employees;

(ii) 20 employees, if the employer employs more than 200, but not more than 300 employees;

(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;

(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or

(v) 50 employees if the employer employs more than 500 employees; or

(b) the number of employees that the employer contemplates dismissing, together with the number of employees that have been dismissed by reason of the employer’s operational requirements in the 12 months prior to the employer issuing a
notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).

(2) In respect of any dismissal covered by this section –

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation.

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if –

(a) the employer has in its notice in terms of section 189(3) requested facilitation; or

(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.

(6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to –

(a) the time period and the variation of time periods, for facilitation;

(b) the powers and duties of facilitators;

(c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and

(d) any other matter necessary for the conduct of facilitations.

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –

(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(b) a registered trade union or the employees who have received notice of termination may either –

(i) give notice of a strike in terms of section 64(1)(b) or (d); or
(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(8) If a facilitator is not appointed –

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and

(b) once the periods mentioned in section 64(1)(a) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(ii) a registered trade union or the employees who have received notice of termination may –

(aa) give notice of a strike in terms of section 64(1)(b) or (d); or

(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(9) Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).

(10) A consulting party may not –

(a) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;

(b) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.

(b) If a trade union gives notice of a strike in terms of this section -

(i) no member of that trade union and no employee, to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers’ operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;

(ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made is deemed to be withdrawn.
(11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:

(a) Section 64(1) and (3)(a) to (d), except that –

(i) section 64(1) (a) does not apply if a facilitator is appointed in terms of this section;

(ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;

(b) subsection (2)(a), section 65(1) and (3);

(b) section 66, except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;

(c) sections 67, 68, 69 and 76.

(12)

(a) During the 14-day period referred to in subsection 11)(c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute between the employer and the party who gave the notice, through conciliation.

(b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.

(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

(c) directing the employer to reinstate an employee until it has complied with a fair procedure;

(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

(14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a).

(15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.

(16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.

(17) An application in terms of subsection (13) must be brought not later than 30 days after the employer has
given notice to terminate the employee’s services or, if notice is not given, the date on which the employees are dismissed.

(b) The Labour Court may, on good cause shown, condone a failure to comply with the time limit mentioned in paragraph (a).

(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer’s operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).

(19) In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if –

(a) the dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs;

(b) the dismissal was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives; and

(d) selection criteria were fair and objective.

(20) For the purposes of this section, an ‘employer’ in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).

3.3.1 Application

It further provides a clear, pre-determined procedural feature for managing large-scale retrenchment consultations. The purpose of s189A is introduce the different processes for the CCMA, which is a facilitation process, thereby giving the parties an option to appoint a facilitator under the auspices of the CCMA. Section 189A (6) enable the Minister to promulgate the regulations for the conduct of the facilitations128. The regulations provide the CCMA with clear guidelines on the facilitation of large-scale retrenchment.

128 Facilitations Regulations published under GN R1445 in GG 25515 of 10 October 2003.
3.3.2 What triggers the facilitation process?

The process of facilitation is triggered by the employer issuing the section 189 (3) letter and any party, including the employer, may approach the CCMA to request the facilitator in terms of the Act\textsuperscript{129}.

The union representing the majority of the employees whom the employer contemplates dismissing or employee parties has 15 days to request the Commission to appoint a facilitator for facilitation\textsuperscript{130}.

The Act allows the parties in the consultation process for retrenchment processes to reach an agreement\textsuperscript{131} and outsource the facilitation from the CCMA. However, such an agreement must not exclude the facilitation to be conducted outside the regulations published by the Minister\textsuperscript{132}.

3.4 Section 189A (8)

This section is designed to cater for circumstances where the parties opted not to make use of the facilitator in terms of Section 189A (3). There have been cases that have been heard by the courts regarding the procedure that needed to be followed to effect the termination of employment based on operational requirements.

One of the earlier cases was where the employer chose not to use a facilitator and issued s189(3) notices inviting the employees to consult, subsequently the employer issued notices of termination that took effect about 60 days after the s189(3) notices were given to the employees\textsuperscript{133}. In the \textit{De Beers} case, the court ruled; notices of termination issued in contravention of s189A(2) and s189A(8) are invalid and of no force and ordered the employer to reinstate with back-pay

\textsuperscript{129} Section 189A (3) of the Labour Relations Act of 1995.
\textsuperscript{130}Section 189A (3) (b) of the Labour Relations Act of 1995.
\textsuperscript{131} Section 189A (4) of the Labour Relations Act of 1995.
\textsuperscript{132}Facilitations Regulations published under GN R1445 in GG 25515 of 10 October 2003.
\textsuperscript{133}De Beers Group Services (Pty) Ltd v NUM [2011] 4 BLLR 318 (LAC).
the employees as the former issued notices of termination in contravention of s189A.

