CRITICAL LABOUR LAW IMPERATIVES THAT IMPACT ON THE ISSUES OF EQUITY, RESTRUCTURING, INCORPORATION AND MERGERS THAT ARE CURRENTLY TAKING PLACE IN THE HIGHER EDUCATION SECTOR

by

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ABSTRACT

This dissertation focuses on the forces that are bringing about changes in the employment relationships in the higher education sector. Labour law regulates the employment relationships. This dissertation also seeks to determine the extent to which the forces that are external to the parties to the employment relationship determine the legal environment within which the parties can exercise their rights and obligations.

The important factor that is taken into account in this regard is the constitution of the country which is the supreme law of the land. The fundamental rights that are enshrined in the constitution must be recognised and respected by labour law and consequently by the parties to the employment relationships. The constitution provides that when interpreting any legislation, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.

This dissertation is confined to the public higher education system. The constitution also stipulates that the power to pass legislation that regulates tertiary education is given to the national government exclusively. It is for that reason that the Higher Education Act has been amended to give the Minister the power to bring about the desired changes.

The National Plan for Higher Education that was introduced by the Minister of Education in March 2001 is the basis of the discussion of the issues of equity, restructuring, incorporations and mergers that are currently taking place in the higher education sector in this dissertation. This is a force that is external to the parties and is brought about by policy considerations.

The analysis of the issue of equity therefore takes into account the right to equality as buttressed by affirmative provisions of the constitution of the country and the legislation that has been enacted to outlaw discrimination at the workplace and to promote equality of opportunity is considered. The

enforceability of the equity provisions of the National Plan for Higher Education are analysed in this context.

Labour law also determines the respective rights and obligations of the parties when it comes to restructuring that is taking place in the higher education sector. Labour law acknowledges that the operational requirements of employers may compel them to restructure their operations. This may lead to a loss of jobs. The principles of labour law and labour legislation that regulate these phenomena are analysed.

The National Plan for Higher Education seeks to bring about a change in the landscape of the higher education system in this country. It proposes mergers and incorporations of certain institutions of higher education into other such institutions. Labour law principles and legislation regulate how these phenomena can be effected. Common law recognises an employment relationship between a particular employer and a particular employee and does not provide for the notion of transferring the employment relationship to a new employer. This dissertation analyses the applicable provisions of labour law when this transfer of contract happens in the higher education sector.

Our labour law is itself in a state of flux, not only because the relevant labour legislation is new, but also because that "new" labour legislation is in the process of being amended. This aspect has been compounded by the fact that the Labour Appeal Court has given different interpretations to certain provisions of the legislation, leading to further amendment of the legislation. The relevant amendments relate to dismissals based on operational requirements of the employer and the transfer of contracts of employment from the "old" employer to the "new" employer.

This dissertation aims to highlight the measures that the role players must take to ensure that the implementation of the directives contained in the National Plan for Higher Education, among others, does not fall foul of our labour law.

DECLARATION

I declare that that work entitled "Critical labour law imperatives that impact on the current issues of equity, restructuring, incorporation and mergers that are currently taking place in the higher education sector" is my own work and all the sources that have been used or quoted have been indicated and acknowledged by means of complete references.

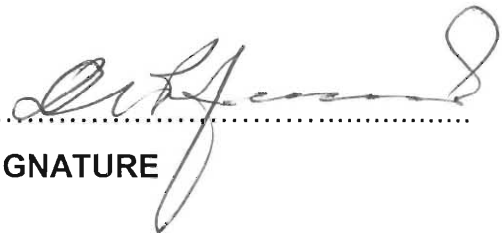

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TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION AND DEFINITION OF CONCEPTS

1.1 INTRODUCTION

The Subject of the Dissertation

The subject of this Dissertation is:
"Critical labour law imperatives that impact on the issues of equity, restructuring, incorporation and mergers that are currently taking place in the higher education sector."

1.2 BACKGROUND TO THE SUBJECT OF THE DISSERTATION

Higher education is regarded as being central to the socio-economic development of every country in the world. This is evidenced by the fact that every country in the world has a university. All the countries, in the African continent in particular, including the so-called homelands in the "old" South Africa, established a University on becoming independent as one of their hallmarks of independence and self-sufficiency. This fact opens up the analysis of this subject to a need for socio-economic comment, although only in passing, in order to contextualise the labour law implications of the current issues in the higher education sector. The other problem that necessitates such comment is "the extent and complexity of the 'juridification' of industrial relations in South Africa". Rycroft[1] raises this phenomenon in his article and explains it as follows:

> "Juridification refers to the use of law by the state to 'steer' social and economic life in a particular direction by limiting the

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1 Rycroft, A. "Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" (1999) 20 ILJ 1411 (with reference to J Clark "The Juridification of Industrial Relations: A Review Article" (1985) 14 The Industrial Law Journal (UK) 69).

> autonomy of individuals or groups to determine their own affairs."

The juridification under discussion is the introduction of the National Plan for Higher Education in South Africa[2] (National Plan) with its emphasis on equity legislation which is an indication of the values and intent of the government.[3]

The discussion of the subject of this dissertation will be premised on the assumption that there is a need for transformation in the higher education sector in South Africa and that labour law can be used as one of the tools that can facilitate, but not justify or initiate it the process.

Cheadle et al[4] make an important observation about the change at the workplace:

> "As always, it bears repeating that the major forces driving change in the workplace lie outside the province of the law and indeed often beyond the labour market itself. The regulatory effect of the law, while not insignificant, remains ancillary."

Squelch[5] argues that:

> "Higher education institutions in South Africa have been profoundly affected by the changes that are taking place in the wider society and its transformation has become part of the broader process of political, social and economic change. One of the objectives of transforming higher education institutions is

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2 National Plan for Higher Education published in Government Gazette No 22138 of 9 March 2001.

3 Op cit, note 1 above at 1412.

4 Cheadle, H, Le Roux, P A K, Thompson, C, van Niekerk, A. "Current Labour Law" (2000), Cape Town: Juta & Co Ltd. 35.

5 Squelch, J M, "Employment Equity and Affirmative Action in South African Universities: From Policy to Practice" (2001) Vol 10 No 3 Education and Law 318.

> to dismantle the fragmented and unequal structures, policies, process that were created under the apartheid system. For decades, apartheid policies gave rise to the discriminatory policies and practices in universities, which were particularly evident in the area of employment, recruitment, appointment and promotion policies and have been biased against women, black people and people with disabilities in particular."

The Extension of University Act[6] established separate institutions for African students, according to ethnic origin, and for Coloureds and Indians. Wolpe[7] argues that:

> "The training of blacks for professional occupations (teaching, social work, law, nursing, medicine, etc) was to be directed towards meeting the needs of the black population, particularly those in Bantustans – a fact exemplified by the statement of a government minister that the University of Natal's Medical School was to be solely for the training of non-Europeans...to meet the health needs of their people."

It was only in 1997 that the Higher Education Act[8] was enacted with the objective, among others, to establish a single co-ordinated higher education system in South Africa. Each institution of higher education was, however, to continue to enjoy its freedom and autonomy.

In March 2001, the National Ministry of Education unveiled the National Plan for Higher Education in South Africa.[9] The National Plan was formulated to meet the needs and challenges that were identified as characteristic of higher

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6 Act 45 of 1959.

7 Wolpe, H. "The Debate on University Transformation in South Africa. The case of the University of the Western Cape" *Comparative Education* Vol 31 No 2 1995.

8 Act 101 of 1997.

9 Op cit note 2 above.

education in South Africa in the Education White Paper 3.[10] This White Paper 3 stated that higher education in South Africa was characterised by the following deficiencies:

- "There is an inequitable distribution of access and opportunity for students and staff along lines of race, gender, class and geography. There are gross discrepancies in the participation rates of students from different population groups, indefensible imbalances in the ratios of black and female staff compared to white and males, and equally untenable discrepancies between historically black and white institutions in terms of facilities and capacities.

- There is a chronic mismatch between the output of higher education and the needs of a modernising economy. In particular, there is a shortage of highly trained graduates in the fields such as science, engineering, technology and commerce (largely as a result of discriminatory practices that have limited the access of black and women students), and this has been detrimental to social and economic development.

- Higher education has an unmatched obligation, which has not been adequately fulfilled to help lay the foundations of a critical civil society, with a culture of public debate and tolerance which accommodates differences and competing interests. It has much more to do, both within its own institutions and in its influence on the broader community, to strengthen the democratic ethos, the sense of common citizenship and commitment to a common goal.

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10 White Paper 3 published in Government Gazette No 18207 of 15 August 1997.

- While parts of the South African higher education system can claim academic achievement of international renown, too many parts of the system observe teaching and research policies which favour academic insularity and closed-system disciplinary programmes. Although much is being done there is still insufficient attention to the pressing local, regional and national needs of the South African society and to the problems and challenges of the broader African context.

- The governance of higher education at a system level is characterised by fragmentation, inefficiency and ineffectiveness, with too-little co-ordination, for common goals and negligible system planning. At the institutional level, democratic participation and representation of staff and students in governance structures is still contested on many campuses."

The National Plan addresses five key policy goals and strategic objectives which the Ministry of Education viewed as central to achieving the overall goal of the transformation of the higher education system. The goals and strategic objectives of the National Plan are:

- To provide increased access to higher education to all irrespective of race, gender, age, creed, class or disability and to produce graduates with skills and competencies necessary to meet human resource needs of the country.

- To promote equity of access and to redress past inequalities through ensuring that the staff and student profiles in higher education progressively reflect the demographic realities of South African society.

- To ensure diversity in the organisational form and institutional landscape of the higher education system through mission and programme

differentiation, thus enabling the addressing of regional and national needs in social and economic development.

- To build high-level research capacity to address the research and knowledge need of South Africa.

- To build new institutional and organizational forms and new institutional identities through regional collaboration between institutions.

The key activities that flow from these strategies and the time frames for completing them are outlined in the National Plan. Although the National Plan acknowledges the role of private higher education, the discourse in this dissertation is confined to the public higher education system in South Africa.

The National Plan lays down a formula for institutional and organisational changes. It argues that there is no single factor that underpins the case for mergers or for new institutional and organisational forms. Instead there are a range of factors limited to the specific context of different groups of institutions. For example, the rationale for merging a historically white and a historically black institution may well differ from that for merging two small institutions. In the one case, the purpose may be that of overcoming the racial fragmentation of the higher education system. In the other, it may be that of achieving economies of scale and/or scope. In yet other cases, the rationale may be that of streamlining governance and management structures and improving administrative systems. It may be a combination of all these factors. It may also be linked to improving the quality of provision and strengthening the sustainability of the national higher education system against the background of increasing competition from foreign and international institutions which are looking for new educational markets in response to economic and financial pressures within their own countries.

The National Plan aims to restructure the institutional landscape by reducing the number of institutions and establishing new institutional and organizational forms through regional arrangement for consolidating the provision of higher

education on a regional basis. It aims to reduce the number of institutions, but not the sites where the institutions are operating from at present. It sanctioned the merger of Natal Technikon and M L Sultan Technikon, the incorporation of the Qwa-Qwa branch of the University of the North and the University of the Free State, the unbundling of Vista University and the merger of Unisa, Technikon SA and the incorporation of the distance education centre of Vista University into the merged institution. In order to facilitate merges and the development of new institutional and organizational forms, the Ministry of Education established a National Working Group to investigate and advise the Minister on appropriate institutional structures on a regional basis to meet the regional and national needs of higher education.

The National Plan provides for measures that will steer the institutions of higher education to comply with its blueprint. It provides, for example, that from 2003/2004 financial year, the Ministry of Education will only fund student places in small and costly programmes, where unit costs are above average on the basis of regional framework for the realization of such programmes. The framework could either involve the joint offering of programmes or agreement that the programmes would only be offered by a particular institution/s. From the 2003/2004 financial year the Ministry of Education will only fund student places in specialised postgraduate programmes on the basis of a common regional teaching platform. It will not fund student places for new programmes that overlap with or duplicate existing programmes offered in the region, unless there is a clear and unambiguous motivation for the provision of the programmes. From the 2002/2003 financial year, only fund student places at satellite campuses if this has been approved as part of institutions plans. Approval will not normally be granted unless there is demonstrated regional and/or national need, especially for specialist or niche programmes and there are clear strategies to collaborate with other notifications in the region.

The National Plan also provides that in order to facilitate collaboration, higher education institutions will be required from 2001 to:

- Submit all proposed new programmes for regional clearance to avoid overlap and duplication, prior to the submission of the programmes to the Department of Education for funding approval and to the Council on Higher Education for accreditation. This will require that institutions establish a regional programme clearing mechanism, which will include criteria for assessing programme overlap and duplication.

- Inform the Ministry of their intention to close down particular programmes at lease one year before the intended closing down. The Ministry must also be informed of the reasons for closing down of the programme and provide with an assessment of the impact on the regional and national need and availability of such programmes.

1.3 LABOUR LAW IMPLICATIONS

The labour law implications resulting from these proposed changes are substantial and far-reaching:

On the one hand, the autonomy of the institutions of higher education is compromised. The highest authority responsible for running an institution of higher learning is by legislation its Council. The Council has the prerogative to decide on its staff complements and, after consultation with other stakeholders, to decide on the conditions of service of its employees. On the other hand the changes have implications for the job security of the employees of the institutions of higher education and their conditions of service. The changes in programmes may lead to redundancy of certain positions and the provision of programmes at different sites may lead to change in the conditions of service.

1.4 THE OBJECTIVE OF THE DISSERTATION

This dissertation aims to examine the role of labour law in balancing the conflicting interests of the parties with a view to giving guidelines as to the actions that need to be taken, and actions that should be avoided in order to ensure that labour law imperatives are not flouted.

1.5 THE ARGUMENT

It will be argued that the changes that are taking place in the higher education sector must recognise and respect the fundamental rights of the individuals and groups that are enshrined in the Constitution of the Republic of South Africa Act[11] and the rights and obligations of the institutions of higher education, as employers, and those of their employees that are contained in the legislation that was enacted to give effect to the provisions of the Constitution of South Africa Act.[12]

The argument will be presented by contrasting the provisions of the National Plan that impact on employment relations with the constitutional and labour law imperatives.

1.6 PROPOSED STRUCTURE/LAYOUT OF THIS DISSERTATION IN PUTTING FORWARD THIS ARGUMENT

- **Lessons to learn from restructuring of higher education in other jurisdictions**

The argument will be presented by relying on literature and conclusions of the National Plan that the support and co-operation of staff is essential if the restructuring of the higher education sector is to succeed. The employment law rights of staff should be respected if such support and co-operation of staff is to be obtained.

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11 Act No 108 of 1996.

12 *Ibid.*

- **Employment Equity Issues**

In presenting the arguments, regard shall be had to the equality clause of the Constitution of the Republic of South Africa Act,[13] the provisions of the Employment Equity Act[14] and those of the Promotion of Equality and Prevention of Unfair Discrimination Act.[15] The decisions of dispute resolution bodies (the courts and CCMA) shall be used around the issue of affirmative action and the fairness or otherwise of its application.

- **Fair Labour Practices and Just Administrative Action**

Reference shall be made to the provisions of the Constitution of the Republic of South Africa Act,[16] labour legislation and the decisions of our courts and literature in support of the argument.

- **Restructuring**

The broad concept of restructuring and its implications shall be argued with reference to the rights of the parties both in terms of the Constitution and labour law.

It will be argued that restructuring takes different forms, in particular the following:

- A change in the terms and conditions of employment.
- Outsourcing.
- Incorporations and mergers.
- Dismissals based on the operational requirements of the employer.

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13 Idem Section 9.

