

**COMMERCIAL OPPORTUNITIES AND THREATS
AS PRESENTED BY SELECTED PROVISIONS IN
SOUTH AFRICAN LABOUR LEGISLATION**

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ABBREVIATIONS

A	Appeal Court
ARB	Arbitration
BEE	Black Economic Empowerment Act of 2003
C	Cape High Court
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COFESA	Confederation of Employers of South Africa
EEA	Employment Equity Act 55 of 1998
HR	Human resources
IC	Industrial Court
LAC	Labour Appeal Court
LC	Labour Court
LIFO	Last in first out
LRA	Labour Relations Act no 66 of 1995
LR	Labour relations
NEASA	National Employers Association of South Africa
NEF	National Employers Forum
OALD	Oxford Advanced Learner's Dictionary
SBEO	Small Business Employers Organisation
SCA	Supreme Court of Appeals
SEESA	Small Enterprise Employers of South Africa
SDA	Skills Development Act 97 of 1998
SDLA	Skills Development Levies Act 9 of 1999
SWOT	Strength, weakness, opportunity, threat

CHAPTER 1

INTRODUCTION

Commerce all over the world is subjected to rules and legislation that sets the boundaries within which businesses conduct their operations. Businesses are confronted with rules and regulations imposed by authorities such as governments, regional authorities, professional societies and others. This is as true in South Africa as it is anywhere else in the world. South Africa's political past has however influenced legislation, and especially labour legislation, greatly and South African business is currently faced with some unique legislative and socio-political challenges. The challenge of how to utilise the workforce in such a manner that maximum commercial advantage is gained whilst remaining within the boundaries of the law is complicated by political, social and even legislative pressure to address past social injustices through employment and training policies.

In this dissertation an attempt will be made to show that South African labour legislation is of such a nature that a business is confronted, on a continuous basis, with legal prescriptions that may present a real and serious threat to the continued profitability or even existence of the business. At the same token, it is believed that the South African commercial environment and labour legislation are such that it may present unique commercial opportunities to a determined business with creative flair and initiative.

A number of businesses have been established and flourish purely in response to opportunities created by the labour dispensation that saw the light after the first significant changes in the historically restrictive labour legislation in 1995. The vast number of labour consultants, employers organisations, labour brokers and so called independent contractors that suddenly came into being are some examples of these opportunistic enterprises.

Labour policy and human resource strategies that comply with, or exceed legal requirements of employment equity, affirmative action and skills development and training may indeed have great marketing potential and may be used as marketable commodities, irrespective of the core products or services offered by an entity. The proposal put forward in this dissertation is that a competitive advantage may even be gained on the strength of a company's labour- and human resource strategies alone.

This dissertation presents a commercial commentary on the affects and implications of labour legislation in general and certain provisions in particular.

1.1 Definitions

The OALD (1998:227) defines commerce as “the buying and selling of goods” and “commercial” as “making or intended to make a profit”. For the purposes of this dissertation the concept of commerce shall be used in a wider sense to also include financial considerations related to commercial interaction.

The term “selected provisions” as it appears in the title and throughout refers to those provisions in labour legislation that make up the core topic of this dissertation. The selected provisions are categorised in two broad categories namely provisions relevant to restructuring and mergers and empowerment. These provisions include:

- sections 189, 189A, 197, and 197A of the Labour Relations Act no 66 of 1995 (LRA);
- sections 5, 6, 13, 14 and 20 of the Employment Equity Act 55 of 1998 (EEA);
- sections 2 and 9 of the Skills Development Act 97 of 1998 (SDA); and
- Regulations 7 and 8 issued into the SDA.

In this dissertation a reference to the human resources (HR) function will include the labour relations (LR) component. The HR management function is much wider than the LR function but LR is often seen as a natural inclusion in the HR function (Bendix, 2003:298, Robbins, 1998:578). The inclusive use of the term HR is deemed suitable for the purpose hereof.

1.2 Problem statement

The problem to be investigated herein is whether SA labour legislation creates an environment in which opportunities and threats exist that may have the potential to either help a business gain a significant competitive advantage or to severely restrict the progress of a business' efforts.

The exploitation of an opportunity or the avoidance of a threat presupposes a clear understanding of the origin and nature of the opportunity or threat. The exploitation of an opportunity or the avoidance of a threat further presupposes a deliberate effort to identify, understand and manipulate specific factors relevant to such an opportunity or threat. For the purposes of this discussion it is suggested that such a clear understanding of relevant labour legislation is required when attempting to identify threats and opportunities. The effective

manipulation of the situation can only result from careful planning and strategising based on the clear understanding gained from a study of labour legislation.

In order to investigate the stated problem effectively, the following aspects will be considered to show why opportunities and threats arising from labour legislation may be as significant as indicated above:

- The importance of planning and devising strategy that provides for the exploitation of opportunities and due regard to threats.
- The way in which legislation affects commerce
- The characteristics and development of South African labour legislation.
- The extent to which labour legislation influences commercial activities in South Africa.
- The nature and extent of the selected provisions from a legalistic, management and marketing point of view
- The centrality and importance of values and norms in both legislative and managerial considerations and commercial functioning.

By researching the stated problem an attempt will be made to demonstrate that commercial opportunities and threats abound in labour legislation. In addition it will be shown that these opportunities and threats are often regarded as no more than mere legal constraints that have to be dealt with as quickly and as efficiently as possible. It is suggested that the creative consideration of such opportunities and threats during planning may however hold the potential for significant benefits to be reaped.

1.3 Research objectives

The primary object of the study is to show that SA labour legislation creates an environment in which opportunities and threats exist that may either help a business gain a significant competitive advantage or severely restrict the progress of a business' efforts. It will also be shown that the nature of labour legislation is such that it may create the opportunity to market the HR component of an enterprise, and to gain real competitive advantage as a result of HR policy, irrespective of the product, services or sector in which the enterprise competes.

Achieving the stated objective will require:

- Identification of threats and opportunities arising from selected provisions.

- Identifying specific threats and opportunities from legal-, managerial- and commercial perspectives respectively.
- Research into the approaches and philosophies of selected companies.
- Consideration of the possibility that the human capital of a business may be employed as a marketable commodity.

The reason for investigating this problem is to show that compliance with labour legislation can be more than merely fulfilling a legal obligation. Through examples it will be shown that non-adherence to certain provisions and ignorance regarding certain provisions pose serious threats to the continued prosperity of a business. At the same token, certain provisions in labour legislation will be shown to present significant commercial opportunities to those who creatively and positively analyse those legal provisions that they are in any event bound to comply with. It will also be shown that labour legislation in South Africa elevates the human resource component in a business to such prominence that a company may actually be able to use its HR-policy and function to gain a competitive advantage over competitors, irrespective of the quality or value of the products or services it provides. Government policy for example dictates that state tenders shall only be awarded to companies supporting an affirmative action/black empowerment policy. This in theory means that black empowerment companies with nominal skills and resources would have a distinct advantage over highly skilled well-established companies that do not actively support black empowerment.

1.4 Previous research

Much has been written on the topic of labour legislation and commentaries on the effects of such legislation are plentiful. Some truly monumental works on South African labour law have been published in the last decade and the works of Brassey (1992, 1998, 1999), Grogan (1988, 1993, 1999, 2000, 2001, 2003) and Du Toit (1998, 2000) are essential publications in the library of any labour law practitioner. Existing books and commentaries are however no more than legalistic discussions containing only brief occasional references to the economic effects of labour legislation and legal precedent. Works on HR management focus on the effective management of people in a business and usually include very well researched discussions of relevant issues regulated by labour legislation such as collective bargaining, disciplinary- and retrenchment procedures and even employment equity (Barker, 1995, Bendix, 2001, Finnemore & van Rensburg, 1999). These discussions however are also factual in nature and do not consider marketing possibilities or commercial opportunities that may arise from legislation. Business- and management orientated fields of study such as strategic

management (Thompson & Strickland, 2003), organisational behaviour (Robbins, 1998), entrepreneurship (Timmons & Spinelli, 2003), economics (Begg et al, 1987) and marketing management (Koekemoer, 1987) always recognise the importance of effective human interaction within a business. Legal provisions that may have bearing on these topics are however mostly used as points of reference or support for specific academic arguments. Literature on marketing and marketing studies seldom consider legal issues apart from legislation governing advertising and publication.

Research did not identify one study on the possible commercial exploitation of opportunities created by labour legislation or in further pursuance thereof, the opportunity to approach the HR function in a South African company as a marketable commodity.

1.5 Field of study

This study cannot be classified as falling squarely within the traditional parameters of any single identified field of study. Considerations covered in this dissertation shall include concepts and principles studied in a number of management related fields including HR Management, Marketing management, Strategic Management and Operations Management. These concepts and principles will be of importance to firstly illustrate the importance of planning and strategising in establishing and maintaining a competitive advantage. Secondly, these principles will be used to highlight the central roll that people play in business functioning.

Consideration of specific labour law issues and in particular specific provisions in labour legislation, normally at home under the discipline HR management, shall then be used to illustrate the manner and extent to which labour legislation effects business in South Africa.

Strategic management principles will be used to elaborate on the concepts opportunities and threats and will then be applied to identify certain threats and opportunities presented by labour legislation.

Marketing principles will be drawn on to briefly show what the function of marketing is and how marketing is used to promote the company and its products or services.

Finally it will be shown how proper planning of the HR function and the actual marketing hereof can be used to gain a competitive advantage in the South African commercial environment.

1.6 Research methodology

This dissertation constitutes an academic discussion and not a statistical exercise. Research will not be conducted by collecting empirical data or drawing statistically based conclusions from the interpretation of such data. As was stated above, a number of important and fundamental concepts will be considered in order to determine the proper position that HR management should fulfil in the functioning of a modern efficiently managed business. Literature study will be consulted to illustrate the subtle difference between planning and strategising and the commercial importance of these activities. Academic works will also be used to confirm and emphasise the proposal that people play the most important role in all business activities and structures. A very brief inquiry will be made into the philosophies, policies and models adopted by two large firms (KPMG and Alexander Forbes) and a medium sized firm (Tasca de Bélem). This information will be used to measure some of the sentiment toward and application of the selected provisions. The proposed theory to be tested is that the HR function in a South African company may indeed be a marketable commodity and may be used to gain a competitive advantage.

The importance of the identification and accommodation of commercial threats and opportunities for efficient management of a business will be researched by referring to academic textbooks.

Research will further include the identification of a number of the most commonly applied statutory- and other principles in labour legislation and the discussion and interpretation thereof with reference to academic commentary and legal precedent. Statistical data regarding incidental matters such as employment equity and tendencies in dispute resolution will be researched and considered. This data will be obtained from the results of studies conducted by government and other entities.

Since this dissertation reflects the author's opinion on the subject matter I will not attempt to justify each and every statement by referring to the intellectual effort of others. As is evident from the above paragraphs, textbooks will be used as the main source of information of legal-, psychological, managerial-, marketing-, and other theories and principles. Legal argument and discussions will further be based on legislation and legal precedent in the form of case law originating from High Court and Labour Court judgements as well as arbitration awards. The Internet is also used extensively during research and some articles and data obtained there from will be used. Textbooks, Internet, academic commentaries, legislation, legal precedent in form

of High Court, Labour Court judgements and arbitration awards will account for the bulk of reference matter. Personal interviews with the HR directors of KPMG and Alexander Forbes and Managing Director of Tasca de Bélem will be used as the source of information regarding the practical effect of the selected provisions.

1.7 Point of departure

The point of departure of this dissertation is that commercial opportunities and threats abound in the market place with the nature and source of such threats and opportunities as diverse as human creativity and imagination may allow. It is suggested that South African labour legislation is such that it presents an enterprise with a number of unique commercial opportunities and threats. Since the correct legal position on almost any matter is not found in the letter of the law only, it is of utmost importance to consider legal precedent as well before an action plan based on any legal provision is devised and implemented. Knowledge of the legal provision involved is thus as important as knowledge of the applicable management and marketing principles and the industry in which the company competes.

The exploitation of any opportunity or the effective confrontation of any threat requires sufficient knowledge and a clear understanding of the facts and circumstances that constitute the particular opportunities or threat. Opportunities and threats arising from legislation can thus only be pursued if the true legal position is understood and considered in the planning process.

The premise that underlies this dissertation is that South African labour legislation, and especially legislation aimed at redressing past social injustices, creates an environment in which an entity can reap benefits and gain a competitive advantage, even over competitors offering far superior products and services, through an active pursuance of the goals of equity legislation.

Central to the theme of this dissertation is the fact that the source, agents and intended beneficiaries of management, marketing and law are people. Opportunities and threats created by labour legislation accordingly have people as the object of the specific provisions, the instrument through which the aim of these provisions are achieved and the market which these provisions have been formulated to satisfy.

The following illustrates the chain of thought to be followed:

- Commercial activities are greatly affected by legal constraints.
 - Planning and strategising are aimed at achieving commercial success/gain.
-

- HR considerations are of great importance for effective planning.
- HR- considerations and policy is greatly affected by labour legislation.
- Accordingly labour legislation is a very important factor in the business environment and has to be to considered during the planning- and other management processes.
- As with any other environmental influence, opportunities and threats arise from labour legislation.
- The timely identification of opportunities and threats arising from labour legislation at the least allows for a company to avoid threats, but may also for creative and rewarding exploitation of a number of opportunities.
- The selected provisions have purely legalistic implications as well as managerial- and commercial value.
- Since social norms and values are at the core of both business ethics and legislation (especially labour legislation), an opportunity exists to exploit the positive sentiment that society displays toward entities that promote and further these norms and values.
- In South Africa so much emphasis is put on empowerment and equity that a commitment to these initiatives may present a business with an opportunity to gain a competitive advantage over competitors through creative planning and exploitation of relevant legal provisions.