In a recent case, the court held that the De Beer case was decided as the interpretation given was not in line with the intention of the legislature. The court decided that “Where the employees have already been dismissed, their recourse would be limited to an application to the LC challenging the substantive fairness of the dismissals in terms of s189A (18) and s189A (19) of the LRA. Alternatively, the employees have the right to embark on a protected strike in retaliation.”

(8) If a facilitator is not appointed –

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and

(b) once the periods mentioned in section 64(1)(a) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(ii) a registered trade union or the employees who have received notice of termination may –

(aa) give notice of a strike in terms of section 64(1) (b) or (d); or

(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

What is clear with regards to the issue regarding the provision of section 189A (8) is the concept of termination notice in the process that is outside what section 189A, in particular, seeks to provide, which is a clear, pre-determined procedural feature for managing large-scale retrenchment consultation.

It is also important to indicate that the employer who follows this procedure has no desire to consider ideas from the employee party, which may mitigate the job losses as they have made up their minds with regards to what the business needs to do in order to remain profitable or functioning.

134Edcon v Karin Steenkamp and others [2015] (4) SA 247 (LAC).
3.5 Examining the mechanisms which do not apply for employees in small scale retrenchment processes

The statutory requirement of s189A of the LRA is concerned with the procedure to be followed when effecting the dismissal for operational requirement. This provides a facilitator and the other consulting party with an opportunity for examination of the rationale given as a reason for dismissing workers for fault of not their own. The facilitator is enabled to suggest alternatives processes like turnaround strategies of Productivity South Africa or access business packages that businesses in distress could access, which do not apply to the employees on small-scale retrenchment processes. The facilitation provides the latitude to explore options to mitigate job losses in a broader sense than the conciliation process which the small-scale retrenchment process is subjected to.

The second important mechanism is the structure of the facilitation process which enables the consulting party to enquire in detail the rationale and offer alternatives, which the employer is expected to consider and provide basis for rejecting.

The Section 189A facilitation process, if better utilised, has a great potential to mitigate job losses and assist to create mechanisms to support retrenched employees with well-thought out survival mechanisms.

3.6 Conclusion

The difference between the provisions of section 189 and section 189A is more in the dispute resolution mechanism and the extent of meaningful joint consensus-seeking processes. The section 189 dispute resolution process is the conciliation process at the CCMA which arrives at the conclusion of the retrenchment process faster. Section 189A is subject to the facilitation process, and if opted for, provides an extensive dispute resolution which creates better opportunities to influence the industrial relations policies of the employer, thereby mitigating large-scale job losses than section 189.
Chapter Four

4 BACKGROUND

4.1. ILO provision

The ILO convention 158 acknowledges that termination of employment, from no fault of the employee, in employment relations, requires stricter regulations. In recognising this, it judiciously provided for the Supplementary Provisions concerning Terminations of Employment for Economic, Technological, Structural or Similar Reasons. This further enabled scrutiny prior termination to be considered. The supplementary provisions are divided into two categories, one deals with consultation of workers' representatives\textsuperscript{135} and another one concerns notification to the competent authority\textsuperscript{136}.

The provision of Articles 13 and 14 of the convention on Termination of Employment is the basis for the enactment of the facilitation of the consultation as envisaged in section 189(3)\textsuperscript{137}.

\textit{Article 13 states the following:}

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

\textsuperscript{135}Article 13 of Convention 158, Termination of Employment 1982.

\textsuperscript{136}Article 14 of Convention 158, Termination of Employment 1982.

\textsuperscript{137}Labour Relations Act 1995 as amended.
2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Article 14 states that:

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

4.2. The Labour Relations Act (LRA)

The Labour Relations Act prescribes that parties must engage in a meaningful joint consensus-seeking process during consultation\textsuperscript{138}. This legislation envisages the parties to seriously consider options for avoiding retrenchment as circumstances are of no fault of the employees. Given the nature of what is at stake, the chances are high for the parties involved in that engagement not to trust each other. In addition, the LRA deems it appropriate to make available assistance of an independent person on request, which means that the parties voluntarily agree on the need to have the facilitator\textsuperscript{139}.

\textsuperscript{138}Section 189(2) of Labour Relations Act 1995 as amended.