14 Act 55 of 1998.

15 Act No 4 of 2000.

16 Op cit note 12 Sections 23 and 33 above.

The argument that shall be presented in respect of each form of restructuring shall be based on the constitutional protection of existing rights, the labour legislation requirements and procedures that need to be followed where restructuring has to take place and the guidelines that have been laid down by our courts in that regard. Reference shall also be made, where applicable, to the international labour law imperatives that are set out in the International Labour Organisation Conventions and recommendations. The Labour Relations Act[17] and the Basic Conditions of Employment Act[18] shall form the basis of the argument. Regard shall also be had to the Labour Relations Amendment Bill[19]that has been passed by parliament which significantly deals with the issue of transfer of contracts of employment that exist between the parties to a third party as well as issues around the dismissals of employees based on the operational requirements of the employer. Lastly the author shall give his conclusions and recommendations.

1.7 DEFINITION/EXPLANATION OF CONCEPTS

- **"Higher Education"**

The Higher Education Act[20] defines higher education as meaning:

> "All learning programmes leading to qualifications higher than Grade 12 or its equivalent in terms of National Qualifications Framework as contemplated in the South African Qualifications Authority Act, 1995 (Act No 58 of 1995) and includes tertiary education as contemplated in Schedule 4 of the Constitution."

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17 Act 66 of 1995.

18 Act No 75 of 1997.

19 Labour Relations Amendment Bill published in Government Gazette No 21407 of 27 July 2000, p.106.

20 Op cit note 8 above.

The ancillary provisions that shall be referred to are: Section 44(1)(a)(ii) of the Act[21] gives the exclusive power to the national legislative authority to pass legislation regulating the tertiary education. Section 29(1)(b) of the Act[22] which states: "Everyone has the right...to further education which the state, through reasonable measures, must make progressively available and accessible."

- **"Higher education institution"**

The Higher Education Act[23] defines higher education institution as meaning

> "any institution that provides higher education on a full-time or part-time or distance basis and which is
>
> (a) established or deemed to be established as a public higher education institution under this Act;
> (b) declared a public education institution under this Act;
> (c) registered or conditionally registered as a private higher education institution under this Act."

The higher education institutions that are dealt with in this dissertation are the universities and technikons that are public institutions and are declared as such under this Act. The National Plan regards the Technikons as institutions whose primary function is to provide career-oriented programmes at the diploma level while it regards universities as institutions which offer a mix of programmes including career-oriented degree and professional programmes, general formative programmes and masters and doctoral programmes. However, this does not imply that there will be no "loosening of the boundaries between universities and Technikons as suggested in the White Paper".[24]

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21 Op cit note 12 above.

22 *Ibid.*

23 Op cit note 8 above.

24 National Plan for Higher Education.

- **"Institutional roleplayers"**

The Higher Education Act, in its preamble acknowledges the desirability for higher education institutions to enjoy freedom and autonomy in their relationship with the State. It however limits this autonomy within the context of public accountability and national need for advanced skills and scientific knowledge. This Act bestows the power to govern the public higher education institution, subject to the Act and any other law to the Council of the higher education institution. The tension arises out of the fact that the Minister of Education has the power with regard to the determination of higher education policy. The Minister of Education is also empowered to influence the governance of institutions of higher education when it comes to institutional statutes: the institutional statute must be submitted to the Minister for approval and has the power to make a standard institution statute which applies to every public higher education institution that has not made an institutional statute until such time that the council of such public higher education institution makes it own institutional statute. On the other hand, the council of a public higher education institution must appoint the employees of the public higher education institution and determine the conditions of service, disciplinary provisions, privileges and functions of the employees of the public higher education institution subject to applicable labour law.[25] The Higher Education Amendment Act as per the Higher Education Amendment Bill[26] was passed to give power to the Minister of Education to establish interim councils for new, declared or merged public higher education institutions. The object of this Bill was to empower the Minister to implement the provisions of the National Plan.

- **"Restructuring"**

In the *New Oxford English Dictionary of English*[27] the word "restructure" means "to organise differently".

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25 Idem Section 34.

26 Higher Education Amendment Bill published in Government Gazette No 22440 of 2 July 2001.

27 *The New Oxford Dictionary of English*, 1988, 1st publication, Clarendon Press, London.

This dissertation encompasses the broad concept of restructuring as expressed by Thompson[28] in the following words:

> "Business restructuring is part of market economics, the more so in the area of globalisation. Its key objective is to improve – or save – the competitive position of the business in its product or service market. An employer may wish employees to work differently, and this may entail changes in the conditions of service or work practices or both. Other forms of restructuring, again, may entail a combination of changed conditions and job losses. Restructuring takes many shapes, including business acquisitions, mergers, relocations, outsourcing, downsizing and closure."

- **"Employment Equity"**

According to Tinarelli,[29] the concept employment equity centres on two things:

- The eradication of unfair discrimination of any kind in having promotions, training, pay, benefits and retrenchment, in line with the constitutional requirements.

- Measures to encourage employers to undertake organizational transformation to remove unjustified barriers to employment for all South Africans, and to accelerate training, and promotion of individuals from disadvantaged groups.

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28 Thompson, C 'Bargaining Business Restructuring and Operational Requirement Dismissal' (1999) 20 *ILJ* 755.

29 Tinarelli, S (2000) *Employers' Guide to Employment Equity Act*, 1st edition, Van Schaik Publishers, 2.

- **"Affirmative Action Measure"**

Section 6(2)(b) of the Employment Equity Act[30] states: "It is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act."

Section 15[31] described affirmative action measures as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer." The Act[32] defines "designated groups" to mean black people, women and people with disabilities. It[33] defines "designated employer" to mean an employer who employees 50 or more employees and includes an organ of the state as defined in Section 23 of the Constitution.

- **"Equality"**

A distinction is made between formal equality and substantive equality. Formal equality prescribes equal treatment of individuals regardless of their actual circumstances, presupposing that all persons are equal bearers of rights within a justice social order. Substantive equality, on the other hand, recognises a world of diverse and disparate groups. Substantive equality acknowledges that all persons are not equal bearers of rights and these differences need to be taken into account in formulating legal approaches to equality rights. Section 9(1) and (2) of the Act[34] states that "every one is equal before the law and has the right to equal protection and benefit of the law". Equality includes the full and equal enjoyment of all rights and freedoms. The Constitution states that in

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30 Op cit note 15 above.

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 Op cit note 12 above.

order to promote the achievement of equality, legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- **"Just administrative action"**

The institutions of higher education are organs of state and they perform administrative actions. Section 35(1)(2) and (3) of the Act[35] provides that everyone has a right to an administrative action that is lawful, reasonable and procedurally fair, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The Promotion of Administrative Justice Act[36] gives effect to Section 33 of the Constitution by defining "administrative action" as meaning any decision taken, or any failure to take a decision by, inter alia, any organ of state exercising a public power or performing a public function in terms of any legislation. The term "decision" is in turn defined as meaning any decision of an administrative nature, made, proposed to be made, or required to be made, as the case may be, under the employing provisions. The Labour Appeal Court has pronounced on the fairness of "justness" of the administrative action and laid down certain guidelines. In the case of Carephone (Pty) Ltd vs Marcus NO[37] the Labour Appeal Court restricted the review enquiring to "whether justifiable in other words (whether) justifiable in terms of the reasons given for it."

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35 *Ibid.*

36 Act No 3 of 2000.

37 1998 BLLR 1093 (LAC).

CHAPTER TWO

LESSONS TO LEARN FROM RESTRUCTURING OF HIGHER EDUCATION IN OTHER JURISDICTIONS

Whilst recognising the uniqueness of the South African situation, it would serve a useful purpose to look at the experiences of other jurisdictions in how they handled restructuring in their countries. For one reason the advent of globalisation is impacting on how organizations maintain their competitive advantage and, for another, there are similarities in the manner in which institutions of higher learning engage in their pursuit for excellence in teaching and research all over the world. It must also be mentioned that the ideal of equity and fairness, with a few exceptions, is an international norm. The analysis that follows will show that there are similarities in the reasons for restructuring that took place in other jurisdictions and those that are necessitating restructuring in the higher education sector in South Africa.

The National Plan for Higher Education is the basis of the fundamental restructuring that the Ministry of Education seeks to introduce in South Africa. The Ministry of Education did raise some issues in relation to the experiences of the other countries in the National Plan itself. It advanced the following arguments.

> "The Ministry is mindful of the costs associated with mergers and of the fact that substantial savings flowing from economies of scale are most likely in the short to medium term. However, the Ministry is less convinced by the claims made that international experience suggests that there are few financial benefits associated with mergers or that mergers of higher education institutions in other jurisdictions have not been successful. Although cognisance should be taken of the international experience, it is important to assess the financial impact of mergers in a context in which apartheid planning often flew in the face of financial rationality.

> Furthermore, the argument that mergers are not successful is usually based on the evidence of mergers in industry. However, a recent assessment of mergers in a range of countries shows that higher education mergers enjoy a considerably higher success rate than mergers in industry.
>
> It should be noted that the merging of higher education institutions is a global phenomenon driven by governments to enhance quality and to strengthen national higher education systems in the context of declining resources. The international experience also indicates that successful mergers in higher education are dependent on a variety of factors, not the least of which is the will, commitment and dedication of all parties to change."

The problems facing South African higher education are fundamentally two-fold. Firstly, the disparity in the endowment and capacity of different institutions of higher education to provide quality academic programmes and to manage these institutions. There is good reason for some institutions to jealously preserve what they already have. This must be viewed against the national interests.

Secondly, the race and gender issues in the staffing complements have not been resolved. There is a need to strike a balance between the vested interests of the existing staff and the need to bring about employment equity. Consultations and negotiations need to take place in order to obtain "commitment and dedication of all parties to change."

The following experience of the other jurisdictions can serve as a guide for South Africa.

Goedegebure and Meek[1] make the following observations about the international trends in the changing relationship between government and higher education.

The two basic international trends that the authors observe in the changing relationship between government and higher education are:

> "(1) the movement away from higher education systems consisting of many small, specialised, single-purpose institutions towards systems consisting of smaller numbers of large, multi-discipline institutions; and
>
> (2) the trend of national governments to retain the prerogative to set broad policies, particularly budgetary ones, while increasingly transforming the responsibility for growth, innovation and diversification in higher education to individual institutions."

It is submitted that the National Plan for Higher Education[2] is introducing this approach in the South African higher education scenario.

The changes in higher education in the other countries was, to a large extent, brought about by external forces, namely by imposition of government policy. A case is made out that the attempts to bring about large-scale change in higher education in Australia and The Netherlands succeeded. The authors further argue that this success was brought about by[3] "the overall ideological and political context and the changes therein, and on basic values, attitudes and interests of those who constitute the system."

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1 Goedegebure, LCJ and Meek, V 'Restructuring Higher Education: A Comparable Analysis between Australia and the Netherlands' 1991 Vol 27 No 1 *Comparative Education* 7.

2 National Plan for Higher Education published in Government Gazette No 22138 of 9 March 2001.

3 Op cit at 9.

It must be pointed out, though, that there are historically divergent ideological and political values in South Africa because of its history.

Policy change in Australian Higher Education included "major changes in staffing, particularly aimed to increase the flexibility of institutions, improve staff performance, and enable institutions to compete more successfully in staff recruitment in priority areas."[4] The emphasis that is placed on equity in the South African context moves from this point of departure and goes on to try and correct the imbalances of the past that were not an issue in Australia's experience. To achieve these changes in Australian Higher Education, institutional amalgamations were brought about.

The policy change in Dutch Higher Education "entailed enlargement of the size of establishments by means of mergers between Hoger Beroepsonderwijs (HBO) institutions. There was also the retrenchment objective. The operation had to result in financial reduction for the total HBO sector. The institutions were thereafter granted more autonomies."[5]

The authors argue that in Australia and The Netherlands the institutions were faced with a basically simple choice: "merge and ensure continued governmental funding or do not change and lose governmental financial support. The 'power of the purse' was dominant in the adopted government approach."[6] Another point that is made and which arguably contributed to the success of the change "is the apparent synergy that evolved between the governmental intention and institutional response". In other words the political and ideological environment in which the operation took place was favourable.

Similarly in South Africa the changes proposed for higher education have to a large extent been initiated made by the government. The government has included some "steering" mechanisms in the National Plan to ensure

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4 Idem at 13.

5 *Idem* at 15.

6 *Idem* at 17.

compliance. It may therefore be argued that if the intentions and values of the government coincide with the intentions and values of the other roleplayers in higher education, the proposed changes will succeed. It is therefore imperative that labour laws should regulate the change in such a way that the interests of all will be safeguarded in one way or the other. The question whether there is synergy between the government intention and institutional response in South Africa is debatable.

The authors[7] conclude their argument as follows:

> "Change is often analysed in terms of the power available to the one actor (in this case, government) to impose its will on others (higher education institutions) despite opposition. We propose a somewhat different theoretical view of change: the degree and extent of change in a complex system, such as higher education, is dependent upon the interaction of interests, strategic behaviour, norms and values, and ideologies of all concerned. Moreover the more that these factors tend to coincide or converge, the more likely it is that change will be extensive and ubiquitous."

Harman,[8] in his article on the restructuring of higher education in Australia, mentions that opponents of amalgamation did many things, including the following to try and block the process:

> "lobbying Ministers, parliamentarians and bureaucrats; working through elites on governing bodies of institutions, forming coalitions with interest groups outside tertiary education, such as teacher's unions; mounting major publicity campaigns; and appealing to opposition parties during elections."

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7 *Idem* at 2.

8 Harman, G 'Restructuring Higher Education Systems through Institutional Mergers: Australian Experience 1981-1983' (1986) Vol 15 No 5 *Higher Education* 579.

They did not succeed. On whether the amalgamations were necessary and constructive, their opponents tried, among others, to "point to the adverse effects on many individual staff, the damage to the institutional morale, inefficiencies in some new multi-campus institutions, failure to achieve all the promised advantages in the short term, loss of many desirable features of smaller institutions, and failure of governments to consult with affected institutions to a sufficient degree." [9]

The lesson for South Africa is that these possible shortcomings that may arise as a result of incorporations and mergers should be anticipated and addressed.

Pritchard,[10] in her article on the restructuring of higher education in the German Federal Republic, states:

> "The 1985 Amendment seeks to promote equal opportunities for women scholars by including in its framework the following statement:
>
> 'The institutions of higher education in the carrying out of their tests shall work towards the overcoming of disadvantages which exist for women academics.
>
> This equal opportunities clause in the Amendment does not merely have the character of an appeal. It lays upon Länder and upon institutions of higher education the duty of helping to overcome the handicaps of female scholars...It is hoped thus to help correct the underrepresentation of women in academic life. As such this clause is surely to be welcomed as liberal and well-intentioned.'

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9 *Idem* at 583.

10 Prichard, R M O 'The Third Amendment to the Higher Education Law of the Federal Republic' (1986) Vol 15 No 5 *Higher Education* 598.

Ramsay[11] makes the important point that:

> 'The continuing under-representation of women at more senior and management levels of the international higher education sector is receiving renewed attention with the recognition that neither institutions, nor the countries in which they are located, can afford to continue to overlook their management abilities or to neglect their leadership potential.'

The National Plan for Higher Education[12] seeks to go beyond the gender under-representation, but also includes racial representation. Attempts by other jurisdictions to correct under-representation on a particular ground should encourage South Africa to correct under-representation that exists on any other arbitrary ground.

Skodvin,[13] in his article "Mergers in Higher Education – Success or Failure?" points out that the concepts "mergers" and "amalgamations", are synonymous and that they both reflect the merger of two or more previously separate institutions into one new single institution.

This article describes mergers in higher education in Australia, USA and several Western European countries (Norway, Sweden, Finland, The Netherlands, Belgium, Germany and Great Britain).

In some of the countries the mergers were voluntary, with the institutions themselves initiating them. In others they were forced, that is, they were

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11 Ramsay, E. "Women and Leadership in Higher Education. Facing International Challenges and Maximising Opportunities" (2001). No 147/April 2001. *The Bulletin*, p.15.

12 Op cit note 2 above.

13 Skodvin, O-J, 'Mergers in Higher Education – Success or Failure?' (1999) Vol 5 No 1 *Tertiary Education and Management* 65.

brought about by instigation external to the institution, for example, government as educational policies.