1.8 Structure of the study

In order to lay the foundation for the remainder of discussion in the dissertation, chapter 2 will be dedicated to discussing the following:

- The use of SWOT analysis to determine a company's internal strengths and weaknesses as well as the threats and opportunities arising from the external environment.
 - The basic principles underlying planning and strategising and the importance of these activities;
 - The roll that HR considerations play in planning processes;
 - An indication of how commercial activities are affected by legal provisions in general;
 - The premise that HR considerations and policy is greatly affected by labour legislation;
 - The importance of legislation as an environmental factor which has to be considered and accounted for when planning and devising strategy.
 - Opportunities and threats may arise from labour legislation, as from any other environmental influence.
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In chapter 3 the provisions selected for discussion in this dissertation shall be considered from a legal point of view. The selected provisions are categorised in two broad categories namely provisions relevant to restructuring and mergers and acquisitions as well as empowerment provisions. The provisions selected for discussion in the first category were chosen to illustrate threats and the provisions selected for discussion in the second category shall be used to illustrate both opportunities and threats that may arise from labour legislation. Selected provisions to be considered are:

- Sections 189 and 189A of the LRA - retrenchment procedures;
- Section 197 LRA - transfers of businesses from one owner to another;
- Sections 5 and 6(2) EEA - unfair discrimination and the elimination thereof;
- Sections 13(1) and 14 of the EEA - equal opportunities and affirmative action;
- Section 20 (1) EEA - achieving employment equity and employment equity plans;
- Schedule 1 to the EEA - fines that may be imposed for contraventions of the EEA;
- Sections 2(1)(a) and (b) SDA - personal, social and professional improvement of employees through training; and
- Regulations 7 & 8 issued in terms of the SDA; financial assistance to employers that actively participate in skills development activities.

Chapter 4 will be dedicated to a discussion of the selected provisions as regarded from a management point of view. The manager's dilemma will be discussed and specific reference will be made to research findings into the philosophies and approaches followed by KPMG, Alexander Forbes and Tasca de Belém.

In chapter 5 the focus shall fall on the commercial opportunities and threats that arise from the selected provisions. The commercial advantage to be gained from creative planning and management will be discussed. Basic principles of marketing have to be discussed as prerequisite for showing how opportunities arising from labour legislation can be applied to market the company' product or services. This will illustrate how a company's compliance with labour legislation, and especially equity legislation as reflected in its HR policies, can be used as marketing tool to improve the company's competitive position. Once again the philosophies and approaches followed by KPMG, Alexander Forbes and Tasca de Belém will serve as examples and points of reference.

The final chapter will contain brief final arguments and will attempt to show that the human component, most often the focus of the HR function of an entity, may indeed be used as a marketable commodity through which commercial advantage may be gained. Since social norms and values are at the core of both business ethics and legislation (especially labour legislation), an opportunity exists to exploit the positive sentiment that society displays toward entities that promote and further these norms and values. Opportunities arising from the selected provisions may also be exploited by building core competencies thereon and so increasing the worth of the company when tendering for contracts, entering into contracts, or even when determining the value of the company for purposes of selling or the valuation of the company.

CHAPTER 2

PLANNING FOR COMMERCIAL OPPORTUNITIES AND THREATS ARISING FROM LABOUR LEGISLATION

2.1 Introduction

In this chapter the author will endeavour to show that a business may be faced with great opportunities and dire threats resulting from labour legislation. In order to present a logically structured argument, the importance of the managerial functions of planning, strategising and strategic management in identifying and accommodating such opportunities and threats will briefly be shown in commencing. It will be shown that legal constraints are an important factor in the environment in which any given enterprise operates. The very profound impact that labour legislation has on the South African commercial environment will then be discussed before showing that labour legislation presents a South African business with very definite opportunities and threats to contend with.

2.2 Opportunities and threats

A company's internal strengths and weaknesses as well as the threats and opportunities arising from the external environment are generally determined by doing a SWOT (Strength, Weakness, Opportunity, Threat) analysis. Strengths represent those capabilities and abilities that company has mastered and which enables it to compete in the market and weaknesses whilst a weakness on the other hand is something that a company is lacking in. Organisational structures, intangible assets such as reputation and workforce motivation and human capital are some of the most important sources of company strengths (Thompson & Strickland, 2003:118). Opportunities refer to circumstances in the environment that a company may exploit to gain an advantage over competitors whilst threats are factors from the external environment in which the company operates that negatively effect profitability and competitive well-being. This environment is described as those institutions or forces outside the organisation that potentially affect the organisations performance (Robbins 1998: 500). Threats may come in many forms such as new competing products or rivals, fluctuations in interest- or exchange rates and changed regulatory factors (Thompson & Strickland, 2003:127). A company should maximise the advantage it gains from its strengths by employing these strengths to avoid or eliminate threats and to exploit opportunities to its best advantage.

Such a SWOT analysis provides management with an overview of the company's present situation as well as some essential information needed to balance the resources available to the company with the requirements and demands posted by the external environment (Thompson & Strickland, 2003:117). According to Gerber et al (1998: 37) an optimal fit between the environment and a company's internal competencies is required in order to prosper. For the purposes of this dissertation specific attention will be paid to human capital as valuable company resource and the legal- and socio-political environment as important external factors affecting the company's market position. Thompson & Strickland (2003:117) convincingly argues that a perceptive understanding of resource capabilities and shortcomings as well as threats and opportunities is essential for good strategising.

Opportunities and threats that a business almost inevitably will be confronted with in the market include financial institution policies, market conditions, foreign market influences, import and export restraints, inflation, price fluctuation in raw materials and governmental influences such as taxation and, of specific importance for purposes of this discussion, legislation.

2.3 Planning and Strategy

A well-managed company inevitably has a well-defined vision (whether expressly stated or implied), which defines the direction that the company sees itself heading in. From such a vision, specific objectives are derived (Thompson & Strickland, 2003:6). Objectives are long-term goals that a company sets for itself that need to be attained in order to realise the company vision. Once a clear vision exists and clear objectives have been set, a strategy is devised. Strategy defines the methods to be employed by the enterprise to reach set objectives. Planning represents the nuts and bolts decisions management makes in pursuance of company objectives. Through the process of planning, management decides how resources are to be utilised (Pycraft *et al*, 1997:32). Simply put, one cannot operate or manage a successful business if the business has no clear roadmap to where it is going. A roadmap alone however, is not sufficient and a clear indication on what will be done, how it must be done, by whom it must be done and by when it must be done will be as important.

A definition of a plan suggested by Jordaan and Jordaan (1989:669) is a scheme designed or conceived to be used as a guide to achieving a goal. Pycraft *et al*. (1997:71) defines a plan as a formalisation of what is intended to happen at some time in the future. By considering all relevant factors in drafting a guiding plan, a business will ensure that its resources, which include the very important human resource component, are applied and managed with optimum effect.

A plan will not only state the vision and mission that it is derived from, but often also the values that the enterprise aspire to and will provide for proper personnel-, operational-, financial- and other relevant planning. In devising a strategy and in drafting plans those involved will necessarily take cognisance of strengths, weaknesses, opportunities and threats that the business is faced with.

A strategy is a plan describing how a company will act in every conceivable situation where intelligent decisions are interdependent (Begg *et al*, 1997:200). A further very academic definition of strategy is “the total pattern of decisions and actions which positions the organisation in its environment and are intended to achieve its long term goals” (Pycraft *et al*, 1997:71). A more practical definition may simply be that strategy refers to the planned course of action that a company decides on in order to compete, survive and prosper. The ultimate goal when devising business strategy is gaining and maintaining a competitive advantage (Thompson & Strickland, 2003:149). A company’s strategy is devised by management to guide the company toward achieving its goals. Such a strategy will determine the nature and extent of resources, including human resources, to be committed to the effort (Robbins 1998:248).

Overall company strategy generally incorporates separate strategies devised for each functional division within the company. Functional divisions may include production, marketing, technology, finance etc (Thompson & Strickland, 2003:49). The HR strategy will dictate what measures relating to personnel selection, recruitment, management and motivation are required in order for the company to compete, survive and prosper. A sound HR strategy should accordingly be a high priority for a company wishing to gain a competitive advantage. Since labour legislation is aimed at regulating the employment relationship it will affect any HR strategy (Thompson & Strickland, 2003:59).

A strategy is drafted after a thorough consideration of the business environment and the identification of opportunities and threats. An optimal fit between environment and internal competencies is required in order to prosper (Gerber *et al* 1998: 37). According to Mellow (2002:100) HR has long since ceased to be merely the personnel department and has become a critical strategic partner in planning processes. Leopold (1999:22) also argues that HR considerations should form an integral part of strategic planning. Considerations relevant to HR functioning, which are impossible to ignore in strategic planning, include recruitment and

selection, training, promotion, productivity, trade union activities and employee motivation, all of which are affected by labour legislation.

Strategic management represents an inquiry into a company's position and an investigation into ways to overcome perceived obstacles and to build on past successes. Obstacles or threats are factors manifesting from the environment in which a company operates that may adversely affect the company's success. Opportunities represent the positive side of the coin and are those environmental situations that may bolster the company's success. As was shown above, legislation is one of the forces from the environment to be reckoned with. The primary aim of strategic planning is to ensure company stability and continued efficiency in the face of disruptive forces from the environment. A further aim of strategic planning is to identify and grasp opportunities arising from the environment. In the next paragraph it will be shown that labour legislation directly affects the functioning of any business. It was also clearly the intention of the legislator that the principles embodied in labour legislation become a part of business functioning (see sections 1 LRA, 2 BCEA, 2 EEA and 2 SDA). A carefully designed HR strategy ought to further include in depth consideration of the *impact* of labour legislation. Threats and opportunities that arise from the direct and indirect operation of labour legislation may accordingly drastically impact on continued efficiency and competitiveness.

Effective long term-, medium term-, short term- and even responsive *ad hoc* planning need to be based on accurate and current information, has to be realistic, and has to take into account sound economic considerations. The old saying that "knowledge is power" holds very true indeed. Begg *et al* (1997:371) describes information as a very special economic commodity. The OALD (1998:656) lists "knowledge" as a synonym for information. The author believes that knowledge is the possession of information. Knowledge and understanding of applicable legislation accordingly represents an economic commodity which in turn may, through careful planning result in a company gaining a competitive advantage by avoiding threats posed by labour legislation and embracing opportunities created thereby.

2.4 Legislation and commerce

Commerce all over the world is subjected to rules and legislation that sets the boundaries within which businesses conduct their operations. In looking for an example of legislative regulation in the world of commerce, one can think of any aspect of commercial activity and an example will be at hand (see Kotler & Armstrong, 1999:108). The creation of business entities is regulated by

company legislation all over the world, such as the South African Companies Act 61 of 1973 and the British Companies Act of 1989. Similarly, international trade, shipping, air- freight and travel, foreign exchange, banking, import/export and many other activities related to commercial activities are subject to national- and even regional legislation such as the European Communities Act of 1972 as well as international regulation in the form of treaties and agreements entered into by international organisations.

2.5 The South African environment

Commercially active entities in South Africa are similarly faced with the challenge of how to operate and prosper in a very regulated environment. Laws and rules regulate every single step in the creation and functioning of any business, from legislation determining how a legal entity is to be created to laws governing the sale of shares and preventing unfair competition and harmful business practices. Business is also subjected to ethical, political and social pressures to conduct its business in a way that carries the approval of the ruling norms in society. South-African businesses are put under further pressure, even legislative pressure, to address perceived past social injustices through labour practices and employment- and training policies (see sections 1 LRA, 2 BCEA, 2 EEA and 2 SDA).

Examples of how the relationship between entities and its people are regulated by legal provisions are abundant. Consider the following situations:

- Liability in the form of “vicarious” liability can be incurred by an entity for the actions of employees. In the very recently decided *Isaacs v Centre Guards CC t/a Town Centre Security* [2004] 3 BLLR 288 (C) the Cape High Court found that a company would be held liable for the unlawful actions of its employee when such employee acts in a representative capacity, even if the employee exceeded his authority and acted contrary to express company rules and instructions. In this matter a security guard on duty shot and seriously injured a robber. Since the guard in question was employed by the company, acted in the course of his duties and committed a delict (an unlawful act against another resulting in personal injury or damages to property belonging to the other person), the company was held liable and ordered to pay compensation to the robber, even when it was clear that the guard was not allowed to carry a fire arm and consciously ignored express rules and instructions to that effect.
- Officials and certain employees of entities can legally represent and bind such entities. This was recently confirmed once again by the Supreme Court of Appeals in *De Villiers*

and Another NNO v BOE Bank Ltd 2004 (3) SA 1 (SCA). In *Barkett v SA Mutual Trust & Assurance Co Ltd* 1951 2 SA 353 (A) the appeal court went as far as to determine that the attitude of the board of directors of the company is also the attitude of the company.

- In terms of section 332 of the Criminal Procedures Act 51 of 1977 a company can even be convicted of a criminal offence based on the actions of its representatives.

In the next chapter certain specific provisions relating to restructuring and mergers and empowerment will be identified and discussed in detail. The following are unrelated examples to illustrate the extensive manner in which South African labour legislation regulate the relationship between entities and its people:

- Sections 4, 12 and 64 LRA establish the rights of individuals to join trade unions, entrenches the right of a trade union with sufficient membership among employees to gain access to the workplace and grants employees the right to strike and employers recourse to lock out employees respectively.
- Sections 9, 16 and 22 of the BCEA sets maximum working hours that an employee may legally be expected to work, what an employee who works on a Sunday must be paid and how much sick leave an employee is entitled to respectively
- Section 9 EEA extends the protection against unfair discrimination and unlawful medical or psychological testing to job applicants.

2.6 Labour legislation and commercial activities in South Africa

By regarding the host of labour legislation in South Africa, one begins to realise how wide ranging and far reaching the effects of labour legislation on commercial activities may be. Employment relations in general are governed by legislation contained in no fewer than 18 different acts of Parliament. Various further acts with application in specific sectors also exist. Labour relations within the South African National Defence Force are regulated by an own act. Mining & Minerals has a further 3 special acts governing labour within that sector (*Mines and Works Act 27 of 1956, Occupational Diseases in Mines and Works Act 78 of 1973, Mine Health and Safety Act 29 of 1996*). Labour relations within the SA Police Services and other security services are regulated by 4 separate Acts and in the Public Service by 2 acts. In total, approximately 40 different acts of Parliament regulate labour relations and influence commercial activities in South Africa in a very comprehensive way. Commercial freedom is greatly affected by legislation, either directly or indirectly. Some of the most prominent and specific acts

effecting labour relations are the BCEA, the EEA, the LRA, the SDA, the Skills Development Levies Act 9 of 1999 (SDLA) and the Black Economic Empowerment Act of 2003 (BEE).