\textsuperscript{139}Section 189(4) of Labour Relations Act 1995 as amended.
4.3. Exploration of the role of facilitation

The facilitation of the consultation for dismissal of the operational requirements is conducted in terms of the Regulations\textsuperscript{140}. The parties have a choice on whether to approach the CCMA or the independent facilitator. However, in exercising their options, they are not empowered to prescribe the manner of managing the process outside the broad principles promulgated in the Regulations\textsuperscript{141}.

The role of the facilitation process under the auspices of the CCMA is popular to both parties as the uptake is from the employers, unrepresented employees as well as unions\textsuperscript{142}. The facilitation may take place outside the CCMA if parties agree to do so in terms of Act\textsuperscript{143}. As it could be read in the background above, the facilitation provisions in the LRA are in line with the international norms and standards.\textsuperscript{144}

The CCMA’s role in the facilitation is more than just chairing a consultation but an extension of its social justice mandate which is embedded in its holistic Job Saving strategy. The CCMA brings along its partners who possess extensive know-how in various areas like business turn-around strategies\textsuperscript{145}, business recovery\textsuperscript{146}, alternatives to retrenchment and support and survival mechanisms for retrenched employees\textsuperscript{147}.

On the whole, the role of the facilitation further enhances co-operation between the parties and has a potential, if effectively managed, to increase the trust level, thereby minimizing the negative effect of the inherent conflict between the actors in the labour market.

\textsuperscript{140}Facilitations Regulations published under GN R1445 in GG 25515 of 10 October 2003.
\textsuperscript{141}Item 4, Powers and duties of the facilitator of Facilitations Regulations published under GN R1445 in GG 25515 of 10 October 2003.
\textsuperscript{142}CCMA Job Saving statistics for 2016/17.
\textsuperscript{143}Section 189A (4) Labour Relations Act 1995 as amended.
\textsuperscript{144}Article 14(1) of Convention 158, Termination of Employment 1982
\textsuperscript{145}Productivity South Africa, the Department of Labour entity responsible for turn-around strategizes.
\textsuperscript{146}Department of Economic Development, responsible for economic development and business sustainability.
\textsuperscript{147}Public Employment Services, Department of Labour unit, responsible for supporting retrenched employees.
4.3.1. The voluntary nature of facilitation

In terms of the Act, the facilitation is triggered by either party by approaching the CCMA or an independent facilitator\textsuperscript{148} if certain conditions have been complied with in terms of the Act\textsuperscript{149}. The parties may decide not to approach the CCMA, appoint a facilitator or appoint an independent facilitator\textsuperscript{150}

4.3.2. Basis for facilitation

The provisions on consultation, in my view, were included to inculcate the culture of accountability on the employer, justification for the contemplated termination of employment of contract, according to the ILO\textsuperscript{151}, while still maintaining the power to manage and make business decision on how this is run. It also seeks to eliminate or minimise disputes relating to procedures on the process followed when the termination of employment of the employees is implemented.

4.3.3. Successes of Facilitation

The facilitation of consultation for dismissal for operational requirements under the auspices of the CCMA has been successful at two levels. Firstly, in the instances where the CCMA has facilitated the consultation process, few matters have resulted in strike action by the union for purposes of the procedure to terminate the employment services of the worker. Out of the facilitations conducted between January 2017 and June 2017, the strike subsequent to the CCMA facilitation was in the matter between, \textit{CEB Maintenance Africa and MWASA}\textsuperscript{152} in May. In fact some of the unions involved consultation did not support the industrial action. There was also a looming strike between Eskom

\begin{flushleft}
\textsuperscript{148}Section 189A (4) Labour Relations Act 1995 as amended.

\textsuperscript{149} Section 189A (3) (a) Labour Relations Act 1995 as amended.

\textsuperscript{150} Section 189A (8) Labour Relations Act 1995 as amended.

\textsuperscript{151} PART II. STANDARDS OF GENERAL APPLICATION: DIVISION A. JUSTIFICATION FOR TERMINATION, Convention 158, Termination of Employment 1982.

