

THE EVASION OF SECTION 187(1)(c) OF THE LABOUR RELATIONS ACT*

***National Union of Metalworkers of South Africa v
Aveng Trident Steel (a division of Aveng Africa
Proprietary Ltd)* (JA25/18) [2019] ZALAC 36;
(2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899
(LAC)**

1 Introduction

Section 187(1)(c) of the Labour Relations Act 66 of 1995 (LRA), has over the years proven to be a controversial section. At the heart of the controversy is the question as to whether an employer may terminate employees' contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment. This question came before the courts on a number of occasions and answered in the affirmative by the Labour Appeal Court in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* ((2003) 21 ILJ 133 (LAC)), and confirmed on appeal by the Supreme Court of Appeal in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2005 (5) SA 433 (SCA)). However, the LRA has since been amended with the Labour Relations Amendment Act 6 of 2014 (LRAA). Whether an employer may, in light of the amendments, adopt this approach, was recently considered by the Labour Appeal Court in *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* ((JA25/18) [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899 (LAC) (13 June 2019) (*Aveng* case (LAC)). The judgment is noteworthy as it is the first time that the Labour Appeal Court (LAC) delivered judgment relating to section 187(1)(c) of the LRA post-amendment, thus providing a degree of judicial certainty on the interpretation to be accorded to the amended section.

2 The law prior to *Aveng*

Prior to the enactment of the LRA, lock-outs were regulated under the Labour Relations Act 28 of 1956. The 1956 Act recognised both termination and exclusion lock-outs. The definition of an unfair labour practice under the

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1956 Act, expressly excluded lock-outs, thus depriving the Industrial Court (IC) of jurisdiction to determine the fairness thereof. However, if the lock-out were not to compel acceptance of a demand or based on operational requirements pursuant to the lock-out, the IC would retain jurisdiction. Under the LRA, a lock-out does not include a termination lock-out. Section 187(1)(c) was introduced with the promulgation of the LRA and provided that it is an automatically unfair dismissal “to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee” (s 187(1)(c) of the LRA). The LRA does not provide clarity on when a dismissal for operational requirements may ensue where employees reject their employer’s demands.

The extent of the prohibition contained in section 187(1)(c) came before the Labour Court (LC) on a number of occasions. Once a dismissal has been established in a section 187(1)(c) context, the critical question that must be determined is whether the dismissal was justified based on the employers’ operational requirements or for purposes of compulsion. This subtle distinction emerged in several judgments. Early in the development, the LC accepted that, where an employer in a retrenchment context proposes amendments to terms and conditions of employment as an alternative to dismissals, and this is met with rejection by its employees, such an employer may dismiss employees based on operational requirements (see *ECCAWUSA v Shoprite Checkers t/a OK Bazaars Krugersdorp* (2000) 21 ILJ 1347 (LC); see also *MWASA v Independent Newspapers (Pty) Ltd* (2002) 23 ILJ 918 (LC); see also *Mazista Tiles (Pty) Ltd v NUM* (2004) 25 ILJ 2156 (LAC)). However, the LC adopted a different approach in a collective bargaining context. In *Fry’s Metals* (LC), the employer sought to alter a shift system and intended dismissing employees who did not accede to the changes. The LC held that this approach was not permissible given the definition of a lock-out under the LRA. If the issue concerned a matter of mutual interest, the employer would offend section 187(1)(c) if employees were dismissed for refusing its demand. In this context, the employer would have to rely on collective bargaining and potentially a lock-out to secure agreement and not change tact midstream. On appeal in *Fry’s Metals* (LAC), the LAC disagreed with this approach and found that the dismissals were final and irrevocable. The final nature of the dismissals could not be said to induce compliance with a demand, thus evading section 187(1)(c). In *Chemical Workers Industrial Union v Algorax* (Memorandum of Objects: Labour Relations Amendment Bill, 2012), the facts were similar to those in *Fry’s Metals*. In this case the employer sought to change a shift system. The employees refused and were subsequently dismissed. The difference in *Algorax* was that the employer repeatedly offered to reinstate the dismissed employees on the proposed changes, an offer that remained open until the date of the trial. This matter was therefore distinguishable in that the dismissals were not final, thus triggering section 187(1)(c). Subsequent to the judgment in *Algorax*, the LAC’s judgment in *Fry’s Metals* was confirmed on appeal by the Supreme Court of Appeal (*supra*). The net effect of the judgments implies that section 187(1)(c) was avoided if dismissal was final and irrevocable, but triggered when the dismissals were temporary.