In addition to acts of Parliament, subordinate legislation further regulates labour relations within many sectors. Subordinate legislation are pieces of legislation issued by government or state departments who in turn derive their authority to enact and enforce such subordinate legislation from acts of parliament. An example of subordinate legislation is regulations issued by a minister empowered to do so by a specific act. A vast volume of subordinate legislation had been enacted in terms of labour related acts of parliament. Sectoral determinations prescribing minimum wages and conditions of employment in specific sectors (for example Sectoral Determination 8 issued in terms of section 50 BCEA in Government Gazette No R 1499 of 2 December 2002 prescribing minimum wages and conditions of employment for the Farm worker sector), and collective agreements formulated by Bargaining Councils are some of the most common pieces of labour related subordinate legislation. Forty-eight Bargaining Councils (previously Industrial Councils) have been introduced, each with its own additions, extensions and qualifications of Labour legislation. Bargaining Councils exist for the Engineering-, Building-, Road Freight-, Safety and Security-, Leather and numerous other industries. Employer and employee parties active within the sector for which such Bargaining Council is created will agree to conditions of service and other issues of mutual interest within the sector and with consideration of the unique requirements and relationships within the specific sector. Certain matters normally regulated by the BCEA and LRA will then be subject to provisions agreed to in such a main agreement. The Minister of Labour may even extend the legal effect of such an agreement to all parties operating in the specific sector (section 32 LRA).

From the above it should be evident that South African labour legislation is very extensive in nature. Inadequate knowledge of the legal environment in which it operates or of legal provisions applicable to the company, pose a serious legal risk to the company (Timmons & Spinelli, 2003:354).

2.7 Labour legislation as opportunities and threats

This statement presents the crux of this dissertation. An obvious opportunity presented by labour legislation that will serve as illustration is the opportunity to build or expand a business by focussing on the provision of labour law advisory- and support services. Entities such as labour consultants, employers organisations and legal firms have long since used the complexity of

labour legislation and the prominent and confrontational nature of labour relations to offer professional support services to market participants. The Commission for Conciliation, Mediation and Arbitration (CCMA) is a body created to exclusively adjudicate labour disputes. An indication of the potential for rendering labour law advisory- and support services can be found in the fact that 42 247 disputes were referred to the CCMA in the 4 month period from 1 April to 31 July 2004 (www.ccma.org.za). The changes in the legal dispensation resulting from the promulgation of the 1995 LRA also seem to have presented an opportunity that was identified and gasped by a significant number of individuals and organisations. 76 new employers organisations were registered after the promulgation of the 1995 LRA. Using the employers organisation as vehicle, individuals, labour consultants and even legal practitioners established or developed sizeable and profitable business enterprises such as COFESA (Confederation of Employers of South Africa), SBEO (Small Business Employers Organisation), NEF (National Employers Forum), SEESA (Small Enterprise Employers of South Africa) NEASA (National Employers Association of South Africa) and many others. The above is an example of an opportunity for commercial gain presented by labour legislation.

A number of selected provisions will be discussed in the next chapter, but by way of general illustration of a threat presented by labour legislation, consider the very common occurrence in the labour market, the dismissal of an employee. During the period April to December 2003 an impressive 78 623 cases of unfair dismissal were referred to the CCMA (www.ccma.org.za). A lawful or fair dismissal may be effected in response to misconduct by an employee, poor work performance by an employee, for reasons relating to an employees health or may result from a change in the operational requirements of a business (section 188 LRA). For each one of these grounds for dismissal, specific rules and procedures are prescribed by labour legislation. Failure to adhere to these rules exposes an employer to risk. Section 193 LRA determines that an employer may be ordered to reinstate or re-employ an employee or to pay compensation to the employee if a dismissal is found to be unfair. In terms of section 194 LRA an employer may be ordered to pay compensation equal to an amount of up to 24 months' remuneration to an employee who is found to have been automatically unfairly dismissed. Above orders for compensation may also be made even where the reasons for the dismissal were fair (substantive fairness) and only the process followed in effecting the dismissal did not comply with those prescribed in the act (procedural fairness). The obvious commercial threat in the from of substantial financial liability as presented by labour legislation is clear from the above example.

In this chapter it was shown that:

- The determination of a company's internal strengths and weaknesses as well as the threats and opportunities arising from the external environment is essential for good planning.
- Strategy and planning are essential in the modern commercial market.
- Timely identification of opportunities and threats in the market allows an enterprise to plan accordingly and may result in competitive advantage.
- HR considerations form an integral part of planning and strategy.
- Commerce all over the world is subjected to rules and legislation.
- Employment relations in South Africa are governed by a host of legislation.
- Labour legislation plays an integral part in the regulation of commercial activities.
- HR considerations and policy is greatly affected by labour legislation and as such cognisance has to be taken of relevant legislation in the strategising and planning activities.
- Labour legislation presents a business with commercial threats and opportunities.

CHAPTER 3

SELECTED PROVISIONS: A LEGAL PERSPECTIVE

3.1 Introduction

Labour legislation confronts an employer with numerous restrictions, directives, obligations, rights and responsibilities. The labour environment is very dynamic in nature. Legal interpretation and authoritative court decisions often have a profound influence on the application of a legal provision and the interpretation of the letter of the law is very often dramatically affected by authoritative court decisions. Legal provisions are thus often more complex than it seem on face value and regard to the letter of the law alone will not be sufficient for effective, informed planning. As was discussed earlier, uninformed decisions may hold potentially serious threats to any enterprise, just as well-informed decisions may result in definite advantage. Only once the net application of legal provisions as applicable on a company is understood, can opportunities and threats it present be identified and can these be avoided or exploited.

In order to determine whether a specific legal provision pose a threat or holds an opportunity, the particular provision must be studied with reference to all contextual factors which may influence the application thereof. For each business the external environment is unique due to the nature of the business and its operations (Gerber et al 1998:37). For a large and prominent company in accounting and management services industry such as KPMG, the threat of falling into procedural traps created by labour legislation such as sections 189 and 197 LRA holds no threat. The company has a very comprehensive internal legal capacity and even offer professional legal services. According to Barry Bauer, director for KPMG (SA), empowerment provisions such as sections 5, 6(2), 13(1), 14 and 20 (1) EEA hold very few commercial opportunities for the company since the clients KPMG attracts, accept such initiatives as a given and are not impressed by such policies. They have been pursuing empowerment initiatives since prior to 1980 and empowerment is no longer a challenge which requires extended effort but has become part of the company culture. In competing for market share with the likes of Price Waterhouse Coopers and Deloitte & Touche, government tenders to the value of approximately R100m per annum are at stake. In this context the failure to comply with empowerment provisions may hold dire threats for commercial prospects.

Compare the KPMG situation with that of Tasca de Belém, a dynamic Portuguese styled restaurant on the V & A Waterfront in Cape Town. The differences in the external environment and the nature of the business are obvious. Tasca, which is growing at a healthy rate, has identified sections 189 and 197 LRA as definite threats in their future planning. Jacques Castelein, managing director of Tasca explained that they have plans to acquire a restaurant in Port Elizabeth and converting it into a second Tasca as well as plans for venturing into the take-away market. This requires Tasca to venture into the scope of operation of these two provisions. In its operations Tasca competes for lease options to supreme commercial location and market share of international tourist market. Empowerment initiatives in compliance with legislative provisions had earlier been identified as certain opportunities and have already resulted in substantial commercial gain to Tasca.

In this chapter the specific provisions selected for discussion in this dissertation shall be considered from a legal point of view. The selected provisions to be considered are categorised in two broad categories namely:

- provisions relevant to restructuring and mergers and acquisitions; and
- empowerment provisions.

Due to the regulating nature of legislation and the punitive measures included in labour legislation commercial opportunities are seldom evident from a study of the legal application of the selected provisions. These opportunities become more evident when considered from management- and commercial perspectives, which will be discussed in chapters 4 and 5 respectively. In this chapter the potential threats inherent to the selected provisions shall be highlighted whilst an opportunity presented by the SDA shall be discussed.

3.2 Provisions relevant to restructuring and mergers and acquisitions

Provisions relating to restructuring and mergers and acquisitions selected for discussion are sections 189 and 189A LRA which provisions relate to retrenchment procedures and sections 197 and 197A LRA that regulate transfers of businesses from one owner to another. These provisions have been chosen to illustrate the threats that may be posed by labour legislation.

The most evident commercial influence that threats from the legal environment may hold for a company comes in the form of penalties and fines that an employer may face due to non-compliance with legal provisions. Apart from substantial unplanned for expenses threats may

also result in disruptions in productivity, loss of man-hours, setbacks in planning and execution of strategies and other results detrimental to the progress or prosperity of a company. In chapter 2 it was argued that knowledge is a valuable resource. All of the threats identified in the course of research for this paper show that threats become reality for most enterprises due to ignorance of the provisions involved. Threats may also be realised due to a conscious decision by management to directly challenge a rule or to accept the risk involved in ignoring a certain determination or rule. Whatever the reason for threats adversely affecting operations, it seems that threats can be avoided relatively easily by obtaining accurate information regarding labour legislation and considering this during planning- and other management processes.

3.2.1 Restructuring

Restructuring is a commonly used strategy when commercially active entities identify a shortcoming in its operations. Certain divisions or lines in a business may show little strategic fit or may not be contributing to earnings (Thompson & Strickland, 2003:314). Long-term prospects may become unattractive due to the current organisational format. The company may require a change in direction or focus due to changes in the market such as the introduction of new technology or products (Thompson & Strickland, 2003:317). Restructuring is very often used as a means of financially recovering from setbacks due to a downturn in demand for products or economic depression (Brigham & Ehrhardt 2002:945).

Sections 189 and 189A LRA prescribes the procedures that have to be followed in event of dismissals based on operational requirements (retrenchments) in the event of retrenchments by employers with fewer (section 189) and more (section 189A) than 50 employees respectively. Operational requirements are described as being requirements relating to the economic, technological, structural or similar needs of an employer (section 213 LRA). Economic requirements pertain to the financial position of the business. Technological requirements refer to the implementation of new technology which influences the employment relationship by rendering certain posts redundant, by requiring employees to adapt to new technology or by requiring restructuring of the workplace. Structural requirements refer to the situation where certain posts become redundant due to the restructuring of the business (LRA Schedule 8 Item 12(1)).

Because dismissals due to operational requirements are seen as “no fault” dismissals (not accredited to the conduct or capacity of the employee), strict requirements are set when such

dismissals are contemplated. All possible ways to avoid dismissal must be considered and fairness toward those involved is required (See section 188 and Schedule 8 Item 12(3) LRA).

Section 189(1) determines that an employer must engage in consultation with those employees involved or a representative elected by such employees. Section 189(2) determines that consultation must be aimed at reaching consensus on a number of prescribed issues including:

- possible ways to avoid dismissal;
- ways to limit the number of employees affected by the proposed dismissals to a minimum;
- reasonable and objective criteria of selecting employees to be dismissed such as “last-in-first-out”, retention of specific skills, disciplinary records etc; and
- the severance payment to be paid to dismissed employees.

Section 189 (3) requires the employer to provide the other party with all relevant information, which is likely to include financial statements if the dismissals are based on economic considerations, in writing. During consultation the employer must allow the other party an opportunity to make representations regarding any aspect referred to above (section 189(5)). The employer has to consider these representations and must react thereto in writing. In the event of the employer not agreeing with suggestions made by the other parties he must provide reasons for rejecting those (sections 189(6)). Minimum payments due to employees dismissed for operational requirements are also prescribed by legislation (sections 40 and 41 BCEA).

Section 189A, inserted by the amendments to the LRA in 2002, contains no fewer than 20 subsections and sets additional requirements that apply to dismissals based on operational requirements by employers with more than 50 employees. For practical reasons this discussion shall focus only on those subsections deemed to be of importance for the purposes of this dissertation. This section is very new to the LRA and in the research process not one decided case on the application or effect of section 189A could be found. In terms of section 189A(1) this section will be applicable if such an employer contemplates dismissing more than a prescribed number of employees or the current dismissals brings the number of employees that have been dismissed by reason of the employer's operational requirements in the last 12 period to more than the prescribed number (see Grogan, 2003:215).

A very ominous threat to the undisturbed commercial functioning of an enterprise is contained in subsection (2). This provision allows for the parties to revert to the power play mechanisms of strikes and lockouts to force the other party to accept its position on the proposed retrenchments. The repercussions that a strike may hold for a company, includes financial loss, lost production, bad publicity, political pressure and more. Subsections (3) and (4) alleviates the strike threat somewhat by providing an opportunity to avoid a strike through intervention in the form of facilitation. These subsections provides for the appointment of a facilitator on request to the CCMA or by agreement.

Section 189A (7) and (8) determines that the employer may give notice of terminate of contracts of employment and the employees involved or their trade union may give notice of a strike or may refer a dispute concerning the substantive fairness of the dismissal to the Labour Court within prescribed periods from the date on which notice of the intended retrenchments was given, depending on whether a facilitator is appointed or not. Subsection (9) provides for a notice of the commencement of a strike to be given if the employer dismisses or gives notice of dismissal before the expiry of certain periods referred to in subsections (7) or (8). Section 189A(10) limits the options available to employee parties to a selection of one of the two alternatives only. They may either give notice of a strike or refer a dispute about the substantive fairness of the proposed dismissal to the Labour Court. Even though the remedies available to the employee party is limited to a choice between two alternatives and even though facilitation may be relied on to avoid the realisation of this threat, the threat of a strike- or legal action is still very real.

In terms of subsection (13)(a) the Labour Court may order an employer who does not comply with a fair procedure to do so. The Labour Court may also issue an interdict restraining the employer from dismissing employees before following a fair procedure (subsection (13)(b), order an employer to reinstate an employee until it has complied with a fair procedure (subsection (13)(c)) or award compensation to dismissed employees.

The sanction for falling foul of retrenchment provisions emphasizes the extent of the challenges posed by these provisions. Sections 193 and 194 LRA address the question of relief that can be ordered against an employer. Section 193 provides that where the Labour Court or an arbitrator finds the dismissal of an employee to have been unfair, it may order the employer to reinstate or re-employ the employee or to pay compensation to the employee. If a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may

make any other order that it considers appropriate in the circumstances. In terms of section 194 compensation equal to no more than 12 months remuneration may be awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair or the employer did not follow a fair procedure in dismissing the employee.

The threat that is presented by provisions relating to retrenchments lies in the clear and extensive guidelines that the process of retrenchments has to comply with and the penalties that non-compliance may be sanctioned with. A company reverting to retrenchments generally do so because financial considerations compel it to do so. Having a court order it to pay compensation to each retrenched employee or to re-employ or reinstate employees because it had not adhered to these guidelines may very well be the final ruin of the company.