\textsuperscript{152}GAJB4863-17. CEB Maintenance, MWASA, CWU, Solidarity and non-unionised.
\end{flushleft}
and Numsa, when Eskom announced the intention to retrench and the strike never materialised.\(^{153}\)

Secondly, the CCMA facilitators are highly trained and able to manage the process and guide parties to engage in a meaningful joint consensus seeking process, thereby mitigating job losses. The CCMA has reported a huge success in job saving in the previous years.\(^{154}\) S189A processes facilitated by the CCMA resulted in 52% (25,196) jobs saved of those likely to be retrenched (48,448), and actual retrenchments were recorded at 22,293 on a year-to-date basis.\(^{155}\)

4.3.4. Weaknesses and Challenges relating to the facilitation process

Firstly, the facilitation process has to be conducted in terms of the Regulations. These Regulations are in a way limiting and prescriptive in nature as parties tend to confine themselves to the Regulations made available that is the procedural aspect of the dismissal for operational requirements.\(^{156}\)

To a lesser extent, the CCMA can assist an unfairly retrenched worker to be reinstated in small-scale retrenchments, but there is no potential to influence the decision to retrench as the matter is only referred to the CCMA after the retrenchment has taken place because the facilitation Regulations are not intended for such dismissal by virtue of the number of employees affected.

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\(^{155}\)CCMA draft Annual report for 2016/17 due to be published in August 2017.

\(^{156}\)Item 4, Powers and duties of the facilitator of Facilitations Regulations published under GN R1445 in GG 25515 of 10 October 2003.

4.3.5. Freedom not to engage in facilitation

The fact that a facilitator can only be requested in the context of large scale retrenchments on a voluntary basis, has the potential to undermine the gains that can be achieved if a facilitator is involved in large scale retrenchments.

If neither party asks the CCMA to appoint a facilitator, a party may not refer the dispute to a council or the CCMA for 30 days from the date of the notice to consult. Once the period for conciliation is finished, the employer can give notice of termination, and the union or employees can give notice of a strike.¹⁵⁸

There is no requirement for any party to explain the basis for not wanting to engage in facilitation. What has been emerging is that in most instances where the facilitation has not been requested, there is no unionisation or its presence is low¹⁵⁹. It would also appear that there is no collaborative industrial relations in those instances where parties have opted not to have facilitation.

4.3.6 Importance of the facilitation process

The Labour Appeal Court clarified the importance of the facilitation process when it provided the interpretation of Section 189A of LRA¹⁶⁰. The court’s prior interpretation of the validity of termination notices that are issued in violation of s189A (8) of the Labour Relations Act, No 66 of 1995 (LRA), was incorrect¹⁶¹. In the De Beers case, the employer chose not to use a facilitator and issued s189 (3) notices inviting the employees to consult. Subsequently, the employer issued notices of termination that took effect as from about 60 days after the s189 (3) notices were given to the employees. The employees' union, referred the dispute to the CCMA before the individuals were to be retrenched and at the conciliation the CCMA issued a certificate of non-resolution. The Labour Court declared the notices of termination invalid and reinstated the dismissed employees.

¹⁵⁹Edcon v Steenkamp and others [2015] (4) SA 247 (LAC).
¹⁶⁰Ibid.
employees with back-pay because the employer had failed to adhere to the timelines in terms of s189A(8).

Despite Edcon case having overturned the De Beer case, it has not simplified the process without the involvement of the facilitator thereby it highlighting the importance of the facilitation process as it potentially eliminate the confusion of non-compliance with the procedure. In cases where parties have not chosen the facilitation process, the employer would refer a conciliation to the CCMA to validate the consultation process undertaken and the process is concluded without understanding of the purpose of the conciliation save to issue the certificate of non-resolution. In such cases, the employee party does not attend the conciliation and render the enquiry on the compliance of procedure ineffective.

4.4 Conclusion

In the majority judgment, the Constitutional Court found that the failure to comply with s189A (8) may impact on the procedural fairness of the dismissals\(^1\). This finding by the court illustrates the importance of the role of the facilitation by the facilitator when dismissal for operational requirements are considered. Embarking on a large-scale retrenchment is a stressful and strenuous process and when there is no guidance by the facilitator, some of the steps which an employer must adhere to in order to ensure that the retrenchment is procedurally fair may be flawed or missed, as it has been seen in the De Beer case\(^2\) as well as Edcon case\(^3\).

In conclusion, the utilisation of the facilitation process under the auspices of the CCMA has proven to be effective in stimulating sound industrial relations, thereby improving the levels of trust and cooperation by the parties involved. From the statistics shared with the South African parliament by the CCMA, it would seem that in the cases in which it has been involved, it was instrumental in mitigating job losses.

\(^1\) Steenkamp and others v Edcon Ltd ((CCT46/15, CCT47/15) (2016).