The author[14] describes the mergers as "drastic and dramatic" – "not only are the governing systems of the institutions affected, but the 'souls' of the partners involved are also affected and they have to relate to the process of change. The institutional changes include the abandonment of existing forms of governance, change in institutional norms, objectives and academic programmes, as well as the modification of organizational procedures. It is "an irreversible totality – the legal death of one or both parties in the creation of a new one."

The lesson for South Africa, if the mergers are so far reaching, is that proper and extensive consultations among all stakeholders must be conducted.

The author[15] argues that the reason for the mergers is that "the external instigators and/or participants generally think that it is more advantageous than disadvantageous. The main force behind a merger is always some kind of assumed gain."

Mergers, according to the author[16], are a process. They can be a "bottom up" process, a "top down" process or both. Top-down processes are most common – but they are often connected to a lot of tensions and conflicts among both administrative and academic staff.' 'The bottom up mergers are often more smooth and successful.'

The "bottom up" process takes place when the institutions themselves and their employees initiate the mergers as in the case of Technikon Natal and M L Sultan Technikon in South Africa. The "top down" takes place when the merger is imposed from above by, for example, the government policy, as in the

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14 *Idem* at 68.

15 *Ibid.*

16 *Ibid.*

case of University of South Africa, Vista University and Technikon SA in South Africa. This may also happen within an institution when the top management introduces and implements change without proper consultation with the other stakeholders – the employees, for example.

The author argues,[17] that, in general, mergers lead to improvement in management, organisation and administration. However, economies of scale with regard to the administrators are less common. Mergers require a lot of resources for planning, co-ordination and physical infrastructure, they are therefore expensive in the short run.

The author[18] further argues that in answering the question whether mergers are a success or failure, the answer depends on to whom you are talking and the stance and perspective that you take. There are, however, factors that suggest success or failure and he mentions the following:[19]

> "The larger the differences in size between the involved institutions, the greater the probability that the merger will succeed:
>
> - Geographical proximity plays an important role.
> - Mergers improve the future position of new institutions, especially in regard to the breadth of different educations.
> - Mergers are characterised by the contradiction between maintaining the status quo and implementing change.
> - The implementation of organizational goals often occurs at the cost of individual needs.
> - Merger processes are often connected to problems, stress, fear and impart inadequate planning at all levels.

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17 *Ibid.*

18 *Idem* at 74.

19 *Idem* at 75.

- Mergers in general are characterised by too many "top-down" processes and too few "bottom up" processes.
- Mergers appear due to external conditions/factors, for example in reaction to public policies or competitive changes within higher education institutions.
- Administrative and efficiency questions seem to have dominated the process (at least the first four to five years after the merger) even if academic gains were the major reason behind the mergers."

The author[20] concludes:

> "Mergers within higher education are complex, time consuming and difficult processes which require negotiation and detailed planning. They should be viewed mainly as long-term strategy and should therefore be accompanied by development plans. Leadership, strategic planning, the use of committees whose members are constitutive of the whole institution and emphasis on positive results are necessary factors for successful mergers. It is also important to develop goals or objectives which are shared by the majority of the staff. Access to resources is very important during the implementation stage. It is important to bring new blood into a system after a merger. This contributes to dampening cultural conflicts and tensions in the new organisation."

Our labour law emphasises the role that is played by collective bargaining. The above suggestions when taken into account for the purpose of collective bargaining would ensure the success of mergers in South Africa. This has happened in the case of incorporations of colleges of education into higher education institutions, as will be shown below.

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[20] *Idem* at 77-78.

It becomes even more compelling to take heed of the experiences from the other jurisdictions, as set out above, if regard is had to the reservations that have been expressed on behalf of some of the institutions of higher education that have been earmarked for mergers in terms of the National Plan. The Vice Chancellor of one of the Technikons that have been called upon to merge is reported to have said:[21]

> "Nobody can guarantee that jobs won't be lost in this process. I might be one of them that have to go. That's why I can identify with staff who feel threatened by this process," but on a positive note, continues to say: "But we don't want to move into this merger with people being disgruntled. It will be priority to take them along with me.""

It is also worth mentioning that the Eastern Cape universities expressed similar opposition to mergers.[22]

"Rhodes University is in Grahamstown, Fort Hare is in Alice about 100 km to the north-east; Unitra, in Umtata is more than 300 km – or four hours drive – east of Fore Hare. Dr David Woods, vice-chancellor of Rhodes' main campus in Grahamstown and its satellite in East London, said he was 'not in favour' of a merger. 'I do not think it will enhance efficiency; the distances (between the universities) are too great...I know the problems of trying to manage two campuses' he said.

Professor Nicky Morgan, the temporary administrator of Unitra, said if the universities worked together on a regional development strategy, the working group would be redundant.

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21 *The Natal Mercury* Mergers of Durban Technikons' 24 May 2001.

22 *Business Day* 'Eastern Cape Universities opposed to mergers' 8 June 2001.

'In several instances mergers are not the answer....In the institutions there should be sufficient expertise to interpret the national plan...without the working group' he said.

Fort Hare's marketing and communications director, Luzeko Jacobs, said Fort Hare and the institutions like Rhodes were not "equally endowed". As such the merger would be unequal in terms of resources and 'no one can annex Fort Hare.' Fort Hare and Unitra had their own life and structure. I do not think we want every university in this country to be the same."

All three universities said their philosophies and approaches were incompatible.

The proponents of restructuring of higher education in South Africa, especially the government, will have to address these concerns. Labour law will have to be equitably applied to allay the fears of staff.

Having dealt with the experiences of restructuring and mergers in higher education in other jurisdictions, mention must be made of the provisions of international law.

Section 233 of the Constitution of the Republic of South Africa Act[23] provides that in interpreting legislation every court must prefer any reasonable interpretation that is consonant with an international law over inconsistency with international law and Section 39 thereof[24] provides that "when interpreting the Bill of Rights, a court tribunal forum must (among others) consider international law and foreign law." Section 3 of the Labour Relations Act,[25] provides that any person applying the LRA must interpret its provisions to give effect to its primary objects, in compliance with the Constitution, and in compliance with the public international law obligations of the Republic of South Africa.

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23 Act 108 of 1996.

24 *Ibid.*

25 Act 66 of 1995.

According to Section 1 of the Labour Relations Act,[26] the primary objects of the Act are to give effect to the fundamental rights contained in the Constitution in relation to, among others, fair labour practices and obligations incurred by South Africa as a member of the International Labour Organisation.

In the case of *Foodgro v WCC*,[27] Froneman DJP, although stressing that foreign judgements should be treated with some caution due to having been decided in terms of different legislation, sought guidance from the court rulings on the Directive[28] and legislation in the European community. Section 97 of the Labour Relations Act[29] that was in issue in this case will be discussed in more detail below in Chapter 4 when restructuring as in incorporations and mergers is analysed.

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26 *Ibid*.

27 1999 (BLLR) 875 (LAC).

28 Directive 77/187/EC of 14 February 1977.

29 Act 66 of 1995.

CHAPTER THREE

ACHIEVING EMPLOYMENT EQUITY IN THE SOUTH AFRICAN HIGHER EDUCATION

The apartheid structure of higher education in South Africa gave rise to severe racial and gender inequalities among staff and students. There is therefore a need to address the past imbalances and to promote non-discrimination in the employment policies and practices in this sector. The Education White Paper 3[1] in Item 1.4 identified the following discrepancy in this regard:

> "There is inequitable distribution of assessment opportunity for students and staff along lines of race, gender, class and geography. There are gross discrepancies in the participation roles of students from different population groups, indefensible imbalances in the ratios of black and female staff compared to whites and males..."

In the Executive Summary of the National Plan for Higher Education,[2] the Ministry of Education provides for the following:

> "3.3 The National Plan proposes that the participation rate should be increased through recruiting workers, mature students, in particular women, and the disabled, as well as recruiting students from the Southern African Development Community (SADC) countries as part of the SADC Protocol on Education.

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1 A Programme for the Transformation of the Higher Education published in Government Gazette No 18207 of 14 August 1997.

2 National Plan for Higher Education published in Government Gazette No 22138 of 2001.

6. The staff composition of higher education has not changed in line with the changes in the student composition. Blacks and women remain under-represented in academic and professional positions, especially at senior levels.

6.1 Institutions will be therefore expected to develop employment equity plans with clear targets for rectifying race and gender inequalities. The National Plan recognises the difficulties in the short to medium-term of achieving employment equity, even the paucity of postgraduates and consequently the small pool of potential recruits. It therefore encourages institutions to recruit black and female staff from the rest of the African continent."

The letter and spirit of this document accords with the letter and spirit of the Constitution of the Republic of South Africa Act[3] which provides the equality clause in the following terms:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

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3 S9 Act 108 of 1996.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one more of grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair."

Two pieces of legislation have been passed by parliament with the aim of ensuring equal opportunity and treatment as well as the elimination of unfair discrimination. The first one was the Employment Equity Act in 1998.[4] The second one is the Promotion of Equality and Prevention of Unfair Discrimination Act.[5] In so far as the Employment Equity Act[6] is concerned, it is important to refer to its preamble which reads as follows:

"Recognising –

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that these disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to –

Promote the constitutional right of equality and the exercise of true democracy;

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4 Act 55 of 1998.

5 Act 4 of 2000.

6 Op cit note 4 above.

Eliminate unfair discrimination in employment;

Ensure the implementation of employment equity to redress the effects of discrimination;

Achieve a diverse workforce broadly representative of our people;

Promote economic development and efficiency in the workforce; and

Give effect to the obligations of the Republic as a member of the International Labour Organization (this Act was passed).'

Section 2 of this Act states:

"The purpose of this Act is to achieve equity in the workplace by –

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the work force."

The Act, defines "designated groups" as meaning black people, women and people with disabilities" and "black people" is a generic term which means Africans, Coloureds and Indians.

Section 5[7] states:

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[7] *Ibid.*

"Every employer must take steps to promote equal opportunity in the work force by eliminating unfair discrimination in any employment policy or practice."

Section 6[8] provides:

"(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to –

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of inherent requirements of a job; and

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of, grounds of unfair discriminations listed in subsection (1)."

Section 15[9] provides for affirmative action measures as follows:

"(1) Affirmative action measures are measures designed to ensure that suitable qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

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8 *Ibid.*

9 *Ibid.*

(2) Affirmative action measures implemented by a designated employer must include:

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designated to further diversity in the workforce based on equal dignity and respect for all people;

(c) making reasonable recommendation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to –

(i) ensure the equitable representation of suitably qualified people from designated groups and all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection 2(d) include preferential treatment and numerical goals but exclude quotas.

(4) Subject to section 42 (assessment of compliance), nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups."

Of relevance to this discussion is the definition of "employment policy or practice" given in the Act[10] as including recruitment procedures, advertising and selection criteria as well as appointments and the appointment process, remuneration employment benefits and terms and conditions of employment, among others."

In so far as the Promotion of Equality and Prevention of Unfair Discrimination Act[11] is concerned, it must be noted that this Act was introduced with the objective of eradicating social and economic inequalities, especially those which "stem from our history of colonialism, apartheid and patriarchy." Section 5,[12] provides that this Act is applicable to the state as well as to all individuals except "any person to whom and to the extent that the Employment Equity Act applies." This section ensures that any discrimination that is not covered by the Employment Equity Act will be covered by this Act.

The schedule to this Act[13] refers specifically to labour and employment and identifies the following unfair practices:

- "creating artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures.
- Applying human resource utilisation development, promotion and retention practices which unfairly discriminate against persons from groups, identified by the prohibited grounds.
- Failure to respect the principle of equal pay for equal work.
- Perpetuating disproportionate income differentials deriving from past unfair discrimination.

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10 *Ibid.*

11 *Op cit* note 5 above.

12 *Ibid.*

13 *Ibid.*

The International Labour Organisation also prohibits discrimination on certain grounds and recognises the need for affirmative action. The ILO Convention discrimination in employment[14] defines the term discrimination as including "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or imposing equality of opportunity or treatment in employment or occupation."

Article 5[15] thereof states that a third category of measures that are not deemed to be discrimination are 'special measures of protection or assistance in relation to the standards concerning the employment of women and indigenous populations." The effect of these measures is to secure an equilibrium between the different communities and ensure protection of minorities or to compensate for discrimination against the economically less advanced population group.

It is significant to note that the Higher Education Act[16], which regulates higher education, in its preamble recognises the desirability to redress past discrimination and ensure representativity and equal access. To this end, it provides for the establishment of an "institutional forum" in Section 31(a)(ii)[17] and this forum must advise the council of an institution of higher education on, among others, race and gender equity policies.

The Labour Relations Act[18] also provides for mechanisms of introducing affirmative action at the workplace where a workplace forum has been

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14 The Discrimination (Employment and Occupation) Convention and Recommendation No 111 of 1958.

15 *Ibid.*

16 Act 101 of 1997.

17 *Ibid.*

18 Act 66 of 1995.

established in terms of Section 80 of the Act.[19] Section 86(1)(c) of the Act[20] provides that:

> 'an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning –
>
> (c) measures designed to protect and advance persons disadvantaged by unfair discrimination....'

The need for employment equity in higher education has been recognised by authors in South Africa and in other jurisdictions. It is interesting that in other jurisdictions it has also been linked to the debate as to whether it has the effect of lowering the standards of educational levels.

Guri[21] makes this point in her article titled 'Equality and Excellence in Higher Education – Is it possible? A case of Everyone's University, Israel.'

> 'The dilemma of equality versus excellence in education bears conceptual and practical difficulties. Most of the universities over the world are selective by nature and pursue academic standards. The more an institution earns a reputation for excellence, the less likely it is to provide equal opportunities to large segments of the population.'

Despite the above assertion, which means that only lecturers of high quality need to be employed, Prichard[22] in the article titled 'the Third Amendment to Higher Education Law of the German Federal Republic', states that 'the need for women representation has been acknowledged in the western universities.'

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19 *Ibid.*

20 *Ibid.*

21 (1986) Vol 15 No 5 Higher Education 59-71.

22 (1986) Vol 15 No 5 Higher Education 587.

In the South African context regard must be had to the previous dispensation and the constitutional endeavour to redress the imbalances of the past. The race and gender under-representation cannot be ignored. Cooper[23] in his article "Technikons and Higher Education Restructuring" identified a need to have the proportion of black and female staff significantly increased over the medium term. He found that the questions of equity in relation to altering the massive white male predominance in student and staff numbers needed to be confronted as a matter of urgency.[24] He endorsed the following recommendations,[25] among others:

- "Affirmative action policies to increase the proportion of black and female staff over a specific time period be put in place.
- Staff development programmes for upgrading of qualifications and academic leadership, including scholarships and funds for sabbaticals and other forms of leave be provided to enable staff to pursue further levels of study and skills training."

The National Plan for Higher Education[26] adopted a realistic approach by accepting that despite the support it receives from the above authorities, it will be difficult to achieve employment equity overnight given the small pool of potential recruits. The following observations are, however, noted in the Plan:[27]

> 'Notwithstanding these difficulties, employment equity remains an important national goal. The Ministry is therefore concerned that many higher education institutions have not yet developed

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23 (1995) Vol 31 No 2 Comparative Education 256.

24 *Idem* at 255.

25 *Idem* at 254.

26 *Op cit* note 2 above.

27 *Ibid.*

employment equity plans and that only a few have set specific race, gender and disability targets. The Ministry believes that more urgent attention should be given to increasing and retaining the pool of qualified black and women staff, as well as to changing the disabled profile.

The Ministry acknowledges that institutions have indicated that they are in the process of developing employment equity plans to meet the requirements of the Employment Equity Act, and that many have identified potential strategies to underpin such plans. These include early voluntary retirement schemes, contract appointments, staff and management development programmes, staff postgraduate study opportunities both locally and abroad to enable staff to enhance their academic qualifications, the provision of scholarships to encourage postgraduate students to pursue academic careers, the establishment of development posts and the appointment of employment equity officers.