Even though the wording of sections 189 and 189A presents a very strict and formalistic picture, the threat of falling foul of legislation is somewhat lessened by the approach adopted by our courts. The courts thus far have fortunately been willing to allow some measure of deference from strict enforcement of burdensome legal provisions. The principle of fairness underlies all South African labour legislation and is used by our courts as a general guide in determining disputes and interpreting legal provisions (see *SA Chemical Workers Union and Others v Afrox* (1999) 20 ILJ 1718 (LAC)). Even though the courts do not expect each and every retrenchment to adhere to the exact letter of the law if circumstances do not allow, an acceptable level of adherence to the purpose of the section (the occurrence of a joint consensus-seeking process) is at least required in order to avoid the dismissal from being regarded as unfair (See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC), *Atlantis Diesel Engines supra (Pty) Ltd National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A), *UPUSA and Others v Grinaker Duraset* (1998) 2 VLLR 190 (LC), *National Entitled Workers Union & Others v Mintroad Saw Mills (Pty) Ltd* (1998) 19 ILJ 95 (LC), *Workers Equally Support Union of SA & Others v Jacobsz* (2000) 21 ILJ 1680 (LC)).

From this discussion it should be clear that the retrenchment of employees in the absence of proper planning and without some professional guidance may pose a fatal threat to the commercial position and well-being of a company (also see Timmons & Spinelli, 2003:354). In *Chetty v Scotts Select a Shoe* (1998) 19 ILJ 1465 (LC) the court, by mouth of Landman J, discussed the reasons for consultation prior to retrenchment and the effect that dismissals have on people. The learned judge equated dismissal to the industrial world's equivalent of capital punishment.

3.2.2 Mergers and acquisitions

Mergers and acquisitions are very much part of commercial activities and are often indicative of strong growth in a company (Brigham & Ehrhardt, 2002:970). Until August 2002, labour related issues relevant to mergers and acquisitions were regulated by section 197 LRA. This provision related to the transfer of contracts of employment from one employer to the next in circumstances where a business or part thereof was transferred to the prospective new employer. Section 197 would regulate cases where the business was transferred as a “going concern” whether the business was transferred in a state of solvency or insolvency. Grogan (2003:224) explains that section 197 was drafted with the aim of effecting a compromise between the obligations placed on employers who need to retrench employees and the need to transfer ownership of businesses. Section 197 also limited employees’ common law right to choose their employer, and sought to prevent employees from profiting from a situation where their continued employment is assured by the transfer of their contracts on the sale of their employer’s business (also see *Foodgro (A division of Leisurenet Ltd) v Keil* (1999) 20 ILJ 2521 (LAC)). In August 2003 the legislator endeavoured to clear up and to remove the substantial uncertainty regarding the matters provided for in section 197. The provision was amended and new sections 197A and 197B were introduced. Section 197, especially if the related sections 197A and 197B are also considered, is arguably one of the most prescriptive and elaborate provisions contained in the LRA. A number of threats may accordingly arise from this provision.

Due to the wording of the initial section 197 a great deal of uncertainty marred the application thereof. The questions of whether employees need to consent to a transfer of their employment contracts and whether these contracts were transferred automatically, resulted in different interpretations and answers of a single set of facts from the Labour Court (*National Education Health & Allied Workers Union v University of Cape Town & others* (2000) 21 ILJ 1618 (LC)), the Labour Appeal Court (*NEHAWU v University of Cape Town & others* (2002) 23 ILJ 306 (LAC)) and eventually the Constitutional Court (*NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC)). Similar uncertainty existed regarding severance payments (see *Mdluli & others v Tillmore (Pty) Ltd* (1999) 20 ILJ 2626 (LC)) and continuity of employment (see *SACWU v Engen Petroleum (Pty) Ltd* (1998) 19 ILJ 1568 (LC)).

The threats inherent to this provision due to uncertainty regarding issues such as the effect of a transfer and the question when a business or part of a business was deemed to have been transferred as a going concern are from the many disputes regarding those issues that had served before our courts. The commercial implications that the application of this provision may hold

are clear from some of the court decisions. In *Kgethe v LMK Manufacturing (Pty) Ltd* (1998) 19 ILJ 524 (LAC) the court ordered disclosure of certain information which exposed the company to the possibility of being interdicted from carrying out the agreement for the acquisition of the business and of having the already implemented transfer of contracts of employment be declared invalid. In *Schutte & others v Powerplus Performance (Pty) Ltd & another* (1999) 20 ILJ 655 (LC) the new employer was forced to accept the transfer of the employees from the old employer and in *Tekwini Security Services CC v Mavana* (1999) 20 ILJ 2721 (LC) the new owner of the business was ordered to honour a settlement agreed to and enforceable against the old employer. In *Foodgro (A division of Leisurenet Ltd) v Keil* (1999) 20 ILJ 2521 (LAC) the court ordered the new employer to include the employees' years of service with the company acquired by Foodgro when calculating a severance package due to the employee and in *NUMSA & another v Success Panelbeaters & Service Centre CC t/a Score Panelbeaters and Service Centre* (1999) 20 ILJ 1851 (LC) an order of reinstatement of a dismissed employee against his former employer was found to be applicable to the new employer. Some further recent and relevant cases include *Ndima & others v Waverley Blankets (Pty) Ltd* (1999) 20 ILJ 1563 (LC), *National Education Health & Allied Workers Union v University of Cape Town & others* (2000) 21 ILJ 1618 (LC) and *Maloba v Minaco Stone Germiston (Pty) Ltd & another* (2000) 21 ILJ 1795 (LC). The newly amended section 197 determines that it shall apply to transfers "as a going concern" of the whole or a part of any business, trade, undertaking or service from one employer to another. The case law relating to the issue of a "going concern" decided under the old section 197 is likely to remain applicable (Grogan 2003:227).

The new section 197 had already served before the courts on a number of occasions. In *SAMWU & others v Rand Airport Management Co (Pty) Ltd & others* (2002) 3 ILJ 2304 (LC) the court held that the inclusion of the word "service" as part of that which may be transferred as a running concern merely referred to a business focussed on the rendering of services to others. The issue of outsourcing was also considered and in *NUMSA v Staman Automatic CC & another* [2003] 11 BLLR 1167 (LC) the applicability of this provision in a case of a transferral of employees to a labour broker was considered and found not to constitute a transfer of business for the purposes of section 197. As can be seen from the above, the interpretation and applicability of the provision may be difficult. An error in judgement with regard to the application of the section may result in a company finding itself in a position where it has become the legal and liable employer to a number of people that it never intended to employ. This situation poses a serious threat to the company. It may find itself employing an

unproductive surplus labour force, which by its very nature poses a threat to the company's commercial efficiency.

The remainder of this part of the discussion shall focus on the post August 2003 version of section 197. In terms of section 197(2) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer. All the rights and obligations between the old employer and an employee are automatically transferred to the new employer and anything done by the old employer before the transfer is deemed to have been done by the new employer. Even liability for unlawful acts of the old employer against its employees before the transfer, including dismissals or the commission of unfair labour practices or acts of unfair discrimination, pass to the new employer. Any arbitration award or collective agreement binding on the old employer before the transfer will pass to the new employer through the application of this provision (*Pillay & others v Mykonon Trust* [2003] 12 BALR 1418 (CCMA)) even with retrospective effect (*Transport Fleet Maintenance (Pty) Ltd v NUMSA & others* [2003] 10 BLLR 975 (LAC)). The *Transport Fleet Maintenance* matter was referred to the court under the old section 197 but I believe the principles involved remain the same under the new section and that the approach followed in this matter will apply to any matter referred in terms of the amended section 197.

A transfer does not interrupt an employee's continuity of employment either and an employee's contract of employment continues with the new employer as if with the old employer. As was shown above, the potential threat posed by commercial action that does not accommodate the possible effects of this provision is substantial. An important aspect regarding this provision is that Subsection (6) still allows for the express exclusion of any of the above arrangements entering into an agreement to that extent with the employees or their representatives.

Section 197 also contains provisions relating to valuation of termination payments that would have been due to the employee at the date of transfer and acceptable arrangements regarding the party liable for payment thereof (see section 197(7)).

Subsection (8) determines that the old and new employer are jointly and severally liable. For a period of 12 months after the transfer, the old employer is jointly and severally liable for payments due to any employee who becomes entitled to such payment as a result of his retrenchment or the employer's liquidation or sequestration, unless otherwise agreed in terms of subsection (7).

The danger in not considering this section in planning and implementation is not limited to the threat of litigation that may follow. An employee who resigns after such a transfer because conditions and circumstances at work have become substantially less favourable due to the transfer may successfully claim to have been constructively dismissed (section 186(1)(f) LRA). If an employee is dismissed for reasons relating to a transfer, such a dismissal is deemed to be automatically unfair (section 187(1)(g) LRA) and entitles the employee(s) to compensation equal to 24 months remuneration (section 194(3) LRA).

The newly enacted section 197A is applicable in instances where transfers take place in circumstances of insolvency. It is determined that the employees of the insolvent employer are also transferred automatically to the new employer. The importance of this section lies therein that it absolves the new employer from liability for actions of the insolvent employer prior to the transfer and does not hold the new and old employer jointly and severally liable for claims against the old employer that arose before the transfer. Section 197B directs that an employer facing winding up or sequestration must inform employees or their chosen representative(s) of that fact. This I would suggest addresses the requirement of timeous consultation and disclosure of information and will lighten the procedural burden and liability risk of the acquiring company. The threat posed by the uncertainty and vagueness of the old section 197 regarding acquisitions in cases of insolvency have thus been greatly reduced by the enactment of sections 197A and 197B.

It should be evident from the above that a thorough understanding of the legal requirements relating to a transfer of employment contracts when transferring or selling a business or part of a business is required. The complexities involved in transactions such as this is not only evident from the wording of section 197, but also from the fact that even our courts seem to be in disagreement on certain technical issues relating to a transfer of a business as a going concern. An extensive discussion of these technical aspects may require more than a brief discussion and are not important for the purposes of this paper. What is of importance is to note the threat that the absence of careful planning before entering into such a transaction holds. When planning economic activities or embarking on a strategy which includes taking over businesses or selling off parts of a business, management must very carefully consider the provisions of section 197 (also see Timmons & Spinelli, 2003:354).

3.3 Empowerment provisions as threats

Past social injustices are described in the preamble to the EEA as products of apartheid and other discriminatory laws and practices that resulted in disparities in employment, occupation and income within the national labour market. In the preamble these injustices or disparities are stated to have created such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. Legislation like the EEA has been promulgated to facilitate the redress of these past injustices. South African businesses are thus challenged to utilise its workforce in such a manner that maximum commercial advantage is gained whilst remaining within the boundaries of very prescriptive and often, very restrictive legislation.

3.3.1 Sections 5 and 6 EEA

Section 5 relates to unfair discrimination and the elimination thereof and determines that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination and lists a number of grounds of differentiation that may constitute unfair discrimination. These grounds include 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. In terms of section 9, the provisions of section 6 also apply to job applicants. Any employer or company that makes itself guilty of unfairly discriminating against employees or even would be employees, or that fails to eliminate any possible unfair discrimination in the workplace may accordingly face the threat of persecution. This implies that indifference toward discrimination will be sanctioned and that positive action toward elimination thereof is imperative. Section 10 regulates disputes regarding contraventions of chapter II EEA, which includes sections 5 and 6. This provision provides for a dispute to be referred to the CCMA for conciliation and thereafter to the Labour Court for adjudication. The Labour Court may then make an appropriate order (section 10(7)), which include the granting of an interdict, ordering the guilty party to take any appropriate action, granting compensation or damages and awarding costs (section 158(1)(a) LRA).

The threat posed by these provisions may materialise in a number of forms. Being ordered to halt, change or implement certain policies or procedures such as selection- training or training policies may necessitate time consuming and costly changes in company functioning and operations. The financial implications of awards of compensation, damages or costs are evident.

3.3.2 Sections 13 and 20 EEA

In terms of section 20 an employment equity plan must be prepared and implemented through which the employer will achieve reasonable progress towards employment equity in its workforce. Section 13(1) directs that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act. These provisions apply to “designated employers” only. A designated employer is defined in section 1 and means a municipality, an organ of state, an employer bound by a collective agreement or an employer employing more than 50 employees and/or has an annual turnover exceeding a certain prescribed amount depending on the sector in which the employer operates. The turnover limits range from R2 million for the agricultural sector to R10 million for manufacturing, R15 million for employers in the sales and motor trade and repair services and R25 million for wholesale sales, commercial agencies and related services (Schedule 4 EEA).

Schedule 1 to the EEA prescribes the fines that may be imposed for contraventions of provisions of the act. These fines range from a minimum of R500 000 for a first contravention to R900 000 for a company with four previous contraventions in respect of the same provision within three years.

Employment equity refers to a situation where the workforce on each functional level in a business reflects the demographic compilation of national and regional society. An employment equity plan and policy accordingly impacts the constitution of the total organisation and the HR policy of an enterprise. Recruitment and selection, promotions and training within the enterprise are greatly effected by the provisions of the EEA. Decisions regarding these issues are not taken lightly and are certainly not something that is decided on an ad hoc basis. Careful planning and consideration is required to determine how employment equity is to be achieved in the company. The threat of fines that may be imposed for non-adherence to these provisions is very real and ominous indeed. As will be discussed in more detail in chapter 5, apart from financial sanctioning, a company will also risk its chances of success in winning government- and other tenders if it seems unwilling to take decisive action in promoting employment equity in its organisation.

3.4 Empowerment provisions as opportunities

3.4.1 Regulations 7 & 8 issued in terms of the SDA

The SDA provides an institutional framework for strategies to develop and improve skills of SA workforce and also provides for related matters such as financing of skills development (Landis & Grossett, 2003:3). This Act promotes personal, social and professional improvement of employees through training and Regulations 7 & 8 issued in terms of this act provides for financial assistance to employers that actively participate in skills development activities. The SDA addresses the need to increase skills and improve productivity and competitiveness of industry, business and commerce (Landis & Grossett, 2003:413). In practice the operation of these provisions can create the opportunity for a company to obtain labour in the form of learners at a fraction of the normal payroll and other training related costs involved in employing people in similar positions. The commercial advantage to be gained from a position of greatly reduced labour costs needs no elaboration.

Utilising the opportunity presented by the SDA may also result in a commercial advantage through the theoretical training that employees are exposed to and the improved skills resulting from training programmes. Inclusion and retention of better- equipped and skilled workers convert to better productivity and performance and results in a competitive advantage to the company (Mellow, 2002:29).

In this chapter it was shown that:

- The application of provisions in labour legislation is more complex than what the wording thereof suggest.
- A number of provisions within the LRA and EEA represent serious threats in labour legislation that may potentially cripple a business.
- Potential commercial threats exist in the application of sections 189 and 197 LRA relating to retrenchments and mergers and acquisitions
- Potential commercial threats exist in the application of sections 5 and 6 EEA, which address unfair discrimination.
- Provisions within the SDA present lucrative opportunities that may be exploited for financial gain and competitive advantage.