\(^3\) Steenkamp and others v Edcon Ltd ((CCT46/15, CCT47/15) (2016).
Chapter Five

5.1 Introduction and context

“At NEDLAC, social partners, namely, labour, communities, government and business, negotiated and finalised a framework agreement to minimise the impact of global credit crisis on the workers and the poor people of our country. In the "Framework for South Africa’s Response to the International Economic Crisis", established in February this year (2009), we correctly identified as the first principle of our approach that "low income workers, the unemployed and the vulnerable groups can lose much through even a relatively brief economic shock, and the risk of unfairly placing the burden of the downturn on the poor and the vulnerable must be avoided"\textsuperscript{165}.

Furthermore, section 189A of the LRA focuses on the Labour Relations Amendment Act 2002\textsuperscript{166} whereby the CCMA’s job saving target relates to “Enhancing the labour market to advance stability and growth” regarding “Advancing employment security”\textsuperscript{167}. This was conceived in the 2010/11 strategy.

The role that the CCMA plays in determining termination of an employee’s employment, whether it has been justifiably or unjustifiably terminated by the undertaking or establishment, is an international acceptable standard\textsuperscript{168} and contributes to the mitigation of job losses in general. The CCMA, as an equivalent of the bodies referred to in Article 8 of this Convention, shall be empowered to determine whether that termination was indeed for these reasons, but the extent to which the CCMA shall be empowered to decide whether these reasons are sufficient to justify that termination shall be

\textsuperscript{165}Adapted from speech delivered during the Presidency Budget Vote in the National Assembly on Thursday 25 June, 2009.
\textsuperscript{166}Act 12 of 2002.
\textsuperscript{168}An impartial body, such as a court, labour tribunal (A body similar to the CCMA), arbitration committee or arbitrator.
determined by the methods of implementation referred to in Article 1 of this Convention.¹⁶⁹

¹⁶⁹ Article 9 item 3 of ILO Convention of Termination of Employment, 158, 1982.
5.2 The CCMA Job saving strategy

5.2.1 Holistic approach

The global financial crisis of 2008 resulted in the increase of retrenchments. When the CCMA was given the role to facilitate, its participation in the Training Lay-off Scheme, a scheme intended to minimise job losses by placing workers in training programmes instead of being retrenched, it reviewed its approach in dealing with retrenchment disputes from 2008. It considered that in order to shape better outcomes, it needed to be more robust in the facilitation process and trained its facilitators to actively participate in the s189A process through assisting the parties to look at different measures to mitigate job losses, including paying attention to the post-retrenchment phase.

It was in this context that the CCMA developed a new approach known as the “holistic approach” to job insecurity situations.170 The new approach was incorporated into the Job Saving strategy and gives regard to the following aspects:

(a) Identify the causes and rationale of the intended retrenchment:

The purpose of this enquiry is intended to enable the facilitator to know what intervention is needed to resolve the problem the business is faced with. When the real problem or rationale has been established, the facilitator would be best placed to suggest appropriate cause of action or which strategic partner to support the s189A process.

(b) Generate alternatives

With causes and rationale identified and agreed to be what triggered the contemplation of retrenchment, the meaningful joint consensus-seeking process is engaged in to generate alternatives. This process entails brainstorming around the possible alternatives to retrenchment.

170 CCMA 2016 - Extract from Facilitating S189A Facilitation Consultations.
All alternatives that come up during the brainstorming session are considered.

(c) Evaluate alternatives

The process of evaluating alternatives is vigorous. Each idea is tested for applicability, the duration required to have it working and the cost of implementation. During this process, some alternatives are piloted on the limited duration. Experts are invited to conduct due diligence on the proposal. Some alternatives considered are combined with other ideas.

(d) Implementation

The implementation plan may include some workers being placed on Training Layoff Scheme as temporary measures while allowing the company to recover. In some instance where the causal factor relates to productivity, Productivity South Africa (Productivity SA) is assigned to assist; where cash-flow challenges have been identified. Also, the Industrial Development Cooperation (IDC) or Department of Economic Development (EDD) may be approached to consider funding or incentive assistance. If it is a mining company, the Department of Mineral Resources is involved as the implementation plan must take into account the Social and Labour plan submitted when the mining license was granted.

(e) Review

The process of review is dependent on what is contained in the implementation programme. In most instances, it is a process that involves the strategic partners of the CCMA as experts than CCMA facilitators.
(f) **Partnership input and assistance where appropriate**

The involvement of the partners is integral to the holistic approach as CCMA’s involvement is restricted by the Act in terms of what it can do to save businesses. The success of the strategy is achieved through ongoing partnerships, exchange of information, experiences and learning.
5.3 Components of the strategy

(a) Business recovery

The purpose of this aspect is to effectively contribute to the stability of businesses and sectors, along with the job and employment security of workers. This assists in the maintenance of an ‘industrial base’ on which job creation initiatives can be built. In a nutshell, without the businesses that are recovered from the economic crisis, there cannot be employment security or mitigation of job losses, and the purpose of recall list in the retrenchment agreement would be meaningless.