An important strategy that institutions have largely ignored is the need to change institutional cultures. There is growing evidence to suggest that historically white institutions, in particular, are unable to recruit or retain black staff because the institutional culture is alienating rather than accommodating. This needs to be addressed urgently as it also impacts on black students success and performance, and is an important obstacle to attracting black students into postgraduate programmes, especially research programmes.

The Ministry is of the view that the potential strategies identified by institutions are critical for ensuring employment equity in the long-term. However, it is imperative that all higher education institutions develop short-term strategies, which could complement, and act as a spur to, the longer-term strategies of

> building the pool of postgraduates, which would supply the needs of the academic labour market.
>
> In this regard, the Ministry would like to encourage institutions to recruit academics actively from the rest of Africa. Although this should not divert attention from the importance of recruiting and retaining black South Africans, it could play an important role in the short-term to providing role models for black students and in helping to change institutional cultures,. It would also contribute to the broader development of intellectual and research networks across the Continent, thus contributing to the social and economic development of Africa as a whole.
>
> The Ministry recognises that current immigration and work permit procedures have made it difficult to recruit and keep staff from the Continent and other countries. The Ministry will, in conjunction with the Ministry of Home Affairs, prioritise the streamlining of the procedures for obtaining work permits. This is in line with the President's State of the Nation Address in which the President indicated that "immigration laws and procedures will be reviewed urgently to enable us to attract skills into our country."

In so far as the plan for recruiting staff and senior students from the African continent is concerned, the African Renaissance and International Co-operation Fund Act[28] would be highly facilitative. It provides for the establishment of an African Renaissance and International Fund in order to enhance co-operation between South Africa and other countries, in particular African countries, through the promotion of democracy, good governance, the prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development.

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[28] Act 51 of 2000.

The Immigration Amendment Bill[29] which provides for the streamlining of granting work and resident permits to foreigners will assist in the recruitment of non-South Africans. The standards that have been set by the International Labour Organisation (ILO)[30] would give guidance to the decision makers in so far as the foreign workers are concerned. The Migration for Employment Convention[31] is based on the principle of reciprocity, "i.e. the state which has ratified one of them is bound to apply it only to the nationals of states which have also ratified it."

It provides, among others, that[32]

> "States which have ratified the Convention should apply – without any discrimination, as stated above, to immigrants lawfully within their territory treatment no less favourable than that which it applies to its own nationals in respect of a number of matters such as:
>
> matters that are regulated by laws or regulations or are subject to the control of administrative authorities, remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons, membership of trade unions and enjoyment of the benefits of collective bargaining, accommodation."

Our courts have had the opportunity to give judgements on discrimination between non-nationals and citizens on labour issues. In *Balero and others v*

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29 Immigration Amendment Bill published in Government Gazette No 20889 of 15 February 2000.

30 International Labour Organization Migration for Employment Convention No 97 of 1949.

31 *Ibid.*

32 *Ibid.*

The University of Bophuthatswana[33] the court held that "it was gross violation of Section 8(2) of the Constitution (to discriminate against non-South Africans), since the protection against unfair discrimination is granted to 'any person'...and aliens are equally protected."

> "It ill behoves an institution of learning which propagates the credo of academic freedom to indulge in or to be party to acts of discrimination against any person, let alone members of its staff no matter what their ethnic or social origin is."[34]

In the case of *Larbi-Adam and others v the MEC for Education (North-West Province) and the Minister of Education*,[35] the Constitutional Court, having regard to Section 9 of the Constitution, declared the regulation which stated that "no person shall be appointed as an educator in a permanent capacity unless he or she is a South African citizen", to be unconstitutional.

In the case of *Auf der Heyde v University of Cape Town*,[36] the argument that was advanced by the applicant that the person who was appointed to the post he had applied for was a non-citizen therefore not appointable above him even though he was adequately qualified, was not accepted as a deciding factor by the court. The court was faced with an argument that affirmative action was meant to benefit South Africans. It was argued that nationality was a limiting factor in the application of affirmative action. The court noted that the consideration of nationality as a limiting criterion in the context of implementing employment equity had some merit but stated that it was not necessary for each potential beneficiary to establish actual disadvantage. It was sufficient that they be members of groups that have been disadvantaged.

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33 1995 (8) BLLR 1018 (B).

34 *Ibid.*

35 Case No CCT 2/97 (Constitutional Court unreported case).

36 (2000) 21 ILJ 1758 (LC).

The above factors should be taken into account when an institution of higher learning formulates its policies and procedures on the recruitment, selection and appointment of staff. Such policies should provide that the advertisements for the vacant posts should be circulated so widely that they should reach potential applicants who are outside the borders of South Africa. They must also provide clear guidelines and criteria for selecting suitable candidates.

The enforcement of affirmative action practices of employers has received the backing of our courts.

In the case of *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,[37] it was held that:

> "For affirmative action to 'survive judicial scrutiny' there must be a policy or programme through which affirmative action is to be effected and that the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination."

The Court found that any appointment by the council on purported affirmative action groups is illegitimate as it is not in terms of any formulated policy against which it can be tested and cannot be justified on affirmative action grounds. See also *Public Servants' Association v Minister of Justice*.[38]

In the case of *McInnes v Technikon Natal*,[39] the Court laid down the following principles in so far as affirmative action is concerned:

- "An employer cannot terminate the employment of an employee, outside the designated group, to appoint another

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37 (2000) 21 ILJ 1519 (LC).

38 (1997) 18 ILJ (T).

39 (2000) 21 ILJ 1138 (LC).

employee (who belongs to the designated group) on account of affirmative action.

- The employer must have a policy in place to regulate its implementation of affirmative action.
- The policy of the employer to implement affirmative action should not in itself discriminate unfairly against other employees.

In this case it was found that the policy advocated in its application, blunt racial discrimination in favour of Africans against all others."

It is therefore submitted that there are sufficient guidelines in our law that could be used to achieve employment equity in the higher education sector as envisaged by the National Plan for Higher Education in South Africa.[40] Every institution of higher education should have a clear Employment Equity policy that is meant to achieve the objectives of the Employment Equity Act. Those policies should not discriminate unfairly against other employees. It is important that such policies should be formulated in consultation with all the stakeholders in the institution.

The National Plan outlines the implementation framework for achieving the vision and goals of the White Paper. It states, among others, that "the Ministry will from 2003 directly link the funding of higher education institutions to the approval of institutional three-year "rolling" plans. The "rolling" plans should contain employment equity plans of the institutions, in terms of the Employment Equity Act. The purpose of an employment equity plan is to reflect the designated employer's employment equity implementation programme. The plan "represents the critical link between the current work force profile and possible barriers in employment policies and procedures, and the

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40 Plan *op cit* note 2 above.

implementation of remedial steps to ultimately result in employment equity in the workplace."[41]

The institutions of higher education could therefore not only grapple with heavy fines for failing to comply with the provisions of the Employment Equity Act, but also stand to lose funding from the central government if they fail to take proper steps to address the existing employment equity problems.

The question that needs to be answered, in conclusion, is whether the principles propounded by these various statutes and regulations can achieve their aims as stated. In theory the answer is yes. In practice, it must be said that there are problems. It is worth noting, though, that the Department of Labour has published names of the designated employers who have complied with the requirements of the Employment Equity Act, and the institutions of higher education are among the employers that have complied. There is also a general acknowledgement that the representation of designated groups has improved in many industries. There is also a substantial number of female and Black persons who have been recently appointed as vice-chancellors of the institutions of higher learning across the board. One limiting factor though is that there is a shortage of suitably qualified members of the designated groups who can fill positions in the higher education sector. By definition it is important that people who are entrusted with the duty of educating the nation should have the necessary skills. This means that serious policies should be put in place towards the training and development of the members of the designated groups in the higher education sector.

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41 Section 4 of the Code of Good Practice: Preparation, implementation, and monitoring of employment equity plans (Employment Equity Regulation No R1394 of 1999).

CHAPTER FOUR

RESTRUCTURING IN THE SOUTH AFRICAN HIGHER EDUCATION SECTOR

4.1 Overview

In the New Oxford English Dictionary of English[1] the word "restructure" means "to organise differently".

When restructuring takes place in an employment relationship changes may come about to the provisions of the contract of employment. The change may be so drastic that the employment relationship may come to an end. The change can be brought about by forces that are beyond the control of the parties, that is external forces, or it may come about by choice of one or both parties, that is internal forces. When changes take place, the rights and interests of one or both parties may be adversely affected. Where possible, the parties may control the consequences of the changes by agreement. The problem arises where the parties are not able to reach agreement on the cause and effect of change. Labour law then determines the respective rights of the parties who are in an employment relationship and sets out the procedures for dealing with such situations. The higher education sector is not immune from the forces that bring about change to the workplace. This chapter shall explore and explain the types of changes that can occur in the employment relationships, in general, and in the higher education sector, in particular.

Ramsay[2] raises the following important point on restructuring in the higher education sector:

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1 *The New Oxford Dictionary of English*, 1988, 1st publication, Clarendon Press, London.

2 Ramsay, E. "Women and Leadership in Higher Education: Facing International Challenges and Maximising Opportunities" (2000) No 147/April 2001, *The Bulletin* 14.

> "Universities all over the world are facing significant new challenges – and some fascinating opportunities in an increasingly competitive global context....The globalisation of the economy – and of higher education as one industry within it – increased and increasing international competition, and rapid technological change are each and together transforming the context in which universities operate, locally, nationally and globally. These three intersecting trends are impacting upon the nature of work and working conditions within universities."

The above exposition refers to the state of affairs in Australia. The same sentiments, however, are equally applicable in the South African context.

The thrust of this dissertation is to highlight the legal requirements that must be followed when restructuring takes place. The courts apply different tests when they review decisions for different types of restructuring. In this regard Cheadle et al[3] indicate the parameters within which the courts may interfere with the decision to restructure.

> "A dual counter-balanced trend appears to be emerging in jurisprudence. On the one hand, the courts have shown that they are – with good reason – reluctant to challenge employers' business decisions on workplace change, whether they relate to the introduction of new technology, process improvements or alterations in work practices. This deference extends, with one exception, also to the consequences of change such as a decision to outsource, changed terms and conditions of employment, and transfers of employees as part of a going concern.

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3 Cheadle, H., Le Roux, P.A.K., Thompson, C., van Niekerk, A. *Current Labour Law* (2000). Cape Town, Juta & Co.

> On the other hand, whenever business restructuring leads to job losses the courts have become distinctly more assertive with respect to both procedure and substance."[4]

It is important to emphasise that the interests of the parties, those of the employer and those of the employee, must be counterbalanced before the employer takes a decision to restructure. The employer should not act unilaterally. At the same time the employer has a right to safeguard its operational requirements.

The question that immediately arises is whether the concept "managerial prerogative" exists in our labour law.

Thompson[5] contends that "[t]here is effectively no such thing as managerial prerogative". In support of this view Thompson argues as follows:

> "A union can push for a collective agreement on "any matter of mutual interest with the employer and the employee, and it can engage in a protected strike on any matter as well. It is the right to strike (alternatively, litigate) on anything impacting on employment relationship that signals by definition, the absence of any managerial prerogative in our system of labour law. No employer decision bearing on employment is immune from industrial or legal challenge."[6]

This conclusion, it is submitted, overlooks the fact that in all matters, including those of consultation, the final decision rests with the employer. The author acknowledges this by saying: "The absence of managerial prerogative does not mean that management cannot have its way. Employers are generally more

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4 Supra at p.35.

5 Thompson, C "Bargaining, Business Restructuring and Operational Requirements Dismissal" (1999) 20 *ILJ* 758.

6 Supra at pp.758-759.

powerful than unions, and so generally do have their way. But that is a function of power, not law."

There are, however, different views on this ideological standpoint. On the one hand Grogan[7] states

> "Despite apparent disagreement on the scope of consultation, the courts are in agreement that, after the consultation process has been completed, the final decision whether to proceed with dismissal rests with the employer."

On the other hand in the case of *Steyn and Others v Driefontein Consolidated Ltd t/a West Driefontein*[8] the court held:

> "It is the prerogative of the employer to determine parameters of business operation but the prerogative must be exercised rationally, in good faith and transparently."

The types of restructuring that are dealt with in the context of this dissertation come about as a result of different reasons. The policy considerations, as contained in the National Plan for Higher Education[9] will bring about restructuring in so far as the plan has a bearing on issues like the change of the institutional landscape of higher education, institutional collaboration at regional level in programme development, delivery and rationalisation and creation of the new institutional and organisational focus to address the racial fragmentation of the system as well as the administrative, human and financial capacity constraints. Even before the advent of the National Plan[10], the institutions of higher education have been compelled to restructure because of

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7 Grogan, J. (2001). *Workplace Law*, 6th Edition, Juta Law, Western Cape, p.199.

8 (2000) 22 *ILJ* 23 (LAK).

9 National Plan for Higher Education published in Government Gazette No 22138 of 9 March 2001.

10 *Ibid.*

operational reasons, which included dwindling student numbers and cut in government subsidies. Van der Walt[11] had the following to say when discussing restructuring at the University of Witwatersrand (Wits):

> "The trend over the last five years has been for universities and technikons to: commercialise their operations; sub-contract 'non-care' activities; and downsize workers and academics."

It is necessary to examine specified types of restructuring.

4.2 Restructuring as in changes to the terms and conditions of employment

In this case an employer believes that business survival or the need to make it more competitive obliges a change to work conditions or practices. At this level there may be no need for the employer to reduce staff by way of retrenchment.[12] The change may, for example, entail changes to working hours and introduction of overtime work or shift work or possibly a wage freeze.

The contract of employment between the employer and employee sets out the conditions of employment for the employee. The changes to terms and conditions of employment can be brought about by agreement between the employer and employee, either individually or collectively.[13]

The legal way of changing an employment contract is therefore by agreement, either individually, or collectively, failing which one of the parties can use industrial action to force change, as long as a proper procedure is followed.

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11 Van der Walt, L. "Wits 2000 – Restructuring and Retrenchments" (2000), Vol 24 No 2 *South African Labour Bulletin* 20.

12 *Op cit* note 3 above, p.765.

13 See Sections 23(3) and 1(i) of the Act.

Section 49 (Variation by Agreement) of the Basic Conditions of Employment Act[14] provides that certain conditions of service may be varied by agreement in the following manner:

(1) A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not –

(a) reduce the protection afforded to employees by sections 7, 9 and any regulation made in terms of section 13. The conditions of service that are regulated by these sections are the working time of each employee, the ordinary hours of work which, by agreement, may be extended as specified and may be prescribed by the Minister on the grounds of health and safety on the advice of the chief inspector and after consulting the Commissioner.

(b) reduce the protection afforded to employees who perform night work in terms of section 17 (3) and (4);

(c) reduce an employee's annual leave in terms of section 20 to less than two weeks;

(d) reduce an employee's entitlement to maternity leave in terms of section 25;

(e) reduce an employee's entitlement to sick leave in terms of sections 22 to 24.

(f) conflict with the provisions of Chapter Six.

(2) A collective agreement, other than an agreement contemplated in subsection (1), may replace or exclude a

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14 Act 75 of 1997.

basic condition of employment, to the extent permitted by this Act or a sectoral determination.

(3) An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination.

(4) No provision in this Act or a sectoral determination may be interpreted as permitting –

(a) a contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement;

(b) a collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council."

The following provisions of Section 84(1) (a), (b) and (f), of the Labour Relations Act[15] apply in the workplace where a workplace forum has been established:

"(1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to...

(a) restructuring the workplace, including the introduction of new technology and new work methods;

(b) changes in the organisation of work...

(f) exemptions from any collective agreement or any law."

Section 85 of the Labour Relations Act[16] provides that consultation entails the process of the employer allowing the workplace forum an opportunity to make

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15 *Op cit* note 10 above.

16 *Ibid.*

representations to advance alternative proposals and that the employer must provide reasons if it does not agree with them. There are only a handful of workplace forums in the country and only one in the higher education sector in KwaZulu-Natal that was established at Technikon Natal.