CHAPTER 4

SELECTED PROVISIONS: A MANAGEMENT PERSPECTIVE

4.1 Introduction

This chapter will be dedicated to a discussion of the selected provisions as regarded from a management point of view. Management considerations will be discussed and certain further threats and opportunities arising from the selected provisions will be identified from this perspective. Specific reference will be made to research findings into the philosophies and approaches followed by KPMG, Alexander Forbes and Tasca de Belém. Numerous threats and opportunities, not even mentioned herein may come to mind when the management perspective is taken. This discussion will however be limited to but a few examples of threats and opportunities that managers may have to contend with when dealing with restructuring, mergers and acquisitions or empowerment initiatives.

4.2 Management

Kreitner and Kinicki (1995:8) define management as the process of working with and through others to achieve organisational objectives in an efficient manner. Robbins (1998:2), in a very similar fashion defines managers as individuals who achieve goals through other people. References to goals and objectives in these definitions once again confirm the acceptance that proper planning and strategising are essential to good management. Good strategy and good strategy execution are deemed to be the most trustworthy signs of good management (Thompson & Strickland, 2003:4). As was shown above (see p 13 *supra*), the management task includes the application of the human resources at management's disposal to achieve company goals. Pycraft *et al.* (1997:304) believes that human resources are especially important to the operations function since that is where the bulk of its people are employed.

The labour relationship exists between employer and employee. This relationship is regulated by labour legislation. While all managers are responsible for the labour relationship between them and their employees, the total company labour relations function generally falls squarely in the domain of the HR manager (Bendix 2003:296). A company's HR strategy will naturally be affected by labour legislation since such legislation is aimed at regulating the employment relationship (Leopold *et al.* 1999:278; Thompson & Strickland, 2003:59). In the same way that finance, operations, logistic or marketing influences and supports managerial considerations, so HR management is an essential element of the overall management effort in an enterprise.

Leopold *et al.* (1999:22) believes that management and strategic planning are processes that HR considerations should be an integral part of and Pycraft *et al.* (1997:304) argues that operations managers are most involved in developing and organising people (HR). The objectives of HR planning is to prevent under- or overstaffing, to ensure that the organisation has the right employees in the right place at the right time and to ensure the organisation is responsive to changes in the environment (Mellow, 2002:135). According to Mathis and Jackson (2002:13), HR is evolving and is no longer merely the personnel department. It is increasingly acknowledged as a critical strategic partner and plays a central role in transformational initiatives (Mellow, 2002:100). Leopold *et al.* (1999:22) further points out that company strategy includes decisions on acquisitions and divestment, which have personnel (HR) implications. During the planning process management will make decisions on the future functioning and staffing of the organisation and these actions will depend on the company personnel forecast (Mathis & Jackson, 2002:13)

As with any planned initiative, HR planning alone is of little value to a company. Implementation of suggested plans and strategies is a complicated management task that requires involvement from almost all functional groupings in the company (Thompson & Strickland, 2003:59; Bendix, 2003:409). According to Mathis and Jackson (2002:13) HR planning is worthless if management does not take the appropriate action to implement these plans. It should be clear that the application of labour legislation affects all managers and that the opportunities and threats identified hereunder are not only of importance to the HR manager, but to the total management effort in a company. In smaller enterprises there may be no separate HR function and will ownership of the traditional HR- and labour relations responsibilities be taken by the management structure that does exist. It was also clearly the intention of the legislator that the principles embodied in labour legislation become a part of business functioning (see sections 1 LRA, 2 BCEA, 2 EEA and 2 SDA).

Threats and opportunities arising from labour relations in general (and including the selected provisions) will have everything to do with the way in which a company recruits, employs and manages its people. The selected provisions that form the focus of this dissertation are taken from labour legislation and accordingly the HR management function will be of special importance for the purposes of this discussion. However, as was shown above, the discussion that follows will have as much relevance to the operations or marketing function in a business as it will have on the HR function.

4.3 Values

According to Pycraft *et al.* (1997:304) an organisation's culture consists of its shared values, beliefs and assumptions. This organisational culture directly affects ethical conduct and sets the standards for acceptable employee behaviour (Robbins, 1998:249,618). Ethics are standards of conduct or moral behaviour. Management is required to make decisions and judgement calls on a continuous basis and face ethical dilemmas daily (Maund, 2001: 627). The way in which managers respond to these ethical dilemmas and the way in which the company conducts its business in general depend on company policy and company culture. Klatt *et al.* (1985:21) argues that workforce value systems reflect values of society at large.

Even though the ideology behind their theories may differ greatly, social theories seem to be in agreement that society's legal system reflects the norms and values prevalent in that society (Haralambos, 1987:41,440). Labour legislation, as any other law is society's way of setting acceptable norms to guide interaction and activities. Law is very much a reflection of social conscience. Rycroft and Jordaan (1992:294) states that labour legislation does not exist in a social vacuum and that it results from social needs and pressures. The learned writers term this type of legislation as "social legislation". From the above it can be seen that societal values play a central role in both management activities and labour legislation.

During the strategic planning process management will have to make decisions on the future staffing of the organisation. The actions that these decisions result in will depend on whether personnel shortages or surplus have been forecast (Mathis & Jackson, 2002:13). Staff shortages will require recruitment and selection procedures to be followed and foreseen staff surpluses are very likely to result in retrenchments. Managers are likely to be guided in decisions regarding restructuring, mergers and empowerment by internal policy, economic- and ethical considerations and is often likely to only consider applicable labour legislation as an afterthought in order to ensure that the course already decided on and the execution of plans and strategy remains within the boundaries of legislation. As was shown in chapter 3 *supra*, the failure to obtain legal advice timeously or the failure to consider the implication of legislation may pose serious threats to an enterprise. Labour legislation however is so much a reflection of the values in society that it more often than not does not only reflect the "legal thing to do", but also the "right thing to do" (also see Mellow, 2002:52). It is the writers opinion that the bulk of labour legislation contains provisions that very often reflects good management principles of what an organisation should have been doing in any event. It then follows that the threats and opportunities that may be found in labour legislation are often much more management

challenges than separable additional legal requirements that have to be monitored by some specialist such as a labour consultant or attorney who is often very far removed from the management team.

4.4 Managing restructuring

Restructuring entails significant changes being brought about to the composition and/or functioning of a company. The need to restructure may arise from numerous circumstances such as:

- a decision to divest operations or business divisions that either do not make meaningful contributions to the portfolio of a diversified company or that are negatively influencing the portfolio by realising losses, hampering cash flow or otherwise (Thompson & Strickland, 2003:316);
- the elimination of unproductive and undesired layers of managers, which are making the company top heavy (Mathis & Jackson, 2002:3); or
- strategies to revive faltering businesses such as closing down or selling a part of the business, implementing cost reductions, shifting the focus of business activities etc. (Thompson & Strickland, 2003:316);

Restructuring exercises are undertaken in efforts to make the company more competitive (Mathis & Jackson, 2002:3) and are usually implemented through a realignment of functions, reallocation of resources, retrenchments or a combination of these. Dismissals that result from the restructuring process are described as dismissals for operational requirements in the LRA. Operational requirements are defined as requirements relating to the economic, technological, structural or similar needs of an employer (section 213 LRA). Dismissals based on operational requirements are regulated by two of the selected provisions, sections 189 and 189A LRA.

4.4.1 Opportunities

Section 189(5) LRA determines that an employer contemplating the dismissal of employees for operational reasons must allow the employees or their representatives the opportunity to consider and make representations about a number of issues relevant to the retrenchment (see section 189(2) and (3)). These issues include possible means to avoid retrenchments (section 189(2)(a)(i)), the reasons for the proposed retrenchments (section 189 (3)(a), alternatives to dismissal considered prior to deciding thereon (section 189 (3)(b) and information regarding the

facts that the decision to retrench is based on (see sections 189(3) and (4), read with section 16(3)).

Our courts have adopted the approach that the employer has to provide proof of a need to retrench in the form of a commercially justifiable rationale in order to prove the substantive fairness of a retrenchment. The court will not question the commercial rationale that underlay the decision to retrench unless some ulterior motive is established. In *Mamabolo & others v Manchu Consulting CC* (1999) 20 ILJ 1826 (LC) the learned judge stated that “..it is not the function of the court to second-guess the employer’s decision to retrench. It is not appropriate to intervene only because the decision taken by the employer was not the one to which the court would have come in the same circumstances.” The Labour Appeal Court confirmed this approach in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* [2000] 2 BLLR 138 (LAC) and found that the “court’s function is merely to establish whether commercial rationale underlay the employer’s decision to retrench, not to “second guess” employer’s strategic decisions”. Recently in *Insurance & Banking Staff Association & Others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC) the court found that a dismissal based on the operational requirements of the employer may pass the legislative muster by the production of a defensible plan of business restructuring. (Also see *SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC) and *Steyn & Others v Driefontein Consolidated Ltd t/a West Driefontein* (2001) 22 ILJ 231 (LC)).

This accepted approach seems to have unnecessarily limited the scope of the matters that parties to a retrenchment consultation would consult on. Grogan (2003:205) convincingly argues that the requirement that employees are entitled to suggest ways of avoiding proposed retrenchments does not find support in the approach that the employer has the right to decide on the economic considerations that lead to the decision to retrench. This criticism was also expressed in the earlier decision of *TATU & others v Spoornet* (1993) 14 ILJ 1056 (IC). Unfortunately the later decisions from the Labour Court and Labour Appeal Court are currently still followed. The accepted position was confirmed and entrenched in legislation with the inclusion of section 189A(19) with the August 2002 amendments to the LRA. This section determines that in any dispute about the substantive fairness of retrenchments that concern the dismissal of the number of employees specified in subsection (1), being roughly 10% or more of the total workforce, the Labour Court must find that the dismissed was substantively fair if:

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

Generally then the obligation to consult as contained in 189(2) is seen as nothing more than a procedural obligation and the aim thereof is deemed to be little more than reaching agreement on issues such as the number of employees to be retrenched, the timing of dismissals and severance pay to be paid (see Bendix, 2003:389, Grogan, 1993:112, Van Jaarsveld and Van Eck, 1998: 306). For management the obligation to consult may however be a golden opportunity to obtain sound practical advice on issues necessitating the proposed restructuring. If a trade union or other employee representative is truly serious about constructive consultation and apply their minds, a host of possible alternatives to retrenchment, and a host of suggestions on improving the situation without reverting to retrenchment may become available. Unions may have vast experience and may have first hand knowledge of workable solutions that may have proven successful in similar circumstances. Union officials and employees also have first hand experience and intimate knowledge of shop floor activities and may be able to guide the employer in identifying the true problem. They may very well be able to suggest a practical solution to the problem.

In *Metal & Allied Workers Union v Hart* (1985) 6 ILJ 478 (IC) the Industrial Court aptly defined the meaning of the term “consult” as being “to take counsel or seek information or advice from someone”. The commercial opportunity herein lies therein that the company is offered an opportunity to gain advice and commentary from a different perspective at no cost. Even if the consultations itself provide no meaningful insight, certain proposals may just stimulate thought among management themselves to devise a previously unexplored alternative. Restructuring is very much limited to situations where a shortcoming or problem exists that have to be addressed. The need to restructure and retrench very often also raises questions about the well-being of a company among suppliers, clients, investors and competitors alike. This opportunity embodied in restructuring provisions in the LRA may allow an enterprise the chance to avoid the need for restructuring, to implement necessary restructuring without retrenchments, retaining capacity and skills, avoiding negative publicity, avoiding the negative impact retrenchments may have on employee motivation of employees remaining behind after heavy retrenchments, the

likely improvement in employee attitudes, and the avoidance of the often expensive and disruptive retrenchment process itself.

4.4.2 Threats

As was shown above, restructuring more often than not includes retrenchments or downsizing. The value of downsizing has often been questioned. Mathis and Jackson (2002:14) believe that the long-term value of downsizing is questionable. They argue that organisational performance often does not improve markedly after a retrenchment process. A decline in operational expenses often only results from a short-term solution in the form of saving on the payroll. The writers believe that downsizing has little effect on the true determinants of performance such as products, services or productivity. Bendix (2003:399) also believes that often, natural attrition would have resolved the perceived personnel surplus over time. The learned author also argues that retrenchments may be reverted to too hastily and the company may find itself in a position where it has to recruit people again a very short time after retrenchments were effected. The writer can confirm the validity of this point of view from first hand experience. Retrenchment is often reverted to in circumstances where a short-term lay-off would, with retrospective insight, have served the same purpose in cutting overhead costs and improving cash flow sufficiently for the company to resume normal, profitable commercial activities within a few months.

Sections 189 and 189A and legal precedent on substantive fairness in retrenchment scenarios make it rather easy for an employer to defend a decision to restructure and retrench. The provisions of section 189(7) and the practice that had developed seem to have elevated LIFO (last in first out) to the clear first choice retrenchment criterium. From these situations two threats may arise. These threats relate to the effect restructuring have on employees and in that which the company loses in departing employees. During restructuring employees are often moved to different positions or even different locations but most often people are retrenched.

In terms of section 198(7) LRA, selection criteria used to identify those earmarked for retrenchment must either be agreed on between consulting parties or must be fair and objective. Where employees are represented by a trade union, differentiation on grounds other than LIFO is unlikely to be accepted as selection criterium. The threat herein lies with the fact that very skilled, knowledgeable and efficient individual employees may be lost merely because they have not been with the company as long as other less valuable employees. Fortunately our courts have acknowledged the fact that certain departures from LIFO may be justifiable due to the unique needs of the business. Special skills and other distinguishing factors may thus be

accepted as justification to retain certain individuals at the cost of others with longer service. (See *Ntangani & others v Golden Lay Farms (Pty) Ltd* (1992) 13 ILJ 1199 (IC), *Engineering Industrial & Mining Workers Union & another v Starpak (Pty) Ltd* (1992) 13 ILJ 655 (IC), *Raad van Mynvakebonde v Harmony Goldmaatskappy Bpk* (1993) 14 ILJ 183 (IC); *Manquidi & others v Continental Barrel Plating (Pty) Ltd* (1994) 15 ILJ 400 (IC) and *Jones v KPMG Aiken & Peat Management Services (Pty) Ltd* (1995) 16 ILJ 1241 (IC)).