(b) Determination and understanding of the economic rationale for business distress

The determination of the economic rationale for business distress is critical in mitigating job losses. It could be that the business is in the sector that is due to decline due to the oncoming Fourth Industrial Revolution, and any intervention or assistance should factor that knowledge in the solution.

The analysis of a company’s finances assists in ascertaining whether or not it is in distress and whether the distress warrants income and / or job loss. The Training Layoff Scheme experience has been very instructive in this regard. The CCMA and Productivity South Africa Advisory Committee have found in a significant number of cases that initially, the business was simply not in distress but that this was when the parties had already agreed to the Scheme. As part of effectively implementing the strategy, facilitators need to be well versed in this aspect.
(c) **Enhancement of the s189A facilitation process, including exploration of appropriate alternatives to income loss and retrenchment**

The s189A cannot be just a process of going through the motions but a meaningful joint consensus-seeking process. The quality of knowledge of the labour market dynamics and labour economics is paramount to the facilitator, thereby enhancing the exploration of appropriate alternatives to income loss and retrenchment, along with the enhancement of the s189A facilitation process generally. This includes facilitators knowing how to identify and suggest viable options, together with being well informed about what those options are. In essence, this process gives full effect to the consultation process.

(d) **Enhancement of Early Warning Systems (EWS)**

It is crucial to identify early warning signs of business distress and to offer assistance long before a request for a Section 189A facilitation process is received.

(e) **Facilitation of survival and support mechanisms for retrenched workers**

Through partnerships with organisations in the space of training and development, targeted training for workers facing retrenchment is necessary in order to equip them with relevant and needed training by the labour market. Facilitation of funding for training and unemployment benefits is part of survival and support mechanisms for retrenched workers, which is a primary need and can be accessed through the Department of Labour's Public Employment services.
5.4 The success of the CCMA in its role

The CCMA has, in the past years, developed a multi-pronged job saving strategy, actively promoting business health and job security and, where this was not possible, ensuring that no retrenched worker would have to “walk into the sunset” without being provided with survival and support mechanisms. During the period of January 2009 to October 2011, large scale retrenchment statistics indicated that 31 103 employees had been retrenched, but 28 325 jobs had been saved through the formal facilitation process.\footnote{https://pmg.org.za/committee-meeting/13847/\text{.} Accessed on 2 May 2017.}

An important aspect of the CCMA’s job-saving initiatives was the Training Layoff Scheme (TLS) which is managed through a multiple-partner arrangement\footnote{See attached flow diagram – Annexure A - Training Layoff Scheme.}. The success the TLS brought is partnership building in that some of the partners are useful in s189A processes as they provide technical expertise in turn-around strategies to ailing businesses, thereby saving jobs or helping in generating alternatives to retrenchments.

The TLS has provided 132 companies with temporary relief while 27 276 workers had participated in training, thereby averting dismissals for operational requirements\footnote{CCMA Annual Report 2015/16.}. In a number of cases, companies had withdrawn from the Scheme, but this was not always for negative reasons. For instance, some businesses were not really in distress and should not have been talking about job losses or training layoffs, while another reason was a lack of an employment relationship.

In a number of cases, the CCMA facilitation process helped to improve employment relationships between companies and worker’s representatives, especially where parties have genuinely allowed the principles of joint consensus-seeking process to take root in their ongoing engagement.
5.5. Weakness of the CCMA Job Saving strategy

Unfortunately, with the small scale conciliation process, the parties became involved only after retrenchments had taken place, and this posed problems, as job losses were equal to, or larger, than those in large scale businesses. This was an area where the CCMA was having little success. The CCMA would not be able to intervene unless the parties came to the CCMA before the negotiation, and this presented a legal challenge.\textsuperscript{174}

The early warning system is not fully embedded in the organisation. Consequently, few Commissioners spot signs of business distress detected from the other CCMA dispute resolution or prevention processes. Furthermore, not all CCMA officials who receive queries or provide advice to the public are able to dissect issues, communicate and glean the elements or signs of business in financial distress.

Lastly, on the early warning system, the CCMA partners, workers or unions are not vigilant to obvious signs in the businesses and, therefore, wait for the company to issue s189(3) notices.