The situation of the changes to conditions of service becomes a dispute if the parties are unable to reach agreement during negotiations or consultations. The employer is prohibited from changing the conditions of employment unilaterally or to dismiss an employee as a means of forcing the employee to accept changed conditions of service. However, the final decision rests with the employer. Thompson[17] correctly points out that:

> "Whenever market conditions call for business restructuring, an employer can modify its operation, even if this entails terminations."

In the case of *National Research Foundation v National and Essential Services Union*[18] the arbitrator accepted the employer's right to renegotiate changes to terms and conditions of employment to address changed circumstances even where the employer took the employees over with pre-existing terms and conditions intact.

The employees or their trade union may, on the other hand, demand negotiations for changed terms and conditions of employment and resort to industrial action to back up their position in the event of a deadlock.[19]

This type of restructuring can also lead to the employee being offered a new position or transfer with consequent changes to the terms and conditions of employment. Should the employee unreasonably refuse to accept the changes

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17 Thompson, C "Bargaining, Business Restructuring and Operational Requirements Dismissal" (1999) 20 *ILJ* 758, p.768.

18 (2000) 9 BALR 1101 (IMSSA).

19 Cheadle, H., Le Roux, P.A.K., Thompson, C., van Niekerk, A. *Current Labour Law* (2000). Cape Town, Juta & Co., p.38.

to the terms and conditions of employment, the employee can be dismissed for operational reasons.[20] This principle was also enunciated in the case of *Ndlela v S A Stevedores Ltd*[21] though it was decided in terms of the old Labour Relations Act[22]:

> "Ndlela refused the new position offered to him. S A Stevedores Ltd then offered him an alternative position, but this he also refused. He was subsequently dismissed. S A Stevedores Ltd argued that it had dismissed Ndlela for operational reasons since it had no positions which Ndlela was willing to fill. The Industrial Court stated that an employer must endeavour to ensure that the new position does not amount to a demotion. However, if this cannot be avoided, the employer must take steps to ensure that "as little harm to the employees as possible arises". One way of doing this is to offer a transfer which would not be less favourable. The court found that, under the circumstances, the dismissal of Ndlela had been fair."[23]

In the case of *Entertainment Catering Commercial and Allied Workers Union of S A and Others v Shoprite Checkers t/a OK Krugersdorp*[24] the employer attempted to maintain business viability by seeking union agreement to a shift pattern which matched trading patterns and volumes. The union would not agree and its members were dismissed after refusing to work the unilaterally implemented shift pattern. The dismissal was contested in the Labour Court. The court held that where a change to terms and conditions of employment is put forward by an employer as an alternative to dismissal during a bona fide

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20 Carl Mische, "Essential Labour Law, Vol 1, *Individual Labour Law* (1998) 1st publication, p.3.

21 (1992) 13 *ILJ* 663 (IC).

22 Act No 28 of 1956.

23 Supra, note 19 (1992) 13 ILJ 663 (IC).

24 (2000) 21 *ILJ* 1347 (LC).

retrenchment exercise and it is a reasonable alternative based on the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative offer. The application was dismissed with costs.

It is therefore accepted that the contemplated change in the terms and conditions of employment may, where no resolution of the matter is reached, lead to termination of employment based on the operational requirements of the employer. If that happens, the employer must still meet its obligations as set out in more detail below.

4.3 Restructuring as in outsourcing

According to the New Oxford Dictionary of English,[25]

> "outsource: (verb) means "obtain (goods or a service) by contract from an outside supplier."
>
> "outsourcing" (noun) means "contract work(out): you may choose to outsource this function to another company or do it yourself..."

The Dictionary further states:

> "outsourcing" can dramatically lower total costs."

It is perhaps this notion that outsourcing can lower costs that makes it attractive to some institutions. It could be argued, however, that the costs saving is a matter of degree and at times minimal given the usual consequences.

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[25] *The New Oxford Dictionary of English*, 1988, 1st publication, Clarendon Press, London.

The discussion under this sub-heading assumes a partial-plant closure where the closure is based on the fact that the activity that was undertaken in that part of the plant entailed non-core business of the organisation. As noted above, most of the institutions of higher education have, even before the advent of the National Plan for higher education, been involved in the restructuring which entailed the outsourcing of their non-core business activities. They were compelled to do this because of budgetary constraints occasioned by dwindling student numbers and limited government subsidies. This, however, led to numerous disputes in this sector.

What is outsourcing in labour law? and - What are its costs and benefits for the employer on the one hand, and for the employees on the other?

There are a few points of law that need to be made before discussing the merits and demerits of outsourcing in instances where voluntary packages are offered. It was held in the case of *Ackion and Others v Northern Province Development Corporation*[26] that where the voluntary retrenchment scheme is offered by the employer and accepted by the employees, the employment relationship between the parties is terminated by agreement and the employees are not dismissed and therefore there is no termination of services for operational requirements. The common law principles of contract are applied to determine the nature and extent of the agreement, if there is one. The employees can refuse to accept the offer and the employer is prohibited from dismissing them for doing so or in order to compel them to accept the change in terms of Section 187 (1)(c) of the Labour Relations Act.[27] In the instances where the employees are invited to apply for voluntary retrenchment packages, and some conditions must be met before the application is accepted, according to the article written by Hurd,[28] there is no guarantee for the employees that their applications will succeed. This view is correct in that there is no absolute offer and acceptance

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26 (1998) 9 (11) SALLR 115 (LC).

27 *Op cit* note 5 above.

28 Hurd, H R "The voluntary severance package – take care approval is not automatically guaranteed" (1998) Vol 5 No 6 *Salut* p.56.

thereof to constitute an agreement. The court held in the case of *Franks v University of the North*[29] that after the University had offered voluntary packages to its employees and after the employees had accepted same, the University was estopped from denying the validity of the offer.

Secondly, the outsourcing of some part of the employer's operation does not necessarily mean the transfer of the contracts of employment of the employees of the employer to the sub-contractor. A detailed discussion of the scope and effect of the transfers in terms of Section 197 of the Labour Relations Act,[30] is set out below in the context of mergers. Suffice to say, at this stage, that the Labour Court, in the case of *National Education, Health and Allied Workers Union v University of Cape Town and Others*,[31] held that the outsourcing of non-core services will not necessarily fall within the provisions of Section 197. In this case[32] the court's interpretation of Section 197 included the following salient points:

- "The section does not compel the automatic transfer of contracts of employment in cases of transfer of business or part thereof. What it does is to permit the transfer of a contract of employment without the consent of the employees concerned, and in turn, the new employer is compelled to maintain the same terms and conditions applicable to those employees where such transfer occur in the absence of any agreement;

- The sale of a business or a merger is markedly different to outsourcing. Outsourcing involves the putting out to tender of certain services for a fee. The contractor performs the outsourced services and in turn is paid a fee for its troubles

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29 (2000) 22 ILJ 1158 (LC).

30 *Op cit* note 10 above.

31 (2000) 7 BLLR 803 (LC).

32 *Ibid.*

by the principal. The principal pays the contractor a fee to render services outsourced as opposed to paying salaries or wages to a group of employees to render the outsourced service.

- The outsourcing party retains some control over the outsourced services, for example the standard of performance or service delivery whereas in the case of a sale or legal transfer, the business and the transferring entity receives consideration for the business that is transferred.

- The court expressed the view that it cannot see how the contractor who loses the contract, after expiry of his/her contract period, can transfer its employees to the successful contractor as it has no say who gets the contract. That remains with the outsourcing party. The court also stated that it could not see how the outsourcing party could compel the contractor to take over the employees of the outgoing contractor.

- The court accepted that it is possible that some outsourcing services could be of a permanent nature, and this type could amount to a transfer of business. In the circumstances of this case the court held that it could not be found that the outsourcing amounts to a transfer of a part of a business. Each case must be determined on its merits."

The employees of the sub-contractor therefore find themselves in an atypical type of an employment contract. The criticism that can be levelled against that arrangement is that the employees of a sub-contractor do not enjoy the same rights as employees in a typical employment relationship.

Van der Walt[33] in her discussion on the restructuring at the University of the Witwatersrand (Wits) argues that the "working conditions of workers deteriorate because outsourcing companies bring in non-unionised replacement workers on a low-wage minimal benefits basis."

Kenny and Bezuidenhout[34] explain the nature of sub-contracting in the following terms:

> "(The) other terms used for subcontracting are contracting, outsourcing and 'partnering'. While there are different kinds of subcontracting, they all have one thing in common: sub-contracting replaces an employment contract with a commercial contract.
>
> In an employment contract a worker agrees to do certain work for an employer. The employer provides the materials, tools, premises, etc to carry out the work and pays the worker for the work. The employer tells the worker what to do and how to do it, and has to implement the relevant legislation governing the treatment of the worker.
>
> In a commercial contract the company does not employ permanent (or even casual) workers directly. Instead, companies pay someone else to do a certain task. The company obtains goods or services from another company through a commercial contract. The assumption with commercial contracts is that the two firms are independent and that each firm is on equal footing."

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33 *Op cit* note 8 above.

34 Kenny, B and Bezuidenhout, A "fighting sub-contracting" (1998) Vol 23 No 3, *SA Labour Bulletin*, p.39.

On weighing the pros and cons of outsourcing Theresa Ulicki[35] says the following:

> "Those supporting subcontracting justify it on the basis of lower costs, increased productivity, and improved labour flexibility. This may be true, but subcontracting is also clearly an attempt to bypass the labour standards negotiated by the unions. Critics of subcontracting blame management's increased use of subcontracting on the grounds that the subcontracted workers:
>
> - Are paid lower wages.
> - Are generally not entitled to medical schemes, pension or death benefits.
> - Do not receive severance packages.
> - Are discouraged from joining unions."

Let us now turn to labour law in order to determine the respective rights and obligations of the labour brokers or "temporary employment services" on the one hand, and the outsourcing organisations, on the other.

It must be stated that assessing the pros and cons of outsourcing is controversial since companies and employees inevitably view this phenomenon from different perspectives.

The employer perspective emphasises the need for cutting costs, the need of labour flexibility and the need to avoid labour responsibilities and liabilities.

Van Meelis,[36] gives as an example the following advertisement that was placed by the labour broker on the internet, which was selling itself on "its ability to handle troublesome workers and handle labour laws."

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35 Ulicki, T "Basotho miners speak" (1999) Vol 23 No 4 *SA Labour Bulletin* p.61.

36 Van Meelis, T. "Labour Practices" (2000) Vol 24 No 2 *SA Labour Bulletin* 44.

> "(We can) protect you as far as possible from disruptive union problems; unfair dismissal claims; time-consuming, legally complex and costly CCMA/Labour Court disputes; protracted substantive disputes; time-consuming disciplinary/appeal hearings; stringent labour laws; staff non-performance frustrations; destabilising and costly retrenchment exercises..."

This advertisement again raises the question: Do the labour laws give any protection to the employees of a labour broker? The analysis that follows seeks to establish that labour law is sensitive to the "plight" of the employees of a labour broker.

Recommendation No 1 of 1919 of the International Labour Organisation,[37] initially sought to prohibit the establishment of fee-charging employment agencies conducted with a view to profit. The ILO found in 1965 that the convention covered "Temporary Work agencies".[38]

> "The opinion of the ILO was that the Convention is applicable to even cases in which a contracted relationship is established between the worker and an agency and not between the worker and the person or undertaking at whose disposal he is placed by that agency as the essential test is the actual nature of the transaction rather than its legal form. Account was also taken in this connection of a number of elements: the temporary work agency assumes no responsibility for the work performed; the temporary worker is paid only when he is placed at a disposal of a third party; it is the third party who decides what work is to be carried out and supervises its execution, and the temporary worker is under his supervision; in many cases he becomes an

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37 International Labour Organisation "The Abolition or Regulation of the Fee-Charging Employment Agencies" Recommendation No 1 of 1919.

38 Valticos, N and von Potobsky, G *International Labour Law* 2 ed. Deventer, Boston (1965) 140.

integral part of the personnel of the undertaking making use of his services."

Member states could not agree on one dispensation to regulate this phenomenon. Other jurisdictions have banned them altogether, others have sought to regulate them.

The South African statutory provisions regulating this phenomenon are the following:

Section 198 of the Labour Relations Act[39] on Temporary Employment Services states:

"(1) In this section, 'temporary employment services' means any person who, for reward, procures for or provides to a client other persons –

(a) who render services to, or perform work for, the client; and

(b) who are remunerated by the temporary employment service.

(2) For the purposes of this Act a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

(3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

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39 *Op cit* note 10 above.

(4) The temporary employment service and the client are jointly and severally liable if the temporary employment service in respect of its employees contravenes:

(a) a collective agreement concluded in a bargaining council, that regulates terms and conditions of employment;

(b) a binding arbitration award that regulates term and conditions of employment;

(c) the Basic Conditions of Employment Act; or

(d) a determination made in terms of the Wage Act."

Section 82 of the Basic Conditions of Employment Act,[40] on 'Temporary Employment Services, provides:

"(1) For the purposes of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

(2) Despite subsection (1) a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

(3) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client does not comply with this Act or a sectoral determination."

The above provisions of these Acts bring about the following relationships in law:

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40 *Op cit* note 12 above.

i) a relationship between the "temporary employment services" and the client for whom services are rendered for which the "temporary employment services" is paid;

ii) the relationship between "temporary employment services" and its employee who is paid by it;

iii) a relationship between the client and the employee who supervises the employee.

The employee procured for the client must not be an independent contractor. The multiple test, also known as the dominant impression test was applied in the case of *Liberty Life Association of Africa v Niselow*[41] to make a distinction between an employee and an independent contractor. Therefore, if a "temporary employment services" arranges for an independent contractor to do a specific job for a client, it is the client who is ordinarily contractually liable to the contractor. The present legislation does not define an independent contractor. To assist in making a clear distinction between an employee and an independent contractor, the proposed Amendment to the Labour Relations Act, in new Section 200A[42] provides:

> "Until the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one or more of the following factors are present:
>
> (a) the manner in which the person works is subject to the control or direction of another person;
>
> (b) the person's hours of work are subject to the control or direction of another person;
>
> (c) in the case of a person who works for an organization the person forms out of that organization;

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41 1996 *ILJ* 934 (LAC).

42 Labour Relations Amendment Bill (2000) published in Government Gazette No 21407 of 27 July 2000.

(d) the person has worked for that person for an average of at least 40 hours per month over the last three months;

(e) that person is economically dependent on the person for whom he or she works or provides services;

(f) the person is provided with his or her tools of trade or work equipment by another person;

(g) the person only works or supplies services to one person."

It is therefore submitted that the employees of the "temporary employment services" enjoy the rights of "employees" as defined in our labour legislation. They exercise the resultant rights against the "temporary employment services", their employer.

Both the Labour Relations Act and the Basic Conditions of Employment Act provide for instances where the "temporary employment services" and the client are jointly and severally liable. This serves to ensure that both parties have an interest in ensuring that the other treats the workers properly. However, this joint liability is limited to situations where the temporary employment service, in respect of any employee who provides services to that client, does not comply with the Basic Conditions of Employment Act or a sectoral determination.

The clients do have some legal responsibility for persons employed on their premises by the "temporary employment services" even though such persons have no recourse against them for unfair labour practice complaints.

The client's legal responsibilities include the following scenarios in so far as the employees of the "TES" are concerned.

1. The Supreme Court of Appeals, in the case of *Midway Two Engineering and Construction Services v Transnet Bpk,*[43] held that clients are vicariously liable in respect of the unlawful acts perpetuated by an employee of an temporary employment services in the course and scope

[43] 1999 *ILJ* 738 (SCA).

of the employees services on the basis of the fact that ultimate control over the employee lay with the client. This, however, refers to delictual liability.

2. In terms of the Health and Safety obligations of the Occupational Health and Safety Act[44] the employer is responsible for the protection of not only its employees, but also others who are on its premises

These are some of the factors that the institutions of higher education must take into account when it decides whether or not to outsource part of its operation.