Retrenchments or downsizing may also target employees in specific departments or areas. This may result in a decline in customer service and productivity (Mathis & Jackson, 2002:14). Employees may be instrumental in interaction with clients and the public. Retrenchment of well-known salespeople or very capable service personnel may negatively affect the quality of service that is eventually provided. A further very real threat lies in the negative effect that restructuring has on employee morale (compare Timmons & Spinelli, 2003:583). Mathis and Jackson (2002:14) show that such a decline in morale often results in uncertainty among employees, which in turn leads to and increase in resignations. In this way the organisation stands to loose continuity in the already disrupted system as well as further valuable capacity and skills. The problems caused by retrenchments with those remaining behind must then be managed, something that once again demands attention, effort and expenses that should rather have been available for application in addressing the problems that gave raise to the need to restructure.

4.5 Managing mergers and acquisitions

Sections 197, 197A and 197B LRA relate directly to mergers and acquisitions. In the process of a merger or acquisition a number of things can happen to the employees of an organisation.

They can:

- be retrenched (in which case earlier paragraphs are applicable);
- be confronted with new management and operational strategies;
- be confronted with new rules of conduct;
- be confronted with a new corporate culture;
- be absorbed into the structures of a new or different organisation;
- be confronted with the introduction of a number of new and unfamiliar co-workers and managers; and/or
- become subject to different conditions of employment.

The list above does not claim to be complete and a number of other situations are likely to come to mind to any reader.

4.5.1 Opportunities

As was discussed in chapter 3, a company or individual that takes over control of a solvent existing business or a part thereof will normally have to accept into service all of the employees involved in the that business (see section 197 LRA). This obligation is often not welcomed in practice. It seems that new owners of businesses often feel that they should be free to staff the business in a way that they deem fit and that the choice of people to employ should fall in their sole discession. These sentiments are common in a situation where no agreement to exclude a personnel takeover could be reached in terms of section 197(6), and the business is so lucrative that the prospective buyer is still willing to proceed with the transaction if a transfer of personnel cannot legally be excluded.

The transfer of earlier employment contracts may however present the new proprietor of a business with certain opportunities. These opportunities derive from the acceptance of the principle that people are important and valuable assets (Mellow, 2002:74). By being forced to take over all personnel the new owner has an opportunity to familiarise itself with the employees taken over as well as their skills and abilities. This evaluation opportunity may also lead to the new business discovering skills among employees taken over that may not just be applicable to the jobs that they are employed in, but that may be very suitable or needed in another branch or department of the company. Transferred employees may possess skills and knowledge that they had acquired during their employment with the company that is being transferred. These skills may be unique and may be of immense value to the new business, especially where the particular employee is employed in an environment that he or she is comfortable in such as the office or workshop where he or she used to work. Transferred employees bring with them intimate knowledge of the internal functioning of the particular business. By tapping into this wealth of information management may be able to get a better understanding of strengths and weaknesses of the newly acquired business. Employee knowledge and experiences may be useful to identify strengths and weaknesses that would not be evident from a study of company reports, policies or statements.

By retaining the employees of a business that is acquired or merged with, a company may have access to information and skills that would enable it to function efficiently with minimal delays.

Great commercial advantage can be gained from entrance into a specific market with all the required skills and experience at the company's disposal.

4.5.2 Threats

As with restructuring, a merger or acquisition will affect the morale of employees (Bendix, 2003:415). This possible affect on morale seem to present a significant threat to the functioning and commercial competitiveness of the company. A forced takeover of employees from the newly acquired or merged with company in terms of section 197 LRA may very well result in a clash of cultures (Thompson & Strickland, 2003:422). Even companies situated in the same geographical area and operating in the same industry may have differing values, beliefs and practices. Internal conflict confronts a manager with a definite threat that has to be dealt with expediently and efficiently. Robbins (1998:464) explains that conflict can adversely affect the effectiveness of an organisation and may further affect group functioning, productivity and ultimately the company's performance. The threat of dysfunctional conflict is not limited to a clash of cultures in merged companies only. A manager will also face the challenge of having to address different compensation packages and different terms and conditions of employment between groups of employees. Such differences will not only lead to conflict among employees, but is likely to also result in dissatisfaction toward management (Gerber *et al.* 1998:221). The manager is accordingly faced with the challenge to introduce an intervention that will address perceived disparities and will lead to a commonly accepted consolidated system. As was shown with similar initiatives in organisations such as Absa and Nedbank, such interventions may take years to implement.

4.6 **Managing empowerment**

It seems that international textbooks very seldom, if ever, uses the term "empowerment" as it is used in a South African context. The term "diversification" seems to be used in reference to initiatives aimed at increasing heterogeneity of organisations with the inclusion of different groups (Robbins, 1998:13). In this sense Robbins (1998:14) specifically refers to South African efforts to have black people appointed to important technical and managerial jobs. Empowerment as used in textbooks seems to refer to the process of putting decision-making powers in the hands of employees. For the purposes of this discussion reference to diversification in international textbooks will be deemed to be synonymous to empowerment in the South African context.

Presently in South African a very high priority is placed on addressing past social injustices. This commitment was given resounding legislative support with the promulgation of the EEA. In the preamble to the EEA it is recognised that as a result of apartheid and other discriminatory laws and practices, disparities exist in employment, occupation and income within the national labour market. These disparities are seen to create such pronounced disadvantages for certain categories of people that it cannot be redressed by simply repealing discriminatory laws. The EEA was therefore enacted to eliminate unfair discrimination in employment, ensure the implementation of employment equity to redress the effects of discrimination and to achieve a diverse workforce broadly representative of the South African community

Even with the high profile empowerment legislation and initiatives enjoy, the writer believes that this is the field where the most profitable opportunities created by labour legislation can be found. Empowerment initiatives have a profound impact on the total functioning of an organisation. Gerber *et al.* (1998:174) are of the opinion that the total culture of an organisation is to be changed and that a manager should be appointed with the exclusive responsibility of overseeing empowerment initiatives. Section 24 EEA requires that one or more senior managers be appointed to oversee the monitoring and implementation of the company's employment equity plan. Bendix (2001:438) argues that holding line managers responsible for the implementation and monitoring thereof will ensure ownership of empowerment initiatives. Maund (2001:631) also believes that diversity initiatives, which are normally seen as an HR function, must be owned by the whole organisation.

4.6.1 Opportunities

The potential financial benefits that a company may reap from opportunities arising from provisions of the SDA have already been referred to in chapter 3. Direct or immediate financial gain may however seem insignificant if the long-term benefits to be gained from ascribing to the principles embodied in the SDA are considered. The social function of the SDA in promoting improved training and education is obvious. The wish of the legislator to also provide for commercial progress and the legislator's understanding of the worth of a higher skilled workforce in commercial interaction becomes evident from the wording of the SDA. Section 2 SDA is clear about the benefits to both employees and employers that the legislator hopes to achieve through application of the SDA. Section 2(1)(a) states that a purpose of the SDA is to develop the skills of the South African workforce and in so doing to improve the quality of life of workers, their prospects of work and labour mobility improve productivity in the workplace and competitiveness of employers. Section 2(b) states that a further purpose of the SDA is to

increase levels of investment in education and training in the labour market and to improve the return on that investment.

Mellow (2002:4) believes that an enterprise should invest in its people since they are important assets that cannot be duplicated and eventually become the competitive advantage. The learned writer refers to Southwest Airlines' approach of investing in its people and its achieving great results because of the highly skilled and committed workforce it has developed. Grants payable to a business participating in development and training programmes seem to be irrelevant when sound business and managerial strategies are employed. Productivity and improved company performance is directly linked to employee skills and levels of training of personnel (Robbins, 1998:558; Pycraft *et al.* 1997:753). It is thus commonly accepted that a sustainable competitive advantage can be gained through training and skill development of employees as part of effective management (Mellow, 2002:25). Brigham and Ehrhardt (2002:12) believes that even though increased employee training adds to costs, it has substantial long term payoff in the form of increased productivity and lower labour turnover. The commercial opportunity presented by the selected provision is found in the benefits that a company may reap from aspiring to the purposes of the SDA.

Alexander Forbes will be referred to as an example of a company who has long since identified the opportunity in training and skills development. This company established a strong training and development culture long before applicable current labour legislation was enacted, but as will be shown wasted no time in latching on to the opportunities created by such legislation. Alexander Forbes believes that its human assets are its most vital resource and have confirmed a commitment to ensuring appropriate education and training for all its employees. Training is aimed at enabling employees to meet the requirements of their jobs and to allow for personal development and the attainment of national qualifications to enable employees to develop to their full potential. Alexander Forbes management is responsible for aligning all training and education programmes to help employees contribute towards achieving the business goals. Management also pays particular attention to specific training required by internal or external pressures on the business. Until June 2004, Alexander Forbes has trained almost 100% of its employees, on courses ranging from self-development to those with technical content. The group paid a Skills Development levy of over R5 million and confirms that it had received the maximum rebate (also see www.alexanderforbes.co.za).

By using structures and opportunities for employee training and skills development, a company may not only be able to better equip its people to do their jobs, it may also dramatically improve productivity and service quality. Such improvements will directly convert into improved company performance, improved competitiveness and commercial gain.

A second opportunity presented by selected provisions (sections 6 and 20 EEA in particular) that deserves reference is to be found in the benefits that can be derived from employing a diverse workforce. Diversity is often approached with fear because of the uncertainty that seems to accompany such initiatives. This fear according to Maund (2001:638) can however be negated by management use of sound management practices with emphasis on creating an environment that allows employees to relate to diversity. Creating a diverse workforce through the pursuance of empowerment policies is not only a legal obligation (see section 20 EEA), but also seems to be a moral obligation imposed on an organisation from the social environment. Mellow (2002:58) believes that business has an obligation as members of society and that diversity is necessary and desirable since it allows institutions to better serve their constituencies.

Barry Bauer of KPMG explains that the company has been pursuing diversification initiatives since prior to 1980 and that these initiatives were always regarded as a moral obligation. Recent legal requirements merely required minor action in formalising the KPMG approach. Jacques Castelein, the managing director of Tasca de Belém confirms a very similar belief as that held by KPMG. Since its conception in early 1990's Tasca's majority shareholder, Tom Castelein, insisted on appointing people representing the community of the area in which the business is situated. Tom believed it would be short sighted to maintain a predominantly white workforce and also believed that the company had an obligation to improve skills among disadvantaged communities. For Tasca the drafting and implementation of an employment equity plan was little more than a bit of paperwork. For both the abovementioned companies the single most compelling reason for implementing and following empowerment policies lies not in legislative requirements, but rather in commercial gain to be derived from such policies. Both directors interviewed emphasised the importance of having a diverse workforce to enable the company to effectively liaise and communicate with clients and the public. Cultural, language and ethnic differences among clients require a company to be able to facilitate these differences in the striving toward delivering excellent efficient service.

Many other reasons exist for companies to accept the changes that the selected provisions are aimed at achieving. Maund (2001:623) believes that the active pursuance of a positive moral issue such as empowerment allows a win-win situation between a company and its employees.

Leopold *et al.* (1999:294) argues that equity is important for competition, efficient management, better employee relations and image and that a company can gain from diversity through the benefit of multi-culturism because of exposure to wider range of ideas and a challenge on stereotypes. These arguments seem to confirm and validate the approaches followed by KPMG and Tasca de Belém.

The commercial opportunities that implementation of empowerment initiatives, as are meant in the applicable selected provisions may present seem vast. For Tasca de Belém opportunities were presented even though the practice had long since been in place. The reduction thereof to paper in the form of an employment equity plan has helped Tasca in securing very important lease agreements and even securing beneficial contracts and better prices from suppliers.

4.6.2 Threats

Sections 13(1) and 14 of the EEA provides for equal opportunities and affirmative action in the workplace. Section 20 (1) EEA is aimed at facilitating the achievement of employment equity in the workplace. A threat that these provisions may pose for an organisation was put aptly by Mathis and Jackson (2002:35) by stating that “equal employment opportunity may cause conflict”. Conflict may result in high absenteeism, high workforce turnover rates, lower productivity and can result in a decrease in the effectiveness of the organisation (Robbins, 1998:464). Commercial performance may accordingly be negatively affected by conflict arising from empowerment initiatives. Mathis and Jackson (2002:36) identify a few examples of specific problems relating to empowerment in an organisation:

- Empowerment of women has social and economic consequences because management has to be more flexible to allow for family responsibilities.
- Gender awareness has to be created in business where only men (or women only) were employed before (compare Bittel & Newstrom, 1990:459).
- Racial empowerment presents problems with language and ethnic conflict between groups.
- Appointments of disabled persons demand that health support structures and something simple as access have to be reconsidered.

Finnemore and Van Rensburg (1999:19) argue that in a society undergoing political and economic transformation, like South Africa in particular, the environment has a dynamic impact on employers and employees alike. Political issues are not easily forgotten or left at home and may have a major influence on employee interaction if this is not managed effectively.

Management will have to anticipate employee reactions to empowerment initiatives and will have to plan to overcome any resistance thereto (Mellow, 2002:58). The threat of serious dysfunctional conflict is likely to materialise if empowerment initiatives are perceived by employees to be undertaken for the wrong reasons such as mere compliance with the EEA or if employees are kept in the dark regarding management's motives. Alexander Forbes have all new appointees participate in an induction process where the company's values and ethics are communicated, in addition to being given an overview of the company and a full understanding of benefits, policies and procedures. Mathis and Jackson (2002:39) points out that training on how to manage diversity may be essential if this aspect is to be implemented successfully. The actual integration of the different diversity initiatives and policies may however be the biggest management challenge to face.

In this chapter it was shown that:

- All managers are responsible for the labour relationship between the organisation and its employees.
- Values are central to management principles and labour legislation alike.
- The obligation to consult with employee parties in the retrenchment process presents an organisation with an opportunity to access important information and advice that may affect commercial performance.
- The relative ease with which retrenchments can be affected due to the provisions of sections 189 and 189A LRA presents the threat that an organisation may too easily retrench and in so doing may lose valuable skills and knowledge without gaining any other significant advantage.
- The obligation to take over contracts of employment of all employees involved in a merger or acquisition presents an organisation with an opportunity to acquire skills and knowledge that may be converted to substantial commercial advantage.
- Empowerment provisions present an enterprise with the opportunity to gain commercial advantage by facilitating academic and professional advancement of employees and facilitating the opportunity to provide improved service to a diverse client base.
- A major threat to the performance in a company may arise in the form of internal conflict resulting from employee discontent due to empowerment initiatives.