3 The amendments to section 187(1)(c) of the LRA

The interpretation accorded to the section prior to the amendments was not without criticism. Academic authors and commentators found it peculiar that a temporary dismissal triggered the section and questioned the interpretation given to the section (Thompson “Bargaining Over Business Imperatives: The Music of the Spheres After *Fry’s Metals*” 2006 *ILJ* 704; Grogan “Chicken or Egg: Dismissals to Enforce Demands” 2003 19(2) *Employment Law* 11; see also Grogan *Workplace Law* 11ed (2014) 216; see also Newaj and Van Eck “Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments” 2016(19) *PER/PELJ* 14). The interpretation afforded to the section in *Fry’s Metals* when read with *Algorax* had the effect of discouraging employers from engaging meaningfully in consultation processes and proposing alternatives to dismissal on pains that such proposals may offend against section 187(1)(c). This in turn prompted an amendment to the LRA with the LRAA, which came into operation on 1 January 2015. Far-reaching changes to the LRA were introduced with amendments. For present purposes, the amendments sought to amend section 187(1)(c) of the LRA. The section now provides as follows:

- “A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
- (a) ...
 - (b) ...
 - (c) a refusal by employees to accept a demand in respect of a matter of mutual interest between them and their employer;”

The fundamental difference between section 187(1)(c) post-amendment lies in the wording of the section. In its pre-amended form, it was an automatically unfair dismissal “to compel the employee” to accept a demand in respect of a matter of mutual interest. This has been substituted with the wording “a refusal by employees” to accept a demand in respect of a matter of mutual interest (Newaj and Van Eck 2016 *PER/PELJ* 17). The amended section also uses the plural “employees” as opposed to the singular term “employee” in the pre-amendment.

4 Facts of the case

The steel industry has experienced a sharp decline since 2010. Aveng’s (the company) sales volume fell by 20%, and its operations could not be sustained by its income (*Aveng* case (LAC) par 4). With the decline in sales and profits, the company desperately needed to reduce costs to maintain profit margins. It decided to restructure and contemplated the possibility of retrenchments. In 2014, it initiated a consultation process in terms of section 189A of the LRA with NUMSA (*Aveng* case (LAC) par 5). Faced with dire operational constraints, the company realised that a reduction in its workforce would not be sufficient. The situation it found itself in also demanded a significant increase in productivity in order to secure the company’s survival (*Aveng* case (LAC) par 6). It proposed to do this by

restructuring through reviewing job descriptions to combine certain functions. NUMSA refused to agree to this proposal. After several consultations, the company gave notice to NUMSA advising it that the process has been exhausted (*Aveng* case (LAC) par 23). After reaching an impasse on this issue, the company informed NUMSA that it would implement the proposed changes and presented all the affected employees with new contracts of permanent employment together with redesigned job descriptions, without altering their rate of pay (*Aveng* case (LAC) par 27). The company further informed the employees that if the contracts of employment were rejected, they would be dismissed. The employees refused to accept the new terms and conditions of employment and were subsequently dismissed (*Aveng* case (LAC) par 28).

5 The Labour Court

The legal question for determination before the court was when do operational requirements justify the dismissal of employees who reject an employer's demands to amend terms and conditions of employment (*National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* (JS596/15) [2017] ZALCJHB 513; [2018] 5 BLLR 500 (LC); (2018) 39 ILJ 1625 (LC) (13 December 2017) (*Aveng* case (LC)). The union (NUMSA) contended that the reason for the dismissal was the refusal by employees to accept the employers' demand in respect of a matter of mutual interest (altered job descriptions and grade structure), thus rendering the subsequent dismissals automatically unfair in terms of section 187(1)(c). Aveng asserted that the dismissals were not automatically unfair, but based on its operational requirements. In considering these submissions, the LC found that the employees were not dismissed for refusing to accept a demand in respect of a matter of mutual interest, but for operational requirements after rejecting alternatives to dismissal proposed by the employer. According to the court, the proposal to alter job descriptions was an appropriate measure to avoid or minimise the number of dismissals (*Aveng* case (LC) par 50).