In *Nehawu v University of Cape Town*[45] the court accepted that where outsourcing of certain business operation is permanent, that outsourcing could amount to a transfer of business. In the case of *Schutte and Others v Powerplus Performance*,[46] the court held that "when part of a business was transferred to another company, the new company has to continue employing workers with their previous terms and conditions of employment."

An institution of higher education which seeks to retrench its employees in order to outsource part of its operations, must meet the legal requirements for terminating employment for operational reasons as discussed in more detail below.

4.4 Restructuring as in Incorporations and Mergers

One of the objectives of the National Plan for Higher Education[47] is to restructure the institutional landscape of the Higher Education system in South Africa. This Plan seeks to establish institutional collaboration at the regional level in programme development, delivery and rationalization and to consolidate higher education provision through reducing, where appropriate, the number of

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44 Act No 85 of 1993.

45 (2000) 7 BLLR 803 (LC).

46 1999 2 BLLR 169 (LC).

47 Plan *op cit* note 10 above.

institutions but not the number of delivery sites on a regional basis. A merger of Technikon Natal and M L Sultan Technikon was proposed to go ahead, the Qwa-Qwa branch of the University of the North was incorporated into the University of the Orange Free State and this Plan envisages the unbundlling of Vista University and incorporation of its constituent parts into the appropriate institutions within each region. A National Working Group was established to undertake the investigation based on the principles of goals for the transformation of higher education system.

The *New Oxford Dictionary of English*[48] defines "merger" as:

"to combine or be combined so as to lose separate identity".
"a combination of two things, especially companies, into one: a merger between two supermarket chains".
"incorporate" means "to put or take on (something) as part of the whole".
"acquisition" means "a set of purchase of one company by another".
"amalgamate" means "to combine or unite to form one organization or structure".
"unbundle" means "to split (a company or conglomerate) into its constituent businesses, especially prior to selling them off."
"collaboration" means "the action of working with someone to produce or create something."

The core issue in this dissertation is to investigate and analyse the statutory provisions, and interpretations that have been given thereto by the courts, for the transfer of rights of an employee from the "old" employer to a "new" employer. In common law the existing employment contracts are terminated and new contracts entered into when an undertaking is transferred to a new employer.[49] It is assumed, for the purposes of this discussion, that the mergers and acquisitions relate to solvent institutions of higher learning because the

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48 *Op cit* note 22 above.

49 Explanatory memorandum on the Draft Labour Relations Bill published in the Government Gazette No 16259 of 10 February 1995.

legislation provides for different consequences to follow where the original entity is insolvent.

The relevant provisions of the Higher Education Act[50] which empower the Minister of Education to merge the higher education institutions read as follows:

> "Section 23 (1)(2)[51]
>
> (1) Subject to subsection (2), the Minister may after consulting the CHE and by notice of the Gazette, merge two or more public higher education institutions into a single public higher education institution.
>
> (2) The Minister must –
>
> (a) Give written notice of the intention to merge to the public higher education institutions concerned;
>
> (b) Publish a notice giving the reasons for the proposed merger in at least one national and one regional newspaper circulating in the area in which the public higher education institutions concerned are situated;
>
> (c) Give the councils of the public higher education institutions concerned and any other interested persons an opportunity to make representations within at least 90 days of the notice referred to in paragraph (b);
>
> (d) Consider such representations; and
>
> (e) Be satisfied that the employers at the public higher education institutions concerned have complied with their obligations in terms of the applicable labour law."

It is the final requirement that warrants scrutiny.

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50 Act 101 of 1997.

51 *Ibid.*

It is worth noting that the Minister may, after meeting certain requirements, merge a subdivision of a higher education institution with another public higher education institution,[52] and may also, after meeting certain requirements, close a public higher education institution.[53]

Some provisions of the Basic Conditions of Employment Act[54] raise the question of the continuity of the rights of the employees of the "old" employer to and the obligations of the "old" employer to the "new" employer. The following provisions have a bearing on this question:

Section 4 of the Act[55] provides:

> "A basic condition of employment constitutes a term of any contract of employment except to the extent that:
> (a) any other law provides a term that is more favourable to the employee,...
> (b) a term of the contract of employment is more favourable to the employee than the basic condition of employment."

Section 27 of the Act[56] on family responsibility leave provides:

> "27(1) This section applies to an employee
> (a) who has been in employment with an employer for longer than four months;
> (b) An employee's service should be taken into account if the employee had worked for more than four months when the takeover takes place."

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52 *Idem* Section 24(1).

53 *Idem* Section 25(1).

54 No 75 of 1997.

55 *Ibid.*

56 *Ibid.*

Section 29[57], on written particulars of employment, states:

> "An employer must supply an employee, when the employee commences employment, with the following particulars in writing...
> (a) any period of employment with previous employer that counts towards the employee's period of employment."

This provision is important when it comes to calculation of severance pay, as discussed later.

Section 84 (1) and (2)[58] regulates the duration of employment in the following terms.

> "(1) For the purposes of determining the length of service of an employee's employment with an employer, for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year.
>
> (2) Any payment made or any leave granted in terms of this Act to an employee contemplated in subsection (1) during a previous period of employment must be taken into account in determining the employee's entitlement to leave or to a payment in terms of this Act."

Section 41(2)[59] on severance pay, states that where employment is terminated for operational reasons, "the severance pay payable by the employer must at

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57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

least be equal to one week's remuneration for each year of completed service with that employer...."

It is important to re-state at this stage that Section 23(1) of the Constitution of the Republic of South Africa Act[60] specifically states that everyone has a right to fair labour practices.

The end result in both incorporations and mergers is that the employees of an old employer "entity" are taken over by the new employer "entity". The question that must be answered in the case of mergers of institutions of higher learning is whether the same consequences follow where the two institutions cease to exist and a new one comes into being. It will be argued that the same consequences must follow because there is a "new" employer. These scenarios are governed by Section 197 of the Labour Relations Act[61] which regulates the transfer of contract of employment in the following terms:

> "(1) A contract of employment may not be transferred from one employer (referred to as "the old employer") to another employer (referred to as "the new employer") without the employee's consent, unless
>
> (a) the whole or part of a business, trade or undertaking is transferred by the old employer as a going concern; or
> (b) the whole or part of a business, trade or undertaking is transferred as a going concern –
> (i) if the old employer is insolvent and being wound up or is being sequestrated; or
> (ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

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60 Act 108 of 1996.

61 Act 66 of 1995.

2(a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by in relation to the new employer.

(c) If a business is transferred in the circumstances envisaged by subsection (1)(b), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer.

(3) An agreement contemplated in subsection 2 must be concluded with the appropriate person or body referred to in section 189(1).

(4) A transfer referred to in subsection (1) does not interrupt the employee's continuity of employment. That employment continues with the new employer as if with the old employer.

(5) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence."

The effect of Section 197 is that it changes the common law. According to Grogan,[62] the common law position is as follows:

> "Under common law, closure of a corporate employer whether by closure, sale, merger, take-over or by any other means, results in the termination of the contracts of employment between the employer and its employees. An employer that contemplates closure cannot compel its employees to work for another employer. In such cases the employer must terminate the services of its employees on notice."

However, even before the promulgation of the new Labour Relations Act[63] the Industrial Court, in the case of *Kubeni v Cementile Products (Ciskei)(Pty) Ltd*[64], held that, in cases of transfer of business employees are in a vulnerable position, thus the following standards should be met:

- "the employer should give the employees reasonable notice of any intended closure and initiate consultation to address mitigating measures in an endeavour to eliminate prejudice to the employees and discuss the preservation of the employment relationship, irrespective of the change of employment.
- Employees should be given sufficient prior notification of any sales of the business and what process will be followed to safeguard the employee's rights, and
- The proposal was made that all contracts of employment should be transferred to the new employer subject to the individual employee's rights in electing not to continue the employment relationship."[65]

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62 Grogan, J. (2001). *Workplace Law*, 6th Edition, Juta Law, Western Cape, p.207.

63 Act 66 of 1995.

64 (1987) 8 ILJ 442 (IC).

65 Supra at 449F – 450D.

Looked from the point of view of safeguarding the interests of the employees, Wallis[66] argues that the legislature had to choose between the two extreme choices:

> "At one pole lay an extension of the already enshrined principle in our law that the employee is free to choose by whom he or she is to be employed. The extension of that principle would have led to a conclusion that where a change in the effective ownership of a business occurred, whether by the disposal of a business or by the disposal of the shares in the company owning the business, such disposal should be treated as bringing contracts of employment to an end, attracting a liability to pay severance pay and affording the employee a choice as to whether they wished to be employed by a new employer or the corporate included under new ownership, assuming such offers of employment were on the table.
>
> At the other pole priority would be given to security of employment rather than the employees' rights to choose his or her employer. (The intention of that principle) would be to protect the employees' security of employment in every situation where there is change in ownership of the business by securing that the employees concerned "follow" the business and become employees of the new owner."[67]

Wallis argues that "given South Africa's history it is unsurprising that the LRA plumps unambiguously for the second of these alternatives. In so doing it was decided that in this field the autonomy of the individual employee is overridden in the interest of achieving a greater collective good."[68]

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66 Wallis, M J D, Section 197 is the Medium – What is the Message? (2000) 21 *ILJ* 1.

67 Idem at pp.2-3.

68 Idem at p.3.

In the case of *Schutte*[69] it was held that "the primary purpose of Section 197 is to protect the rights of employees during certain processes of business restructuring, but did so on the assumption that Section 197 brought about automatic transfer of contracts of employment when a business is transferred." So too in *Foodgro v Keil*[70] the Labour Court referred to the "automatic transfer" of contracts of employment that took place as a result of the transfer of a business as a going concern. Although Mlambo J in *NEHAWU v The University of Cape Town*,[71] accepted that he was bound by the decision of the Labour Appeal Court on the rule that Section 197 brought about automatic transfer of contracts when a business is transferred, his interpretation of the section was that this was not necessarily the case, the circumstances of each case should be taken into account to determine whether the employment contracts were indeed transferred.

This brings us to the point that our courts and writers agree that the wording of Section 197 is poor and leads to problems and confusion in its interpretation.

Wallis argues that in interpreting this section foreign law should be followed with caution by stating "whatever powers of interpretation may be vested in the Labour Court by S3 of the LRA, those powers do not extend to ignoring the actual language of the statue in search for the achievement of unstated primary objectives."[72]

Wallis argues, correctly, that the words "unless otherwise agreed" in Section 197 means that "in the absence of an agreement making alternative arrangements, the transfer is automatic and takes place by operation of the law. If the employee does not like it he or she is free to resign but that is all."[73]

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69 (1999) 20 *ILJ* 655 (LC).

70 (1999) 20 *ILJ* 2521 (LAC).

71 (2000) 21 *ILJ* 1618 (LC).

72 Op cit note 66 Walls p.4.

73 Idem p.4.

It is important to bear in mind that it is the substance rather than the form of the transaction which is important, as was endorsed by Judge Seady in the *Schutte*'s case.[74]

Wallis' interpretation of the phrase "as a going concern" is important as the National Plan for Higher Education seeks to reduce the number of institutions, but not the sites:

> "This phrase assists in identifying affected transactions in the light of the overriding purpose of security of employment, (it) conveys the fact that the object of the transfer must have been in place where people were working before the transfer and will continue to be a place where people are working after the transfer."[75]

Le Roux makes the point that "it is not stated in Section 197 (3) whether the agreement referred to must be concluded between the transferring employees or their representative and the old employer; or between the transferring employees or their representative, and the new employer. The provision probably intended the old employer to conclude the agreement."[76]

Milo and Molatudi argue that "the new employer should be directly involved in all the negotiations preceding the transfer with the transferring employees or their representative. This will allow the effecting of a tripartite agreement that potentially changes the existing terms and conditions of the employees with the consent of the transferring employees or their representative prior to the effective date of transfer."[77]

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74 *Idem* p.5..

75 Ibid.

76 Le Roux, PAK, "Transferring Contracts of Employment: Implications Surrounding the Sale of Business under the new LRA" (1996) Vol 6 *Contemporary Labour Law*, p.14.

77 Milo, D and Molatudi, O. "The legal position in relation to the outsourcing of services: Part II", (1999), Vol.17, No.10, *People Dynamics*, October 1999, p.53.

Section 197 does not entitle the transferring employer to terminate the contracts of employment of its employees. "The LRA is silent – in respect of dismissals attendant upon the transfer of business."[78] The Labour Relations Amendment Bill[79] referred to hereunder has tried to plug this loophole.

In the *Foodgro* case[80] the court held that while an employer and employee whose contract was transferred by virtue of Section 197 (2) (a) or (b) could agree to new terms and conditions (whether they were better or worse for the employee), the parties could not waive the provision concerning continuity of service per section 197 (4).

Section 84 of the Labour Relations Act[81] provides a mechanism for dealing with this restructuring in the workplace where a workplace forum has been established in the following terms:

> "84 (1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to, among others:
>
> (c) partial or plant closure;
> (d) mergers and transfer of ownership in so far as they have an input on the employees'

Section 85[82] lays down the obligations of the employer when consulting and Section 89[83] regulates the issue of disclosure of information to the workplace forum, to enable the latter to engage effectively in consultation, among others.

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78 (1999) 20 *ILJ* 655 (LC).

79 Labour Relations Amendment Bill, Bill 2000 published in Government Gazette No 21407, 2000.

80 (1999) 2o *ILJ* 2521 (LAC).

81 No 66 of 1995.

82 *Ibid.*

Workplace forums have never really taken off. There are less than half a dozen in the whole country. The Labour Relations Amendment Bill of 2000 seeks to address this issue by simplifying the mechanisms for the establishment of these fora.

The Labour Relations Act[84] defines the collective agreement as follows:

> "'collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –
>
> (a) one or more employers;
> (b) one or more registered employers' organisations; or
> (c) one or more employers and one or more registered employers' organisations."

This mechanism can be used to good measure and effect when dealing with the issues around the mergers that are envisaged in the South African higher education system.

Although the provisions of the Competition Act[85] do not apply in the case of institutions of higher learning as the purpose of this Act is to avoid one from having market dominance and being in a position to fix prices or affect availability of goods, the mechanisms that it provides for the participation of the trade unions in the cases of merger in the area of its jurisdiction should give guidance in all situations of mergers. This Act seeks to improve the ideals of transparency, consultation and consensus-seeking. The Act requires the merging companies to notify the trade unions that there is an intention to merge.

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83 *Ibid.*

84 *Ibid.*

85 Act 89 of 1998.

If the trade unions want to be a party to a merged transaction, they must file a Notice of Intention to Participate form with the Commission.

Much as Section 185 of the Labour Relations Act[86] provides that "every employee has a right not to be unfairly dismissed, Section 188 states:

> "a dismissal that is not automatically unfair is unfair if the employer fails to prove:
> (a) that the reason for dismissal is a fair reason –
> (i) related to the employer's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (b) that the dismissal was effected in accordance with a fair procedure."

These provisions of the Act are not specifically excluded by Section 197 when transfers take place. The Amendment Bill has introduced the following:

> (1) In this section –
> (a) 'business' includes the whole or part of any business, trade or undertaking;
> (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
> (2) A transfer of business is covered by this section if –
> (a) an economic entity, consisting of an organised grouping of resources, that has the object of performing an economic activity is transferred;
> (b) the economic entity retains its identity after the transfer.
> (3) If a transfer of business takes place then unless otherwise agreed in terms of subsection (7) –

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86 *Op cit* note 5 above.

(a) the contracts of employment in existence immediately before the transfer of employees employed by the old employer in the business that is transferred transfer automatically to the new employer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt the continuity of employment and their employment continues with the new employer as if with the old employer.

(4) The new employer complies with subsection (3) as the case may be if it employs a transferred employee on terms and conditions that are –

(a) the same as those on which the employee was employed by the old employer;

(b) on the whole not less favourable to the employee than those on which they (sic) were employed by the older employer; or

(c) agreed in terms of subsection (7).