CHAPTER 5

SELECTED PROVISIONS: A COMMERCIAL PERSPECTIVE

5.1 Introduction

The opportunities and threats identified in chapters 3 and 4 are not product-, service- or industry specific. These opportunities and threats may be relevant to any business in any industry, even though it does not seem to be applicable in case of very small businesses. It is not product related and does not directly result in cheaper production processes or improved products that would result in a competitive advantage.

In chapter 1 a definition of commerce was given and it was shown that commerce relate to selling- an/or trading activities. A commercial opportunity does not convert into an advantage and a threat does not disappear by it self. Exploiting an opportunity or avoiding a threat was shown to require deliberate planned management action. Taken on face value, it may be impossible to tell whether an organisation is complying with legal provisions or not, unless non-compliance is so gross as to attract media attention. Even a strike by employees is likely to go unnoticed by the vast majority of potential clients and the general public if it does not attract some form of media coverage. The writer believes that apart from the opportunities or threats posed by those factors as discussed earlier, these opportunities and threats may present a further opportunity through marketing. Grasping an opportunity or managing to avoid a threat has great operational value and result in increased competitiveness. The fact that steps were taken to grasp these opportunities transforms that aspect into a strength that may in turn be used to grasp further opportunities. For the purposes of this discussion it will be shown that a further great opportunity, in marketing, is presented from a successful exploitation of opportunities and avoidance of threats presented by the selected provisions. In relation to diversity, the argument in brief is that telling a diverse society how well the company manages to use diversity to serve its clients may present the further consequential opportunity from the initial opportunity.

Training, consultation with employee parties, staff development, recruitment, selection and promotion are all traditional HR responsibilities (compare Charlton, 2000:94). It is proposed that HR features or policies such as these may present a marketing opportunity.

This dissertation is based on the premise that the selected provisions may present a company with opportunities to gain commercial advantage over competitors. In chapters 3 and 4 the following opportunities were identified:

- Taking maximum advantage of training opportunities
- Consultation or employee involvement may lead to increased productivity and commercial gain.
- Attracting, developing and retaining skills lead to increased productivity, improved professionalism, better service to clients and as result, a competitive advantage.
- Catering for diverse community and different market needs through internal capabilities and diversity leads to excellence in service, better corporate image and ultimately, a competitive advantage.

The following are strengths to be developed from exploiting opportunities arising from the selected provisions:

- A well-trained, skilled and productive workforce
- A culture of consultation or employee involvement
- A diverse workforce representative of the community

The legislature is attempting to achieve positive social goals through the selected provisions. A commercial enterprise' marketing effort, by its very nature has a positive character and seeks to promote the positive characteristics of the company or its products. In keeping with this positive spirit, the discussion to follow will be focussed on further opportunities presented by the selected provisions.

5.2 People / Human capital

From the opportunities identified in chapters 3 and 4, the importance of the human element in a company's functioning should be evident. It is once again important to emphasise that people are of utmost importance in the exploitation of opportunities identified as arising from the selected provisions.

A sustainable competitive advantage can be achieved by building unique and superior core and distinctive competencies within an enterprise. A core competency refers to an organization's ability to do something well, which affects that organization's competitiveness. Core competencies will develop from strengths and capabilities that the organization possesses.

Distinctive competencies are those sought after skills and abilities that rivals are unable to match or duplicate. A company's core- or distinctive competences in turn derive directly from the skills and abilities possessed by the people in the company (Thompson & Strickland, 2003:122). From the wide definitions of core- and distinctive competencies it can be seen that such competencies can be built on just about anything. Many factors such as the sector in which a company operates, the nature of its business, the organisational and operational structure and philosophies and others can present a basis for building core- and distinctive competencies. It is suggested that the composition and utilization of the people in a company presents as powerful a tool as any for building core- and distinctive competencies.

Mellow (2002:3) discusses how Nordstrom, a prominent retailer in the USA constantly shows better profit than the market average. Nordstrom is believed to perform better because of its employees. Mellow (2002:4) believes that varied factors contribute to performance but that the human element is clearly the most critical. As with Nordstrom companies often do not have the best product, technology, marketing or other important feature, but its performance is based on having appropriate systems for attracting, motivating and managing employees. Distinctive human resources are a firm's core competencies (Mellow 2002:74).

Human capital theory proposes that people must be regarded as an investment, as with fixed and movable assets such as plant and machinery. Begg *et al.* (1987:241) defines human capital as the stock of expertise accumulated by a worker and which is valued for its income earning potential. People are deemed to be assets because they are valuable. The writer believes that it is not merely the skills vested in people that represent the real asset, but rather the package of the skill within the person. It is only through motivating and rewarding the person that the company will be able to access the full benefit of the skill at the person's command. A company has to invest in its people because they cannot be duplicated and they become the competitive advantage (Mellow, 2002:5). Kotler and Armstrong (2001: 13) refer to Southwest Airlines who had invested in its people and achieved great results. The company believes that in order for any company to work, it must see people as being central to its mission and strategy. Not only its employees are deemed thus important, but also its customers (also see Mellow, 2002:7). As such investment in the training and development of employees is seen as an investment with long term return potential. Coetzee (1988:11) rightly points out that growth is not synonymous with development and that growth without development is of little economic or social worth. Development has a ripple effect whereby the effect of improved circumstances, skills and opportunities in a specific market or economic level tend to impact on society as a whole

(Coetzee, 1988:12). As such development of individuals should remain a focal point in strategies aimed at improving an organisation, economic sector or even society in general. Investing in the development of its people equips an organisation with superior quality of human capital.

5.3 Marketing

Marketing is seen as a social and managerial process that starts long before the company even has a product to sell. The marketing activity includes the research done to access market needs, to measure the extent and intensity thereof and to determine whether a profitable opportunity exists (Hingston, 2001:11; Blem, 1995:10).

Having a superior product or service in hand does not automatically convert into profit or success (compare Dorrian, 1996:90). A need for a product or service in the market has to be identified, the product or service has to be introduced to the market and then has to be sold at a cost that is perceived as good value in the market (Hawkins *et al.* 1998:18). The marketing effort in turning a concept, product or service into a commercial commodity is thus of utmost importance (Kotler & Armstrong, 2001:6). In order to reap maximum commercial advantage from the opportunities that were identified as arising from the selected provisions, some form of publication of the company's efforts may be required, especially in the case of empowerment related opportunities. Intended clients must be informed of the relevant actions, policies or initiatives. It must be impressed on these clients what the company is doing and why this makes the company preferable over competitors. A mere reliance on word-of-mouth publication or merely enlightening each prospective client as and when they come along, will not be sufficient to allow for commercial exploitation of opportunities. Some form of active marketing, focused on the relevant actions, policies or initiatives, must be followed before commercial benefits will be realised.

5.3.1 Needs

The primary objective of any business is to make a profit (De Beer *et al.* 2003:221). The marketing effort supports this primary objective and is focused on providing customers with what they want. That which customers want is determined by what they physically require (need), shaped by culture and individual personality (Kotler & Armstrong, 2001:7).

Once a specific market need has been identified, there may be numerous ways in which to satisfy this need. A company that is able to meet an important customer need and in doing so creates

high added value or benefits may be deemed to be a high potential venture from an investment point of view (Timmons & Spinelli, 2003:93).

5.3.2 The objects of marketing

Products and services present the objects of marketing. What may serve as product or service is important when devising a marketing strategy. The very nature of the opportunities and threats discussed thus far is very much incorporeal. An important question to be considered will be; how does one market such incorporeal assets or strengths? In the marketing effort almost anything can serve as distinguishing feature to be used in attracting market share. Services and ideas, as with physical products, can be marketed (Kotler & Armstrong, 2001:7; Hawkins *et al.* 1998:18) and if these services or ideas offered by a company meet market needs better than the services or ideas of competitors, that company is assured of success. Services are defined by Kotler and Armstrong (2001:7) as any activity or benefit that one party can offer another that is essentially intangible and does not result in ownership. Hawkins *et al.* (1998:21) show that auxiliary or peripheral activities that a company perform to enhance the primary product or service, are also seen as services offered by the company. Kotler and Armstrong (2001:7) include experiences, persons, places, information and ideas as marketable products. A visit to the game reserve, attending a rock show or watching a movie is well known and commonly marketed experiences. A marketable product is more than just something that can be wrapped up and taken home. It also includes how the object is obtained and even to what extent the object appeals to the customer's specific beliefs, needs and convictions. Mellow (2002:75) argues that where the company product is a service provided directly by employees interacting with customers, employees actually are the products.

To achieve success, that which a company is marketing must better satisfy market needs than that which competitors offer. A company can differentiate its products (and itself) from competitors by providing better quality products or services, lower prices, better value for money, better customer support or any other distinguishing feature that customers perceive to be of value.

5.3.3 The market

Identification of the target market is of obvious importance when devising a strategy for exploiting an opportunity and deciding on the marketing effort to be made. The composition of the target market will depend on the nature of product or service and the use it is destined for.

Legal firms, security companies, butcheries, insurance brokers and Internet service providers have vastly different target markets to contend with. The way in which a company will reach its target market will in turn depend on who the market is. Reaching 20 million average citizens to market potato chips will require a different strategy than that required by a company wishing to sell high-speed network servers.

5.3.4 Environmental influences

The underlying needs of the market are one of the greatest determinants of market success (Kotler & Armstrong, 2001:8). These needs do not only have bearing on the purpose that a certain product or service seek to satisfy. If a common need for social upliftment and empowerment exist among individuals in the market, this need may convince people to choose a product or service or provider that promotes or supports social upliftment and empowerment. Blem (1995:55) argues that a company that knows what its customers want is in a position to decide how to satisfy these wants. Moral issues, societal norms, common values and social expectations of members of a target market are all factors that influence choice of products or services.

Kotler and Armstrong (2001:75) believe that the marketing environment also produces threats and opportunities to be analysed and accounted for in planning processes. The marketing environment includes both internal and external forces. Internal forces are those which affects a company's ability to serve its customers and include competitors and the company itself. The ability to serve customers is one of the major opportunities identified from the selected provisions relating to empowerment. Some important external forces influencing a company's ability to serve are demographic factors, legislation, economic factors, political influences, social and cultural forces, government regulation and policies and pressure groups (Hawkins *et al.* 1998:40). Kotler and Armstrong (2001:110) show that in recent times a great increase in the emphasis on ethics and socially responsible action or "doing the right thing" is evident. Welfare organisations and those who have to revert to begging to survive "market" themselves by reliance on emotional manipulation and an appeal to the target market's feeling of what is right.

The cultural environment in which an organisation operates reflects that society's perceptions and values (Kotler & Armstrong, 2001:111). Even though the ultimate goal of management is the maximisation of shareholder wealth, management has a responsibility for ethical and social considerations. An important deduction that can be made from the above is that social

responsibility is an undeniable and very marketable commodity in a company's marketing strategy.

5.3.5 Factors that affect marketing success

Personal factors such as beliefs and attitudes greatly affect buyer behaviour (Kuzwayo, 2000:56). In a society where people believe in the redressing of past social injustice and the need to empower workers, such initiatives will influence consumer choices. Dorrian (1996:152) believes that excellent companies are differentiated from average companies by:

- their ability to consistently satisfy customer needs (including the need to be served in the customer's language of choice and being served by cultural peer);
- the feeling that the company creates that it cares about its customers; and
- the fact that the company is one that people want to work for.

Examples of such companies are listed as Diners Club International, Avis, IBM and Japan Airlines.

The image portrayed by the company is important. A company's image is its personality of its business and its products or services (Hingston, 2001:58). The public opinion of the company is reflected in its image (De Beer *et al.* 2003:225). It seems that consumers tend to equate a product or brand name with the company or vice versa (Kuzwayo, 2000:109). A company's approach toward social ideals reflected in legislation plays a major role in the establishment of public opinion. In a case study involving Ben & Jerry's Homemade Inc. an ice cream manufacturing company, Thompson and Strickland (2003:C-489) found that this company's commitment to social causes were well known in the market and had played a major role in creating a very favourable company image. Hingston (2001:60) states that for a company selling expertise or rendering a service, the image of competence and credibility is important. In a market where services offered to the public by competitors are similar, a company needs to differentiate itself by way in which the services are provided, or by the company image.

The most simple yet easily understood and accurate explanation comes from Freemantle (1999:3), who believes that one critical factor accounts for some company's performing consistently better than its competitors; being liked by customers. The writer believes that the degree to which a company is liked is a function of the emotional value added to the relationship. An organisation that fails to be liked is certain to fail in motivating its employees and will therefore fail to provide required quality customer service. This argument is consistent

with my argument in that empowerment initiatives and internal fairness toward employees reflect a company trait and renders it likeable to those who value these traits. A positive emotional reaction is invoked if the customer identifies and agrees with that which the company does. Integrity is an important factor that solicits emotional liking (Freemantle, 1999:24). As with every aspect of human life, that which one group of people may find likable may be intensely disliked by another group. A good knowledge of the market will enable a company to use any particular likeable trait to its best advantage in markets where such a trait is highly valued. It is quite possible that certain markets (whether defined by geographical location, economic status, race, religion or whatever parameters) may not find any trait that a company has to offer of value. Management will have to consider its options in this regard and may decide to ignore these markets or to develop a mechanism to penetrate such markets.

5.4 Marketing opportunities arising from selected provisions

In the discussion thus far, as with all the marketing textbooks referred to during research, the marketing concept was seen in the context of a consumer target market. The writer believes the marketing effort required to reach and influence investors or potential investors to be as great. Successfully marketing the company to investors may require a far more comprehensive effort than marketing to consumers. Investors are as concerned with the mechanics of the company such as management and internal policies as they are with a good product or service. Investors main concern is not necessarily the quality of the product or service but much rather the returns on investment they can expect. Being able to market the company to investors is crucial since investors are the source of finance required for growth.

For consumers the threats as identified from the selected provisions may be of passing interest. For investors however the commercial threats of strike action, loss of productivity, decreased efficiency, loss of man-hours, penalties and fines incurred, forced changes in structures and policies, loss of expertise, poor employee motivation, internal conflict and employee uncertainty are of great concern. Management's ability to avoid these threats may not be such a major consideration among consumers and may not be reflected in the product or service offered. These aspects are however of great concern to investors and the commercial opportunity lies therein that investors will regard such an avoidance of threats as a very positive indicator of management's competence and the investment potential of the business.

Opportunities arising from selected provisions identified earlier such as a better trained and productive workforce and improved customer service are of importance when considering

marketing strategies to be employed in attracting customers. In the next part of this chapter the focus will be on commercial opportunities in marketing arising from those opportunities identified from selected provisions.