Despite the strategy involving a partnership-building in order to achieve on all the other aspects, the offering of early intervention and assisting retrenched workers to access support and survival mechanisms have been minimally achieved, given the potential that exists in these areas.

The TLS concept was regarded as sound and had huge potential. However, it was still too bureaucratic and complex to administer and involved too many partners, including three Ministries, in the process. For this reason, the Scheme was not being “driven” through a clearly defined central structure. The TLS should be seen as a permanent feature, but it needed to be streamlined.\textsuperscript{175}

5.6 Conclusion and Recommendations

What has made CCMA to achieve the tremendous success in mitigating job losses within the facilitation process for the consultation of retrenchment is the nature, content of and approach to the process. The facilitation is conducted more like a workshop where ideas are brainstormed, and each proposal is tested objectively, which distils bias and subjectivity of the proposal from the proposal owner.

The advisory role that the CCMA plays in facilitating the success participation by the business in the Training Layoff Scheme would forever limit its potential to use the Scheme as an effective vehicle to mitigate job losses in the context of operational requirements dismissal. The delays experienced currently make the Scheme not a viable option because the business in distress needs an urgent intervention. Lastly, the decision on funding the training aspect of Training Layoff Scheme resides with SETAs, which are ineffective when required to respond on portable training skills needed to appreciate the changes that the labour market is going through.\footnote{https://pmg.org.za/committee-meeting/24121/}. If the CCMA is required to play a more active role in mitigating job losses, it must form part of decision makers in adjudicating the participation of a business in the Training Layoff Scheme. In the interim, given the legislative changes required to be accorded such role, it must collaborate with SETAs to actively play a role in the s189A process in order to enhance the quality of alternatives generated and offer training solutions to retrenchments initiated by the need to mechanise the businesses.

The CCMA needs to continuously explore new and improved approaches and mechanisms through ongoing sharing of experiences and learnings between CCMA facilitators. Built in that best practise sharing, there should be focussed capacity with facilitators specialising in specific industries in order to master sector knowledge and dynamic, thereby structuring and enhancing intervention when facilitation is required.
Chapter Six

6.1. Conclusion

This research has presented a thorough illustration that the CCMA has succeeded despite South Africa’s lack of ratification of the International Labour Organisation’s (ILO) Termination of Employment Convention to enhance employment security for workers who generally would not have had innovative approaches to the interpretation of s189A of the Labour Relations Act (LRA).

It is hoped that this study will provide an insight to the role played by the CCMA’s job-saving strategy and the effectiveness of the holistic approach wherever the intent of the legislation, which is a joint consensus-seeking mechanism, has been embraced by the consulting parties and CCMA partners in action.

The CCMA’s credibility and legitimacy in the labour market should encourage social partners to fully make use of the facilitation process given its success in both job-saving and reshaping their capacities towards fully implementing joint consensus-seeking in collective bargaining processes.

The LRA regulates the facilitation of the consultation for large scale retrenchments in a manner that enables the CCMA to engage various potential strategic partners in different aspects of the process in order to assist with business recovery. However, the CCMA does not have an overarching Service Level Agreement or Memorandum of Agreement which stipulates clearly what each partner organisation must bring to the s189A process.

The Training Layoff Scheme has been integrated into the CCMA’s job saving strategy as one of the measures applied by the CCMA to mitigate job losses during the s189A facilitation processes by exploring alternatives to retrenchment and providing support and survival mechanisms for retrenches. Despite its potential, the Training Layoff Scheme has been found to be ineffective and unable to deliver the necessary assistance needed by the companies in distress at the speed and extent envisaged due to the red tape in its adjudication, thus making it undesirable; hence few companies and unions have agreed to consider it as the best mechanism to mitigate against job losses.
The Unemployment Insurance Fund (UIF) has been using the Training Layoff Scheme adjudication process as a verification exercise on the employers who have not been complying with UIF obligations. Unfortunately, this is done at the stage where the business is already in distress, thereby delaying the participation of the workers in the Training Layoff Scheme. This conduct tends be a punishment of workers who may end up being retrenched or employers not being keen on agreeing to apply for participation. The participation of the employees in the Training Layoff Scheme is a means of mitigating job losses and helps to broaden the skills base of the employees to participate in the economy at large.
6.2. Recommendations

As much as the CCMA’s job saving strategy is effective and has successfully achieved its objectives to a certain extent within a short space of time, there is still room for improvement.