(5) To determine whether the terms and conditions of employment on which the employee is employed by the new employer are the same or as favourable to an employee as those on which the employee was employed by the old employer, regard must be had to the employer's contribution to any retirement, medical or similar fund, but not to any benefits that employee is entitled to from that fund.

(6) Unless otherwise agreed in terms of subsection (7), the new employer is bound by –

(a) any organisation right granted in terms of Chapter III binding on the old employer immediately before the transfer in respect of any workplace that is transferred; and

(b) any collective agreement binding on the old employer in terms of section 23 immediately before the transfer in terms of which a registered trade union is recognised by the old employer as representing the employees in a workplace that is transferred.

(7) An agreement contemplated in subsection (3), (4) or (6) must be concluded between –

(a) either the old employer, or the new employer, or the old and new employees acting jointly, on the one hand; and

(b) the appropriate person or body referred to in section 189(1), on the other.

(8) -

(a) An employer may not dismiss an employee on account of a transfer covered by the section.

(b) Paragraph (b) does not preclude –

(i) the old employer from dismissing an employee in accordance with the provisions of this Chapter for a reason based on the old employer's or the new employer's operation requirements; or

(ii) the new employer from dismissing an employee in accordance with the provisions of this Chapter for a reason based on its operational requirements.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any terms and conditions of employment that arose prior to the transfer.

(10) The provisions of this section do not transfer or otherwise affect the liability of a person to be prosecuted for, convicted for and sentenced for, any offence.

This proposed amendment does clarify some of the uncertainties that emanated from Section 197 of the Act. It clarifies what a transfer is, and when it takes

place, that the transfer from the old employer to the new employer is automatic, who the parties to the agreement should be if the applicable provisions are to be excluded and the whole issue of dismissals for operational reasons associated with the transfer.

It must be emphasised that the parties can regulate this phenomenon by agreement, especially by collective agreement as it was done with a measure of success, when colleges of education were incorporated into institutions of higher learning. The parties concluded resolution 2/2000 of the Public Service Co-ordinating Council to regulate that incorporation. This resolution provided for the absorption of the educators that were employees of the Provincial Governments of Education by the institutions of higher education. Provision was made for the payment of severance packages to these employees. It was agreed that they would apply for employment to the institutions of higher learning that took over the colleges of education where they used to work. Details of how the selection process was to be conducted by the higher education institutions were agreed upon and provision was made for those whose applications for employment were not successful by offering them alternative positions. The moot point though is that such alternative positions should be reasonable. An unsatisfactory state of affairs has arisen where educators have been called upon to take up clerical positions. The educator then finds himself/herself in an untenable position for having to find alternative work because he/she has already received a severance package from the original employer and the employer has discharged its obligations under labour law. The institutions of higher learning are not legally bound to employ those educators. In any event, our labour law does not guarantee any employee employment for life by any employer.

4.5 Restructuring leading to dismissals based on operational requirements of the employer

The point was made in 4.2 above, that "should an employee unreasonably refuse to accept the changes to the terms and conditions of employment, the employee may be dismissed for operational reasons". In 4.3 it was illustrated

that when the workplace is restructured so as to outsource certain operations, jobs can be lost. If there is no agreement on a voluntary severance scheme, an employer can in appropriate cases dismiss the affected employees. In so far as 4.4 on incorporations and mergers is concerned, the Vice-Chancellor and Principal of M L Sultan Technikon is reported to have said the following on the merger of his Technikon and the Technikon Natal.[87]

> "Nobody can guarantee that jobs won't be lost in this process (merger). I might be one of them that have to go. That's why I can identify with staff who feel threatened by this process (the mergers of the two institutions)."

Employees of the institutions of higher education can therefore be rendered "redundant" by the incorporations and mergers. In that case they could be dismissed for operational reasons of such institutions.

Two important factors must be taken into account in such events:

1. Section 23(2)(e) of the Higher Education Act,[88] provides that the Minister may merge two or more public higher education institutions if the Minister is "satisfied that the employers at the public higher education institutions concerned have complied with their obligations in terms of the applicable labour law."

2. Section 188 of the Labour Relations Act and Clause 2(2) of Schedule 8, Code of Good Practice: Dismissal[89], recognise the operational requirements of the employer's business as one of the three grounds on which a termination of employment might be found to be fair. (The other two grounds being the conduct and the capacity of the employee.) Section 189 of this

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87 *The Mercury*, May 24, 2001.

88 Act 109 of 1997.

89 *Op cit* note 5 above.

Act,[90] stipulates what the employer must do if the employment relationship is to be terminated on operational requirements as envisaged by the Act.

Section 213 of the Act,[91] defines the "operational requirements" as meaning "requirements based on the economic, technological, structural or similar needs of an employer."

Section 203 of the Act,[92] provides that Nedlac may prepare and issue codes of good practice and that any person interpreting or applying the Act must take into account any relevant code of good practice. The following Code of Good Practice: Dismissals Based on Operational Requirements has been issued:[93]

(1) The Labour Relations Act, 1995 (Act No 66 of 1995) defines a dismissal based on operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

(2) Dismissals for operational requirements have been categorised as 'no fault' dismissals. In other words, it is not the employee who is responsible for the termination of the employment. Because retrenchment is a 'no fault' dismissal and because of its human cost, the

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90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 Notice 1517 of 1999: Government Gazette 20254 of 16 July 1999.

Act places particular obligation on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated fairly.

(3) The obligations placed on an employer are both procedural and substantive. The purpose of consultation is to enable the parties, in the form of a joint problem-solving exercise, to arrive for consensus if that is possible. The matters on which consultation is necessary are listed in section 189(2). This section requires the parties to attempt to reach consensus on, amongst other things, appropriate measures to avoid dismissals. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments or redundancies, is contemplated by the employer, so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.

(4) The Act also provides for the disclosure by the employer of information on matters relevant to the consultation. Although the matters on which information for the purposes of consultation is required are specified in section 189(3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed dismissal or the development of alternative proposals, they should be disclosed to the consulting party. In the event of a disagreement about what information is to be disclosed any party may refer the dispute to the CCMA in terms of section 16(6) of the Act.

(5) The period over which consultation should extend is not defined in the Act. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include:

(a) The opportunity to meet and report back to employees;

(b) The opportunity to meet with the employer; and

(c) The request, receipt and consideration of information.

(6) The more urgent the need by the business to respond to factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand, the parties who are entitled to be consulted must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.

(7) If one or more employees are to be selected for dismissal from a number of employees, the Act requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria.

(8) Criteria that infringe a fundamental right protected by the Act when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are neutral on the face of it should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the 'last in, first out' (LIFO) principle. There may be instances where the LIFO principle or other criteria need to be adapted. The LIFO principle, for example, should not operate so as to undermine an agreed affirmative action program. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution.

(10) Employees dismissed for reasons based on the employer's operation requirements are entitled to severance pay of at least one week's remuneration for each completed year of continuous service with the employer, unless the employer is exempted from the provisions of section 196. This minimum requirements does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation. The right of the trade union, through collective bargaining, to seek an improvement on the statutory minimum severance pay is not limited or reduced in any way.

(11) If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employee's right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee's refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee's personal circumstances play a greater role.

(12) (1) Employees dismissed for reasons based on the employer's operational requirements should be given preference if the employer again hires employees with comparable qualifications, subject to:

(a) The employee, after having been asked by the employer, having expressed within a reasonable time from the date of dismissal a desire to be rehired.

(b) A time limit on preferential rehiring. The time limit must be reasonable and must be the subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment."

Indeed, Section 197(2)(a) of the Act,[94] makes it possible for the institution of higher education and its employees to enter into whatever agreement they may deem fit regarding the position of the employees when a transfer takes place, provided such agreement is concluded prior to the transfer taking place. Such agreement may include, for example, the retrenchment of the entire workforce prior to the transfer taking place provided such agreement is reached by way of negotiations between the institution of higher education and the relevant party identified in section 189(1) of the Act.[95]

The timing of retrenchments in relation to incorporations and mergers is important. If an institution of higher learning is to retrench its employees before a merger, all the provisions of Section 189[96] must be complied with. If the retrenchments take place after the merger of one or more institutions the provisions of Section 197,[97] as discussed under 4.4 above, should also be taken into account. The equity requirements would have a bearing on the rate of calculation of severance packages. It would be untenable for the employers to use different rates in calculating its packages, for example, if one of the institutions offered a higher severance package than the other or others before the measure.

It is also possible for an institution of higher education to offer voluntary severance packages to its employees before the incorporation or merger takes place. The labour law imperatives that govern "voluntary retrenchments" should be complied with, as set out in 4.3 above.

Some of the relevant provisions of section 189[98] need further elucidation.

The section provides as follows:

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94 No 66 of 1995.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

(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, 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;

(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;

(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 consulting parties must 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 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 e 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.

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

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

(6) 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.

(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.

The disclosure of information is of the outmost importance in the application of Section 189. Section 16, on disclosure of information provides:

(1) For the purposes of this section, "representative *trade union"* means a registered *trade union,* or two or more registered *trade unions* acting jointly, that have as members the majority of the *employees* employed by an employer in a *workplace.*

(2) Subject to subsection (5), an employer must disclose to a *trade union representative* all relevant information that will allow the *trade union representative* to perform effectively the functions referred to in section 14(4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative *trade union,* the employer must disclose to the representative *trade union* all relevant information that will allow the representative *trade union* to engage effectively in consultation or collective bargaining.

(4) The employer must notify the *trade union representative* or the representative *trade union* in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information-

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an *employee* or the employer; or

(d) that is private personal information relating to an *employee,* unless that 5 *employee* consents to the disclosure of that information.

(6) If there is a *dispute* about what information is required to be disclosed in terms of this section, any party to the *dispute* may refer the *dispute* in writing to the Commission.

(7) The party who refers the *dispute* to the Commission must satisfy it that a copy of 10 the referral has been *served* on all the other parties to the *dispute*.

(8) The Commission must attempt to resolve the *dispute* through conciliation.

(9) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration

(10)In any *dispute* about the disclosure of information contemplated, in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an *employee* or employer 20 against the harm that the failure to disclose the information

is likely to cause to the ability of a *trade union representative* to perform effectively the functions referred to in section 14(4) or the ability of a representative *trade union* to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the *employee* or employer.

(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that *workplace* and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any *dispute* about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that *workplace* be withdrawn for a period specified in the arbitration award."

The provisions of Section 189 comply with the international labour norms as propounded by the International Labour Organisations (ILO).[99] "The ILO Recommendation No 119 of 1963 requires prior full consultation with workers' representatives on positive measures that could be taken to avert or minimise reductions in the workforce 'without prejudice to the efficient operation' of the business. The Recommendation also requires precise criteria to be used in selecting those workers who are to be retrenched, with these criteria to apply to the possible re-engaging of retrenched workers. Convention No 159 and Recommendation No 166 of 1982 places (emphasis) on notification of workers' representatives in good time, providing relevant information, and early consultation on measures to avert or minimise the terminations."

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99 Rycroft, A, Jordaan, B 1993, *South African Labour Law*.

The above provisions of section 189 of the Act should be read with the other relevant sections of the Act.

Section 185 of the Act[100] provides that "every employee has a right not to be unfairly dismissed".

Section 188 of the Act[101] states:

> "A dismissal that is not automatically unfair is unfair if the employer fails to prove:
>
> (a) that the reason for dismissal is a fair reason...
>
> (iii) based on that employer's operational requirements: and
>
> (b) that the dismissal was effected in accordance with a fair procedure.

In this regard the Code of Good Practice: Dismissals Based On Operational Requirements,[102] must be complied with.

The discussion on the above-mentioned section 189 of the Act can thus be conducted on two aspects: That is, the substantive fairness of the dismissals for operational reasons and the fairness of the procedure leading to such dismissals.

- **Substantive fairness of a dismissal for operational reasons:**

Strydom argues, correctly so, it is submitted that:

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100 No 66 of 1995.

101 *Ibid.*

102 *Op cit* note 96 above.

> "The question of whether or not an employee's dismissal for operational reasons is substantively fair, is a factual one. The employer must prove that the offered reason is based on the operational requirements of the business. The employer will have to prove that the reason for dismissal falls within the statutory definition of "operational requirements". [103]

In the second instant the employer must prove that the operational reason actually existed and it was the real reason for the dismissal. In other words, the employer must prove that the offered operational reason is not a mere cover-up for another reason for the dismissal of the employees.

Grogan submits that "the test for substantive fairness in dismissals for operational requirements remains whether the dismissals were operationally rational."[104]

The Labour Court and the Labour Appeal Court have handed down significant judgements on the question of substantive fairness of dismissals based on the operational reasons of the employer.

The Labour Appeal Court in *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*,[105] the court held:

> "What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification of the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances.

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103 Basson, A, Christianson, M, Gerber, C, le Roux, PAK, Mische, C and Strydom, E M L, Essential Labour Law, Volume 1, *Labour Law Publications* (1998) pp.195-196.

104 Grogan, J, *Workplace Law* (6th ed), Western Cape: Juta Law (2001) pp.186-189.

105 (1993) 16 *ILJ* 642 (LAC).

> It has become trite for the courts to state that the termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That in our view, applies equally to termination of employment for economic or operational reasons.'

This case was decided in terms of the old Labour Relations Act.[106] This case was taken on appeal in *Atlantis Diesel Engines (Pty) Ltd v NUMSA*[107] to the (then) Appellate Division where the court characterised consultation as:

> "joint problem solving exercise with the parties striving for consensus where possible. According to Lagrange, the problem-solving concept 'aims to get disputant parties to see their differences in the form of joint problems to which both parties are committed to seek solutions, rather than simply pursuing their own respective positions in a manner which excludes the other party's interests as well."[108]

Grogan argues that under the new Labour Relations Act, "the Labour Court has, however, suggested that the requirement that all dismissals must be for a fair reasons obliges the employer to show that it was in fact necessary to retrench the employee. It is further argued that the requirements set out in Section 189 are not procedural only.[109]

In *Johnson and Johnson (Pty) v Chemical Workers Industrial Union and Others* the Labour Appeal Court held that: "The ultimate purpose of Section 189 is thus to achieve a joint consensus in seeking process. In this manner the section

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106 Act 28 of 1956.

107 (1994) 15 *ILJ* 1247 (A).

108 Idem at p.1248 A-D.

109 Grogan *supra* at 187.

implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed." [110]

Two recent decisions of the Labour Appeal Court and Labour Court have arrived at divergent conclusions as to the question whether section 189 compels an employer to dismiss for operational reasons only if it is fair to do so.

In *Baloyi v M & P Manufacturing* the Labour Appeal Court held that:

> "Given the nature of the detailed codification of the procedure to be adopted for retrenchment dismissal, it cannot be said that some residual test remains notwithstanding that the employer has complied meticulously with the requirements as laid out in Section 189 (1) and (2). (In other words Section 189 does not import a concept of fairness into retrenchment dismissal similar to that on unfair labour practice.)" [111]

In *Sikhosana and Others v Sasol Synthetic Fibres*, the Labour Appeal Court held:

> "The relationship between the dictates of S 189 and those of fairness is not one to one, however, it cannot be assumed that every breach of S 189 necessarily makes the retrenchment unfair; every invalid dismissal will doubtless be unfair but not every dismissal in conflict with the section will necessarily be invalid. It would be even more dangerous to assume that every retrenchment in compliance with S 189 is necessarily fair. Compliance with S 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such

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110 1999 20 *ILJ* 89 (LAC) p.96.

111 (2001) 22 *ILJ* 391 (LAC) p.396 A-E.

> should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness." [112]

Despite the difference in emphasis that is obvious in these two decisions, it is important for the role players in the higher education sector to take the provisions of Section 189 into account in instances where retrenchments come about as a result of restructuring in the higher education sector.