6 The Labour Appeal Court

On appeal before the Labour Appeal Court (LAC), NUMSA argued that the LC erred in its interpretation of section 187(1)(c) and that the dismissals were automatically unfair as the wording of the section makes it plain that the section intends to render any dismissal automatically unfair where the reason is based on the employees' refusal to accept a demand in respect of a matter of mutual interest. It was submitted that the section envisages three elements being; a demand, a refusal and a dismissal. Aveng submitted that the wording of section 187(1)(c) of the LRA does not imply that, since a proposed change to terms and conditions is refused and a dismissal thereafter ensues, the reason for the dismissal is owing to the refusal to accept the proposed change. Aveng also asserted that no demand was made and instead, an alternative to retrenchment was offered to employees, which they had a choice to accept or decline.

The LAC considered the explanatory memorandum accompanying the Labour Relations Amendment Bill, which provided the reasons for amending section 187(1)(c) (*Aveng* case (LAC) par 59). According to the Bill, the reasons were to remove the anomaly arising from the interpretation of section 187(1)(c) by the SCA in *Fry's Metals* when read with judgments such as *Algorax*. After the decision in *Fry's Metals*, employers were wary of offering re-employment to retrenched employees in the context of restructuring, even if there was a valid operational requirement for the retrenchment (*Aveng* case (LAC) par 60). This was due to the fact that such an offer might be construed as falling within the ambit of section 187(1)(c) of the LRA, thus rendering the dismissal automatically unfair. This consequently had the effect of depriving employees of offers of re-employment (*Aveng* case (LAC) par 60).

The LAC held that the amendment of section 187(1)(c) has a specific purpose (*Aveng* case (LAC) par 61). It shifts the focus from the employer's intention in effecting the dismissal to the employee's refusal to accept proposed changes (*Aveng* case (LAC) par 61). Thus the distinction between final and conditional dismissal as a basis for the application of section 187(1)(c) is no longer applicable (*Aveng* case (LAC) par 61). According to the court, if employers were not permitted to dismiss employees who refuse to accept changes to terms and conditions of employment and to employ others in their place who are willing to accept the altered terms and conditions of employment that are operationally required, the only way to satisfy an employer's operational requirements would be through collective bargaining and ultimately power play. If no agreement could be reached, the only means available to an employer would be through an offensive lock-out (in which case it would not be permitted to use replacement labour) or unilateral implementation in breach of contract (potentially resulting in litigation) (*Aveng* case (LAC) par 63). The LAC found these options to be self-defeating and only add to the economic pressure placed on an employer that was already trying to remain afloat.

According to the court, NUMSA's approach would result in employers being wary of proposing any changes to terms and conditions of employment during the course of a section 189 consultation process (*Aveng* case (LAC) par 64). That in turn would undermine the purpose of a consultation process which is to encourage engagements on alternatives to retrenchment. While employees cannot be dismissed for refusing to accept a demand, they may be dismissed if such a refusal results in the more dominant or proximate operational imperative. The court held that the question whether section 187(1)(c) of the LRA is contravened does not depend on whether the dismissal is conditional or final, but rather on what the true reason for the dismissal is. The existence of a refusal on the part of employees merely prompts a causation enquiry (*Aveng* case (LAC) par 67). The proximate reason for the dismissal then needs to be determined. In doing so, there is no basis for excluding an employer's operational requirements from consideration as a possible reason for dismissal. In finding that the true question that must be determined is one of factual and legal causation, the court held as follows:

“Hence, the essential inquiry under section 187(1)(c) of the LRA is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.” (*Aveng* case (LAC) par 68)