I, therefore, submit the following recommendations to the CCMA on how to improve the effectiveness of its role in mitigating job losses:

6.2.1. Internal improvements in the CCMA workings

1. In order to further improve on the efficiency of the facilitators during consultation processes in matters of large scale retrenchments, the capacity-building of facilitators on analysing financial information is critical for effective section 189A processes.

2. The current Early Warning System (EWS) is a “miss and hit” as it is not largely embedded in the organisation and within CCMA partners in action. A systematic flow diagram needs to be adopted to enhance the effectiveness of the EWS in the strategy.

3. It is further recommended that as a matter of principle, the first meeting of the consultation process be used as a statutory workshop where parties would be capacitated on the principles and behavioural attributes required from the consulting parties in the process in order to enrich their participation in the process.

6.2.2 Revitalisation of the partnership

1. The CCMA must engage all relevant stakeholders contributing to the job-saving strategy with the need to establish a National Job Saving Forum (NJSF) which would proactively assist sectors which could be affected by the fourth Industrial revolution through proactively building capacity and skills needed in the economy at large.
2. The CCMA should elevate the collaboration it has with Department of Mineral Resources (DMR) into an effective relationship that would enhance the early warning system as mining houses are required to inform the DMR of the challenges they experience.

3. The DMR’s involvement in the s189A processes should provide opportunities to trigger better support and survival mechanisms for retrenched workers by enforcing what the Social and Labour Plan (SLP) had committed regarding the upskilling and development of workers.

4. The Sector Education and Training Authorities (SETAs) should be involved, especially in the sectors where there are signs of redundancy, in order to encourage businesses to train workers to acquire skills that would be needed in light of the looming fourth industrial revolution.

5. Productivity South Africa (Productivity SA) should scrutinise or alternatively should help in the development of the turn-around strategy to be submitted for consideration together with the Training Layoff Scheme application in order to ensure that there is continuity of the business post the assistance.

6. In dealing with s189A processes or Training Lay Scheme applications that arise as a consequence of free trade agreements, like African Growth and Opportunity Act (AGOA), CCMA should, as a part of a standard procedure, involve International Trade Administration Commission of South Africa (ITAC) and/or Department of Trade and Industry (DTI) as their expertise would be helpful in attempting to save those businesses so as to mitigate job losses.

7. With regards to the s189A process initiated by the Business Rescue practitioners, CCMA should, as a part of a standard procedure, involve Department of Trade and Industry (DTI) in order to manage the current challenges that prevail in Business Rescue initiated s189A processes.
6.2.3. National and legislative related

1. Compliance with statutory obligations should be separated from participation in the Training Layoff Scheme. Currently, where a company is not compliant with statutory obligations, it is the workers who suffer by not being able to participate in the Scheme, thereby barring them from being trained and acquiring new skills which are required by the employer. The UIF must take alternative steps to address non-compliance which does not impact on participation of the workers in the Training Layoff Scheme.177

2. In order for NEDLAC to unlock the potential of the Training Layoff Scheme, it must facilitate a multi-facetted memorandum of agreement which would regulate the roles and responsibilities of each role player and be the accounting principal where all the role players would report quarterly on the progress made in training workers and saving businesses in distress.

3. NEDLAC should consider enforcing that when the CCMA is facilitating a S189A process, it must adopt an approach that advocates that a company which finds itself having more than one s189A within 18 months must be subjected to compulsory turn-around strategy development in order to improve its productivity under the supervision of Productivity SA.

177CCMA, Employment Security Unit, Presentation to NEDLAC in June 2015.
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A Table of Statues

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3. Industrial Relations Act 1971 of United Kingdom.
7. Worker Adjustment and Retraining Notification Act.

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2. Code of Good Practice on Dismissal Based on Operational Requirements GN 1517 in GG 20254 of July 1999.
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iv.  BMD Knitting Mills v SA Clothing & Textile Workers Union (2001) 22 ILJ 2264 (LAC)


viii.  Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa [1995] 1 BLLR 1 (AD)

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E. Reports and press articles

1. Adapted from speech delivered during the Presidency Budget Vote in the National Assembly on Thursday 25 June, 2009.


F. Internet Sources


1. Training Layoff scheme flow diagram
ANNEXURE A

Section 189A process or workplace request

Commissioner to check viability and eligibility of TLS, incl statutory compliance

Commissioner assists parties to conclude a TL Agreement

CCMA sends to SETA and UIF. Now also Productivity SA

Advisory Committee assesses eligibility and makes a recommendation

TL Agreement, T&C doc and list of workers submitted to the Advisory Committee

SETA applies for funding of training allowances and submits to UIF

UIF checks statutory compliance

UIF approves participation and pays allowances