- **Procedural fairness of a dismissal based on operational requirements:**

Should the institution of higher education deem it necessary to dismiss an employee or employees based on its operational requirements, it is important that it should comply with the proper procedure before effecting such dismissal. It is important that proper consultation with the appropriate person or persons should take place.

The stage at which consultation must commence, as stipulated in Section 189, was clearly expounded on in the case of *Atlantis Diesel Engines (Pty) Ltd v NUMSA*,[113] in the following terms:

> "When the employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing, a consideration of causes and possible remedies, an appreciation of the need to take remedial steps, and the identification of retrenchment as a possible remedial measure."

On the nature of the consultation that Section 189 stipulates, it is clear that the Act envisages a more comprehensive process than merely taking counsel or

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112 (2000) 21 ILJ 649 (LAC) pp.655-665.

113 *Supra* note 111 p.97.

seeking information or advice from the other side. Section 189 states that the parties must attempt to reach consensus on the issues listed in that section. Most significantly, the employer is required to allow the other consulting party an opportunity during the consultation to make representations about any matter on which they are consulting and consider and respond to the representations made by the consulting party and, if the employer does not agree with them, to state reasons for disagreeing.

In *Johnson and Johnson v CWSU* as stated above, "[t]he ultimate purpose of Section 189 is thus to achieve a joint consensus-seeking process." [114]

The connection between the procedural and substantive aspects of a fair retrenchment is clarified in *SA Chemical Workers Union v Afrox Ltd* as follows:

> "It is implicit in terms of 189 (2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to mitigate the adverse effects of the dismissals; to change the timing of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees. What is appropriate will depend on the facts of each case, and on the evidence presented about the steps taken if the matter proceeds to court." [115]

Retrenchments that may take place in the higher education sector will have to be conducted in accordance with these requirements.

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114 *Supra* note 112.

115 (2000) 11(6) SA LLR 1 (LAC).

The duty to consult is a correlative one. In *Fowles v SA Housing (Pty) Ltd and Khayalethu Home Loans (Pty) Ltd*,[116] it was held that the provisions of Section 189 do not only impose duty on the employer to comply with the provision. They impose a duty on the employee or consulted party to meaningfully take part in what the employer institutes. It cannot be heard to complain afterwards if it acquiesced with the decision initially. The Union's refusal to consult might entitle the employer to continue with the process without the union. It was confirmed in *CWIU v Lennon Ltd*[117] that Section 189 sets out the hierarchy of the parties with which the employer must consult. In *Singh and others v Mondi Paper*[118] the court expressed the view that consultation with a union did not necessarily mean consultation with union officials and that consultation with shop stewards would suffice, unless there was a collective agreement to the contrary. However, consultation with union officials would be preferable by virtue of their greater expertise and experience.

In *Channon v University of Fort Hare* the court held that there was a duty to consult with individual employees who had been selected for retrenchment. [119]

The decision of the Labour Appeal Court in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* emphasised the point that senior executives are also entitled to a fair consultation process prior to retrenchment.[120]

In *Visser v Sanlam* the Labour Appeal Court found that "the process of consultation envisaged in S189 (2) involves a bilateral process in which obligations are imposed upon both parties to consult in good faith in an attempt to achieve the objectives specified in the section."[121]

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116 (1999) 19 (4) SALLR 133 (LC).

117 (1994) ILJ 1037 (LAC).

118 (2000) 21 ILJ 966 (LC).

119 (2000) 2 ILJ 175 (LC).

120 (2000) 21 ILJ 129 (LAC).

121 (2001) 22 ILJ 666 (LAC) pp.671-672.

In *NEHAWU v University of Fort Hare*[122] the court held that the applicant had itself to blame for the fact that its members were retrenched without a meaningful contribution by it to the consultation process, as it, after having been given adequate notice that the Respondent was contemplating restructuring that might lead to retrenchments, it gave unequivocal notice to the Respondent that it would not attend the scheduled meetings.

Section 80 of the Labour Relations Act[123] provides for the establishment of workplace forums where the prescribed conditions are met. The functions of the workplace forums are the following:

(a) to promote the interests of all employees in the workplace, whether or not they are trade union members;
(b) to seek to enhance efficiency in the workplace;
(c) to be consulted by the employer with a view to reaching consensus about the matters referred to in Section 84; and
(d) to participate in joint decision-making about matters referred to in Section 86.

According to Section 84 (1) (e) of the Act[124], a workplace forum is entitled to be consulted by the employee about proposals relating to among others, "the dismissal of employees for reasons based on operational requirements."

Section 85 of the Act[125] states that consultation entails the following:

> "(1) Before an employer may implement a proposal in relation to any matter referred to in section 84(1), the employer

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122 (1997) 8 BLLR 104 (LC).

123 No 66 of 1975.

124 *Ibid.*

125 *Ibid.*

must consult the *workplace forum* and attempt to reach consensus with it.

(2) The employer must allow the *workplace forum* an opportunity during the consultation to make representations and to advance alternative proposals.

(3) The employer must consider and respond to the representations or alternative proposals made by the *"workplace forum* and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(4) If the employer and the *workplace forum* do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer's proposal."

It must be noted that the Labour Relations Amendment Bill[126] seeks to address, among other things, the "demand" by COSATU for compulsory negotiations and the right to strike as opposed to the duty to consult as contained in the present Section 189 of the Act.

The Explanatory Memorandum to the Bill[127] states:

> Trade Unions are critical of the manner in which employers conduct retrenchment consultations. They argue that these meetings are formalities because the decision to retrench has already been taken. In addition, these proceedings often become highly confrontational and the parties fail to explore

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126 Notice 1517 of 1999: Government Gazette 20254 of 16 July 1999..

127 *Ibid.*

> options that would avoid or reduce the size of the retrenchment. The parties become preoccupied with disputes about the disclosure of information rather than seek to avoid or minimise dismissals. This has particularly severe consequences in large scale retrenchments where thousands of jobs are at stake."

The counter argument that can be made against this COSATU demand is that "consultation" in terms of the current Section 189 has been interpreted by our courts in a manner that takes into account the concerns raised. It can also be argued that the right to negotiate retrenchments would be against international labour law standards and against the spirit of our legislation which provides that disputes of right must be dealt with by way of third party adjudication. The Amendment that has been proposed by the Minister of Labour in this regard is contained in Section 189 A of the Bill[128], and it reads as follows:

> (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;
>
> v) 50 employees, if the employer employs more than 400, but not more than 500, employees; or

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128 *Ibid.*

(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 feed; 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 a 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) A consulting party may not –

i) 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;

ii) 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) subject to subsection (2)(a), section 65(1) and (3):

(c) 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;

(d) 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)(b) 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) (a) 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)."

Section 189 A is merely to be inserted after the existing Section 189 and it seeks to cater for the occasions where a large number of employees face a possibility of being dismissed for operational requirements of the employer.

This means that the jurisprudence that has developed under the existing Section 189 must still be complied with if a dismissal is to be effected based on the operational requirements of the employer. Guidance in this regard can be obtained from the case of *Fernandes v H M Leibowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies*[129] where the court reviewed the law relating to dismissal for operational requirements, especially the requirement that the company must discharge the onus that the dismissal was fair and the procedural requirements of meaningful prior consultations, attempts to reach

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[129] (2001) 22 *ILJ* 153 (LC).

consensus, written disclosure of information, opportunities to make representations and severance pay.

Section 197A of the Amendment Bill[130] will enable institutions of higher education to dismiss an employee for operational reasons after a merger. It states that an employee may not be dismissed merely because a transfer occurs. However, if the transfer creates operational requirements that justify a dismissal, an employee may be dismissed. Where applicable the institutions of higher education can also rely on the case of *Democratic Nursing Organization of South Africa and others v Somerset West Society for the Aged*[131] where the court held that "the requirement for compliance with labour legislation can provide valid ground for possible dismissal for operational reasons where compliance has financial implications for the employer.

It is important for the institutions of higher education to consult properly with the affected employees and/or with their representatives as set out in the Labour Relations Act. If this requirement is met and the parties reach consensus at the end of the consultation process, the court held in the case of *Botha v BBR Security (Pretoria)*[132] that the agreement reached by the parties is final and binding.

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130 Notice 1517 of 1999: Government Gazette 20254 of 16 July 1999.

131 (2001) 22 *ILJ* 919 (LC).

132 (2001) 22 *ILJ* 1367 (LC).

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

The following facts have been established in this dissertation and they form the basis of the argument.

- The advent of democratisation of South Africa in 1994 brought about major changes in the socio-economic and political spheres of lives of all South Africans. The Constitution of the Republic of South Africa, which is the supreme law of the land, drives and directs this re-configuration of the South African society. The institutions of higher education are not immune to the influence of these changes.

- The changes that are taking place in South African higher education arise out of three sources:

  Some of the changes take place because of the internal reorganisation of structures and programmes found in these institutions. These are brought about by factors like the dwindling student numbers, changes in the government formula for funding these institutions and the need to improve the programmes of study offered in order to meet the changing needs of the South African society.

  There are also changes that come about as a result of the changes in the government policy. These changes are "imposed" on the institutions of higher education. The example, which is the subject matter of this dissertation, is the National Plan for Higher Education. The National Plan raises the issue of juridification of industrial relations in South Africa.

The effect of globalisation world-wide necessitates changes in the institutions of higher learning for them to remain relevant in all the other spheres of life that are affected by this phenomenon. Restructuring of higher education has taken place in many other countries. It has been established that restructuring has

been more successful in some countries than in others. The lessons that South Africa can learn from the other jurisdictions is instructive.

The basis of the legal argument is that South Africa is a constitutional state. Its constitution contains a Bill of Rights. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It enshrines the right of everyone to a basic education, including further education, which the state, through reasonable measures must make progressively available and accessible; the right of everyone to administrative action that is lawful, reasonable and procedurally fair and the right of everyone to fair labour practices, among others. All these rights and values must permeate all spheres of life in South Africa including the higher education sector.

As recently as on 4 December 2001, the Constitutional Court held, in the case of *M Fredericks and 47 others v MEC for Education and Training, Eastern Cape and Permanent Secretary of Education, Culture and Sport and the Minister of Education,* Constitutional Court Case Number CCT 27/01, that a party to a dispute can raise the question of fundamental rights contained in sections 9 and 33 of the Constitution even though the dispute is about an agreement entered into in terms of section 24 of the Labour Relations Act. The dispute between the parties was about the agreement that the parties had allegedly concluded around the issue of a voluntary severance scheme.

Section 157(2) of the Labour Relations Act states as follows:

> "The Labour Court has concurrent jurisdiction with the Supreme Court (High Court) in respect of any violation or threatened violation, by the state in its capacity as employer of any fundamental right entrenched in Chapter 3 of the Constitution and in respect of any dispute over the constitutionality of any executive or administrative act or conduct or any threatened

executive or administrative act or conduct by the state in its capacity as employer."

The argument is also based on the labour legislation that has been promulgated to regulate employment relations in South Africa, the legislation that has been promulgated to regulate such relations in the higher education sector and the decisions of our courts.

The following conclusions have been reached for dealing with the issues raised in this dissertation.

- **Employment Equity**

The Employment Equity Act requires all employers to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination in their employment policies and practices. The employment policies and practices are defined as including recruitment procedures, advertising and selection criteria, appointments and the appointment process; remuneration, employment benefits and terms and conditions of employment; training and development, promotion, transfer, demotion, disciplinary measures other than dismissal, among others. The Act requires designated employers, in order to achieve employment equity, to implement affirmative action measures for people from designated groups in order to ensure that the people from these designated groups are equitably represented in all occupational categories and levels in the workforce of a designated employer. The institutions of higher education are, by definition, designated employers. They have to prepare and implement employment equity plans which will achieve reasonable progress towards employment equity in their workforce.

The National Plan incorporates the letter and spirit of the Employment Equity Act. It requires the institutions of higher learning to prepare and submit rolling plans that should include these employment equity issues.

A constitutional and labour law issue that is raised by the National Plan is the directive that non-South African Africans be employed in South Africa to ensure employment equity. The question is whether they should be appointed as "affirmative action candidates" in such circumstances.

The Immigration Draft Bill states that foreigners that are lawfully in the country should be employed under the same sanctions and conditions as South Africans and that labour laws should apply to foreigners in order to avoid legal entrenchment of a two-tier labour market. However, the Commissioner in the case of *Moses v Safika Holdings (Pty) Ltd*[1] held that the definition of employee in our labour legislation does not include persons who are in South Africa unlawfully.

The question is whether those foreigners who are in South Africa lawfully, and are black, form part of the designated group of blacks, and if so, whether they have suffered disadvantages in the past. The decisions of our courts have up to now accepted that membership of a designated group is sufficient and have not required an individual to prove individual disadvantages suffered in the past. The Labour Court, in the case of *Auf der Heyde v University of Cape Town*[2], held that the consideration of nationality is a limiting criterion in implementing employment equity. The court confirmed, however, that it was not necessary for each potential beneficiary to establish actual disadvantage. It was sufficient if they are members of the groups that have been disadvantaged. Section (2) of the Constitution requires measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. It is submitted that the consideration of nationality after the advent of the National Plan, should not be a limiting criterion in the implementation of employment equity in the higher education sector.

The point is that the institutions of higher education should have clear employment equity policies that are designed to achieve the objectives of the Employment Equity Act.

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1 (2001) 22 *ILJ* (CCMA).

2 (2000) 21 *ILJ* 1758 (LC).

- **Restructuring of Higher Education**

The point of departure in discussing this phenomenon is that the Constitution of South Africa guarantees everyone the right to fair labour practices and the right to a fair administrative action. The court, in the case of *Simelela and others v Member of the Executive Council for Education, Province of the Eastern Cape and Another*[3] held that although the Labour Relations Act does not deal with the question of a transfer in its unfair labour practice provisions, a decision to transfer an employee without prior consultation is an unfair labour practice because it infringes that employee's constitutional rights to fair labour practices and to fair administrative action.

All the forms of restructuring that are discussed in this dissertation are governed by the above constitutional imperatives.

Our labour legislation sets out the rights and obligations of the parties to an employment contract. The constitution entrenches the existing rights. The procedures that are laid down in the labour legislation should be scrupulously observed by the parties if any of the terms and conditions of employment are to be changed or where the security of employment is to be interfered with.

The roleplayers that are affected by the process of reconstruction that is taking place in the higher education sector are the employees of the institutions of higher learning, the institutions of higher education (as employers) whose operational requirements must be respected, and the National Ministry of Education. The other roleplayer, which will come about as a result of mergers, is the merged institution. The merged institution will have to take over employees who would have enjoyed different conditions of service, including salaries from the previous institutions. The tenet of employment equity would require such merged institutions to treat their employees fairly and as equals. They would have to use the highest level of benefits before the merger as a common denominator. However, the law also empowers them to take the

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3 (2001) 22 *ILJ* 1688 (LC)

necessary steps to protect their rights on the basis of their operational requirements.

The National Ministry of Education is an organ of the state. It has to comply with the constitutional imperative of a fair administrative action and respect labour legislation of the country in its dealings with the institutions of higher education and, indirectly, with their employees.

Our constitution as well as our labour legislation regards the phenomenon "consultation" as a prerequisite to all changes that take place in the work environment. Consultation is regarded as a form of joint problem solving mechanism.

The Labour Relations Act sets out as one of its objectives the promotion of orderly collective bargaining and collective bargaining at sectoral level. A shining example of the efficiency of the collective bargaining is resolution 2/2000 of the Public Service Co-ordinating Bargaining Council which provided a framework for the management of personnel in the process of incorporations of teacher training colleges into higher education. It ensured that this process respected the existing rights of personnel and sought to provide reasonable alternatives to avoid job losses.

It is submitted that the processes of consultation and collective bargaining, are the two vehicles that should be used to good effect in managing the phenomenon of restructuring that is take place in the higher education sector in South Africa today. In the final analysis, it is only the legislature, at the national level that can compose legislation that regulates tertiary education. It is submitted that this machinery should be resorted to as a measure of last resort as the means of managing the restructuring of higher education.

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