The court found that the contention that the dismissal was effected based on the employees’ refusal was not sustainable on the facts. According to the court, there was no employer demand (*Aveng* case (LAC) par 72). The proposals were made not only to change terms and conditions of employment, but as an alternative to dismissal in the context of retrenchment consultations. The purpose of *Aveng*’s proposal was not to gain an advantage in collective bargaining, but to restructure for operational reasons in order to ensure its survival (*Aveng* case (LAC) par 72). The proximate cause for the dismissals was therefore based on the employer’s operational requirements. Notably, the LAC acknowledged that the distinction between a demand and a proposal is a fine one, but held that demands are often made in the context of collective bargaining (*Aveng* case (LAC) par 72). While both wage negotiations and restructuring impacts on the business and restructuring proposals may feature in wage negotiations, the risk of retrenchments arise when the viability of the enterprise is at stake and constitute the dominant objective for the proposal (*Aveng* case (LAC) par 72).

7 Analysis

The Memorandum of Objects: Labour Relations Bill of 2012 makes it plain that the amendment to section 187(1)(c) has a limited reach in that it was intended at resolving the anomaly arising from *Fry’s Metals* read with *Algorax*. The amendment was not aimed at altering the law by outlawing the type of dismissals that came before the court in *Fry’s Metals*. The LAC’s interpretation afforded to the section in *Aveng* accords with the intention of the legislature by removing the anomaly complained of. According to the LAC, the inquiry is whether the reason for the dismissal is the refusal to accept changes to terms and conditions of employment in terms of the *Afrox* test for factual and legal causation. If the purpose of the amendments were to dissolve the kind of dismissals discussed in *Fry’s Metals*, it would require section 189 subject to section 187(1)(c). There is no indication in the statute that such an interpretation is called for. Established law as outlined herein recognises that an employer’s operational requirements may be adduced as a reason for dismissal when confronted with a section 187(1)(c) claim. If this were prohibited, it would bring about the exact anomaly that the amendments intended to resolve, which in turn impacts negatively on a section 189 process relating to engagements concerning an alternative to dismissals. The effect of *Aveng* is therefore clear in a section 189 context. The effect of the judgment is rather obscure in the collective bargaining

context. As far as dismissal as a consequence is concerned, the court drew an analogy between the right to strike and collective bargaining and reasoned that:

“[I]f it is permissible in terms of section 67(5) of the LRA to dismiss protected strikers where the employer is able to demonstrate (on all the facts and circumstances of a particular case) a legitimate and substantial business necessity, the underlying policy rationale applies equally to the dismissal of employees resisting employer demands or proposals. Striking workers may not be dismissed for striking but can be retrenched where a genuine substantial operational necessity arises. By the same token, while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if that refusal results in a more dominant or proximate operational necessity. This legislative scheme of collective bargaining is in line with the constitutional right of trade unions and employers to engage in collective bargaining in that any limitation of the power play is reasonable and justifiable in the balance struck between the strike weapon and the employer’s power of implementation at impasse.” (*Aveng* case (LAC) par 67)

A degree of scepticism is required when interpreting this part of the judgment. The above paragraph appears to suggest that dismissal for operational requirements may follow the rejection of both a demand and a proposal as would potentially be the case in a strike context where this is motivated by operational requirements. The effect is then to conflate the application of section 187(1)(c) in a section 189 process and a collective bargaining context without drawing any meaningful distinction between the two processes. In the absence of a clear distinction, the judgment proceeds to apply the *Afrox* test. In attempting to distinguish a demand from a proposal, the LAC held that:

“The distinction between a demand and a proposal is admittedly a fine one, but nonetheless goes beyond semantics. Collective bargaining demands are made ordinarily in negotiations over wages. Although both wage negotiations and restructuring proposals may impact similarly on the bottom line, and restructuring proposals can feature regularly in wage negotiations, the retrenchment risk arises when the operational requirements for the viability of the employer are compelling, overriding and the dominant objective of the proposal.” (*Aveng* case (LAC) par 72).

