Operational requirements dismissals are governed by section 189 of the Labour Relations Act 66 of 1995 (LRA).

Although crafted in procedural terms the object of section 189 is substantive. It is aimed at the retention of jobs and if the jobs cannot be retained, at ensuring that any process resulting in job losses are fair and the adverse effects of job losses are mitigated.

Under section 213 of the LRA, “operational requirements” is defined to mean “requirements based on the economic, technological, structural or similar needs of an employer”. The Code of Good Practice: Dismissal based on Operational Requirements as contained in the LRA further states in Item 1 that:

“…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 that 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.”

What constitutes “similar needs” is not defined in the LRA or the Code. It is, however, accepted that this concept is broad enough to include factors that generally have economic consequences for the enterprise. For the purposes of the definition in section 213, these factors will ordinarily be determined by the circumstances of each case.

There are two components of substantive fairness for a dismissal for reasons...
related to dismissals for the operational requirements:

- The first component is that operational requirement must exist for retrenchment (that is, there must be a "need to retrench"). Section 192(2) of the LRA places the onus on the employer to establish the existence of operational requirement.

- In relation to the need to retrench, the court must not defer to the employer, at least in the sense that the employer is bound by the employer’s say so or that it should necessarily accept the rationale proffered by the employer for the retrenchment at face value.

Fairness is found not only in the consultation process as required by section 189 of the LRA and in the justifiability of the employer’s decision on rational grounds; the reason must be fair.

In *Van Rooyen & Others v Blue Financial Services (SA) (Pty) Ltd* the Labour Court made reference to the objective enquiry as expressed in *BDM Knitting (Pty) Ltd v SACTWU* where the court per Davis AJA formulated the applicable legal principle as the following:

> "the starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extend the court is required to enquire as to whether a reasonable basis exists on which a decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reasons offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test".

The application of *fair selection criteria* is the second component of substantive fairness. Section 189(2)(b) requires the employer and the employee/s to consult and to attempt to reach consensus on the method for selecting the employees to be retrenched. Section 189(7) gives substantive content to this requirement by stipulating that the employer select the employees to be retrenched according to
selection criteria that have been agreed or, in the absence of the agreed criteria, fair and objective criteria must be applied.