It is submitted that the question of whether the matter concerned the rejection of a demand or proposal was incidental to determining the matter before the court. In rejecting the contention that the dismissal was effected based on the employees’ refusal, the court found that there was no employer demand. Importantly, the LAC acknowledged that the distinction between a demand and a proposal is a fine one. However, the distinction drawn by the court is rather superficial and fails to take into account that there are instances where the two processes overlap (Cohen “Dismissals to Enforce Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable?” 2004 *ILJ* 1883–1896; Cohen opines that “the wide scope of mutual interest disputes encompasses proposed changes to terms and conditions of employment as part of a business restructuring exercise. Notwithstanding the clear demarcation of interest and rights disputes and their respective dispute-resolution-forums, such disputes by their very nature also fall within the ambit of s 189”). In *Fry’s Metals* (LAC), the court per Zondo JP as he then was, held as follows:

“[A]ll that the Act refers to, and, recognises, in this regard is an employer’s right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.” (par 33)

Given Zondo’s *dictum*, the “risk of retrenchment” does not only arise when the viability of the business is at stake given that the LRA does not distinguish between retrenchment to ensure survival and retrenchment to increase profit. The categorisation of the concepts “demand” and “proposal” is particularly helpful in matters of this nature as a distinction must be drawn between section 187(1)(c) of the LRA in a collective bargaining context and in a retrenchment context. Regrettably, the LRA makes no such distinction with the result that the debate rages on. In the absence of such a clear distinction, there is practically no difference between the two concepts with a demand being capable of being disguised as a proposal with the ultimate result that dismissal for operational requirements may follow the rejection of a demand disguised as a proposal. The use of the *Afrox* test is apposite where a demand or proposal determination has been made. The suggested approach may also be reconciled with the wording of section 187(1)(c) in that it is only concerned with a dismissal pursuant to the rejection of a demand and not the rejection of a proposal. Thus, if on the factual matrix, it is found that there was no employer demand, but a proposal in a section 189 process, it would be superfluous to employ the *Afrox* test. In the absence of a clear demarcation, the effect of the judgment potentially covers both areas (collective bargaining and retrenchment). The LC judgment was clear that “a consultation in terms of section 189 is not a collective bargaining process” (*Aveng* case (LC) par 50). It is a statutory process wherein parties must attempt to reach agreement on amongst others, measures to avoid dismissal (*Aveng* case (LC) par 50). This reasoning makes it plain that the section is confined to a demand in a collective bargaining process.

8 Conclusion

Prior to the amendments to section 187(1)(c) of the LRA, an employer who sought to implement changes to terms and conditions of employment could, if its proposed changes were rejected by employees, justify dismissing its employees based on operational requirements, provided the retrenchment was final and irrevocable, and the requirements of the LRA were met (*Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA supra*, and confirmed on appeal by the Supreme Court of Appeal Court in *National Union of Metalworkers of SA v Fry’s Metals (Pty) Ltd supra*). With the amendments to the LRA, there has been much anticipation as to how the amended section would be interpreted and applied. In *Aveng*, the Labour Appeal Court in interpreting section 187(1)(c) determined that a change to organisational structure culminating into changes to terms and conditions of employment would not invariably render dismissals that follow automatically unfair. An employer may therefore terminate employees’ contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment.

Aveng did not alter the law in that respect. However, the LAC transcended *Fry's Metals* and *Algorax* in that the question whether section 187(1)(c) of the LRA is contravened no longer depends on whether the dismissal is conditional or final, but a consideration of the true reason for the dismissal. The question is whether the reason for the dismissal was for a refusal by employees to accept a demand in respects of any matter of mutual interest between them and their employer. In answering this question, the court must employ the test in *Afrox* as outlined above. The approach adopted by the LAC is in line with the Memorandum of Objects accompanying the Labour Relations Amendment Bill (Memorandum of Objects: Labour Relations Amendment Bill, 2012). Despite what has been decided, in *Aveng* and previous Labour and Labour Appeal Court authorities, this is unlikely to be the end of disputes relating to the interpretation of the elusive section 187(1)(c).

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