5.4.1 A well-trained, skilled and productive workforce

The importance of the “right team” is professed by many successful entrepreneurs and academics alike (Timmons & Spinelli, 2003:99; Robbins, 1998:303). Turner and Giles (1989:95) believe that a well-chosen group displaying high degrees of commitment and cooperation delivers superior results. Charlton (2000:9) argues that the single best predictor of overall excellence is the ability to attract and retain the right people. The people in a company are the marketing instruments through which the very important company image is conveyed to customers who interact with these employees (Hingston, 2001:61)

The opportunity identified in retaining skilled and experienced employees during restructuring of operations or in event of a merger or acquisition may be a contradiction of many of the teachings on new venture creation or entrepreneurship. Many authors and practitioners seem too hasty and willing to revert to retrenchments in approaches of “getting in and cleaning up”, “getting rid of excess baggage”, “trimming the fat” and many more (Cummings & Worley, 2001: 280; Timmons & Spinelli, 2003:588). Such approaches may be necessary to resurrect the dead as alternative to total company closure, but in an economically active enterprise, even in times of difficulty I believe the retention approach is preferable. Apart from the practical benefits to be gained from using the opportunity to bridge economic low tides by training employees and receiving grants for training during such times, the writer believes the selected provisions also provides a marketing opportunity. The writer further believes that a significant opportunity exists to build a positive image on having a policy of training rather than retrenching.

Robbins (1998:557) warns against the threat of skills becoming obsolete and losing touch with market development and client expectations. He states that competent employees do not remain competent forever since skills can deteriorate or become obsolete. Intensified competition, technological changes, increased productivity requirements and other influences require continuous employee training.

The opportunity to gain advantage from collecting and retaining skills was shown in chapter 4. Internal service quality refers to the quality of the work environment as experienced by employees. In that which Kotler and Armstrong (2001:319) terms the service profit chain the

effect that employee training has on company performance is illustrated. By implementing superior employee selection and training policies, the quality of the work environment is ensured which results in satisfied and productive employees. By training people to be better at what they do, a company enable them to provide better service to clients. More effective and efficient customer service results in satisfied and loyal customers, which ultimately leads to superior firm performance and commercial gain (compare Charlton, 2000:18; Meyer & Botha, 2000:416). Competitive advantage can be gained through improved employee skills because of increased productivity and improved professionalism. Of course training is not the only factor relevant to productivity and employee motivation, remuneration and other circumstances must also be conducive thereto.

A very good example of the exploitation of commercial opportunities arising from the selected provisions relating to marketing can be found in the approach followed by Alexander Forbes. In its published company profile Alexander Forbes proudly states that in the company, opportunities and benefits exist for all. Such opportunities and benefits are professed to exist in the form of growth of the company by expansion into government, parastatal, NGO and union markets. The company further states that, in terms of procurement, Alexander Forbes will become a more favoured service provider due to its Black Economic Empowerment credentials and that, internal transformation will be maintained through continuous recruitment, development and retention of talented black individuals at all levels of the company. The growth of the business, according to the publication, will also ensure that current employees are accommodated in the future of Alexander Forbes (see www.alexanderforbes.co.za).

From the above the importance of a well-trained skilled and productive workforce is evident. As practical examples of how training improves service to customers and serves to build corporate image Tasca de Belém, KPMG and Alexander Forbes can once again be referred to. All of these companies are committed to employee training initiatives and spend significant amounts of time and money in training employees to ensure better service to clients.

5.4.2 A culture of consultation or employee involvement

Due to the great power and influence that South African trade unions have and because of much media attention and government initiatives, members of society in general have become sensitised to employee participation in management decisions in companies. Companies like the Altron Group have committed itself to “promote a climate which encourages its employees to reach their maximum potential and to provide a shift from prescriptive to a more participative

management style environment". Altron refers to their participative approach in its marketing material (www.altron.co.za). PSG Online states that "our company's strength is in its people" (www.psg-online.co.za), Be-Tabs Pharmaceuticals "believes the company's strength is in its people" (www.be-tabs.co.za) and Sithole Inc professes that "our greatest strength lies in our people" and they have invested substantial resources in training our people to excel (www.sitholesa.co.za). De Beer *et al.* (2003:230) convincingly argues that a business has a social responsibility toward those responsible for its success, including both employees and consumers. As was shown above, doing the right thing greatly influences the company's image in consumers' eyes and affects consumers' choice of products or service providers.

The value of a motivated workforce was shown above, and employee participation is but a further factor affecting motivation. Employees who feel empowered (in the participative-, and not in the racial sense) perform better (Turner & Giles, 1989:95). The reasoning remains the same: If a company listens to its employees, good communication will result and employees will feel empowered. Because of this improved sense of worth employees become more committed and more productive. This in turn leads to better customer service, a better corporate image and ultimately better commercial gains.

5.4.3 A diverse workforce representative of the community

As with skills development and employee participation the legal obligation to promote diversity in the workplace is also seen as the right thing to do. Apart from being a social and legal obligation diversity is also necessary for continued organisational success (Mellow, 2002:52). Freemantle (1999:211) believes that the first hurdle to superior customer service is to recruit the right people. The right people are skilled, knowledgeable and experienced, but more importantly, have the personal traits that appeal to customers. Being able to emotionally relate to customers is important. The author believes that, as Tasca de Belém and KPMG shows, people relate emotionally to people of same cultural, racial or language heritage. Barry Bauer tells of the loss of a major black client when KPMG merged with a black firm of accountants. The client's response was to move its business to a smaller black owned company, rather than entrusting it to the multi-national giant, stating as reason the belief that only a black accounting firm would be able to understand another black firm's business.

Being able to cater for a diverse community with diverse needs through internal capabilities and diversity amounts to service excellence, which will convert into a competitive advantage. The

public and customers demand that staff understand them and their particular needs (Kuzwayo, 2000:57). Consumer behaviour is very much affected by cultural factors (Kotler & Armstrong, 2001:172) and shifts in cultural values are similarly reflected in consumer behaviour. Cultural values and beliefs affirm what is deemed to be desirable and accordingly it is of utmost importance that the consideration of the value systems of the target market receives careful consideration in the marketing effort (Hawkins *et al.* 1998:80). Kuzwayo (2000:63) sums up the situation by stating: “if you want us to be interested in your product, you must be interested in us. Know our traditions, know our lifestyle, know our do’s and don’ts and know our sensitivities.”

Marketing is influenced by culture and values, but culture and values are also influenced by marketing (Hawkins *et al.* 1998:40). Preferences for products or services of specific brands or companies are seen as definitive of a person’s personality (Kuzwayo, 2000:55). Socially, the company or brand one supports is seen as an indication of one’s personal beliefs. Culture is the most difficult and most crucial thing to change (Robbins, 1998:651; Cummings & Worley, 2001:508). The cultural environment reflects society’s perceptions and values (Kotler & Armstrong, 2001:111). Legislation is founded and reflects society’s values. Diversity in the workplace has come to be expected by society. In reflecting this social expectation in the composition of the workforce, a company will gain much public support and improve its image. Once again the opportunity from a selected provision proves to be a double opportunity if marketing value is considered.

5.5 Implementation

Succeeding in a competitive environment requires an organisation to provide more value to customers than its competitors are able to (Hawkins *et al.* 1998:11). Success comes from performing better than competitors in the eyes of clients. A successful marketing strategy requires a company to analyse competitors and the target market, to plan the marketing effort and to devise strategies and then to implement the marketing strategy (Kotler & Armstrong, 2001:69). A service strategy is an important part of the overall marketing strategy. A company must have vision of what it wants to achieve and must be able to communicate this vision to staff and customers. The company must know what goes on in the marketplace and must know where it is and where it wants to be. To gain a competitive advantage the company must develop a service strategy within its plans (Blem, 1995:67). By including the HR policy, which in turn includes training, participation and empowerment policies, as part of mission statement and

vision a company will ensure that the principles involved become part of the company goals and also part of its strategies.

The societal marketing concept is a marketing approach based on the belief that an organisation should determine the needs, wants and interests of target markets and then deliver the desired satisfaction of these needs, wants and interests more effectively and efficiently than competitors in a way that maintains or improves consumer and society well-being (Kotler & Armstrong (2001:20). Using television advertising as an example, one finds that marketing drives for companies like Edgars, Eskom, Shell, Telkom, banks, and many others focus heavily on the social responsibility initiatives that these companies support in attempts to gain market share.

Implementing a marketing strategy to exploit opportunities presented by selected provisions may require a different approach from a marketing drive to promote a specific tangible product or even a professional service. Companies often have to use big and expensive marketing campaigns to raise awareness of its product or services (Kotler & Armstrong, 2001:349). As far as the principles and ideals underlying the selected provisions are concerned, government, political movements and the media have been sensitising people for a long time. I believe that every consumer in South Africa is familiar with the negative nature of retrenchments, the desirability of employee participation and the obligation to establishing workplace diversity. A large chunk of the total theoretical marketing effort had thus already been accounted for. Marketing initiatives offering these ideals as part of a company's product or services package are likely to immediately sound right to consumers. Kuzwayo (2000:69), in another of his very insightful comments advises that; "the signs are there for all to see. Use them."

As with any other aspect of commercial interaction, the selected provisions may present lesser opportunities to one company than to another, depending on the situation, environmental factors, the specific company, methods of execution and other factors. Due to the differences in market sectors, company size, services rendered, target markets and other considerations, the opportunities from selected provisions as discussed above seem much more valuable to Alexander Forbes than to KPMG and most valuable to Tasca de Belém. For Tasca the implementation of official policies and the publication of information regarding empowerment initiatives have realised substantial commercial benefits. Jacques Castelein feels that Tasca had become the dining choice of many political leaders, ambassadors to Portuguese speaking countries and other high profile customers because of these initiatives, as much as the quality of its food and service. As a customer to others Tasca has recently adopted the policy of requiring

that effective empowerment policies be in operation with a potential supplier before using the particular entity as supplier of choice.

For Alexander Forbes opportunities still exist in pursuing empowerment initiatives and it still uses its commitment to these initiatives in marketing efforts. Employee participation, training and black empowerment initiatives receive very detailed and high profile exposure in marketing efforts (see www.alexanderforbes.co.za). Effective and dynamic training, employee participation and empowerment policies are par for the course for KPMG and its competitors. Clients accept such initiatives as a given and are not impressed by such policies any more. Barry Bauer points out that the absence of such policies or a watered down effort may in fact pose a severe commercial threat to the company since its customer base includes the South African and other governments as well as many multi-national companies that expect total commitment to such initiatives as a minimum requirement.

5.6 Threats

As with any other aspect of commercial interaction, the selected provisions may easily present a threat rather than an opportunity, depending on the situation, environmental factors, the specific company, methods of execution and other factors. According to Kuzwayo (2000:100), taking for granted that merely because a company is doing the right thing and has a diverse labour force to communicate with cultural diverse customers, it will be successful, is big mistake. Other factors also still need to be addressed. The product, for example, must still be good and well priced. Selecting the right person to do a job is also still very important. Just having a black person because the target market is mainly black will not succeed. The person must be street smart and must understand the customers. Ideas and theory means nothing if the individual employee cannot use it and cannot establish a repertoire with customers (Kuzwayo, 2000:57).

Extreme political correctness will sink any attempt at using this opportunity (Kuzwayo, 2000:136). From his ample personal experience and research findings the learned author also points out that there is a line between respect, as represented by correctness, and paranoia about being correct. Over correctness is tasteless and smacks of insincerity.

The threats of losing skills, internal conflict and falling foul of the law still remain, irrespective of marketing strategies and past successes. Rapidly changing technologies and market expectations as well as constant changes in legislation require continued management efforts in identifying, addressing re-evaluation and monitoring of the commercial environment. Threats may still

materialise in the form of costs, poor service, poor productivity, poor image, negative publicity or many other forms due to sudden environmental changes.

A further example of a threat that may arise from a selected provision, irrespective of earlier successes in exploiting opportunities and even successful marketing initiatives, comes in the guise of mergers and acquisitions. Mergers and acquisitions are often regarded as important strategic options to stimulate growth and are common occurrences in the market. This commercial challenge and aspiration can easily become a great threat if not managed with great care. Charlton (2000:94) refers to statistics showing that 75% of mergers in the US in 1998, costing \$2,5 billion, failed, mainly due to cultural differences.

In this chapter it was shown that:

- Further great opportunities exist, in marketing, resulting from a successful exploitation of opportunities and avoidance of threats presented by the selected provisions .
- People are of utmost importance in the exploitation of opportunities identified as arising from the selected provisions.
- In order to reap maximum commercial advantage from the opportunities that were identified as arising from the selected provisions, the company's efforts must be marketed.
- The marketing effort will be influenced by needs, the identified objects of marketing, the market itself, environmental influences.
- Specific marketing opportunities arising from selected provisions relating to employee training, employee involvement and workforce diversity were identified and discussed.
- The implementation of marketing strategies to exploit further opportunities arising from selected provisions was discussed and actual results achieved by a number of companies were shown.
- Finally it was shown that changes in the environment and other factors may pose new or renewed threats arising from selected provisions.

CHAPTER 6

CONCLUSION

As the title of this dissertation indicates, the writer believes that a number of commercial opportunities can be found in provisions of labour legislation. A commercial opportunity can present itself in a number of forms such as financial benefit, improvements in productivity and service, better image and market profile, better contracting opportunities and many other. Similarly, threats to commercial prosperity can take on numerous forms such as legally imposed sanctions, disruptions in production, employee dissatisfaction and the loss of resources.

People, as company assets, and society's commitment to pursue diversity and empowerment, come hell or high water, are two of the most crucial management considerations when devising corporate strategy. In this way empowerment has been elevated to more than a mere aspiration but to a generally accepted ideal social norm and a minimum expected employment initiative. To the minority part of society who had not embraced the ideal, it has been elevated to at least the level of a necessary evil. The truth is, everybody, employer, employee and unemployed are aware of the ideal and should at least have accepted it as the harsh reality.

Threats and opportunities should be identified by management during the all-important planning processes. Since threats and opportunities are factors confronting a business from the environment in which it operates, management should be very aware of the environmental influences relevant to the business.

Without an understanding of the true nature of threats and opportunities and responsive strategies based on this understanding, opportunities will be lost and threats are likely to become assaults on the commercial prosperity of the company. Legislation and in particular, labour legislation in South Africa, is an important and potentially enormous environmental influence that affects every business in South Africa.

Maximising profit by establishing a sustainable competitive advantage is the main aim of any commercial enterprise. The identification of opportunities and threats is but an early step in realising this ultimate goal. An initial mission and vision statement serve to give management direction in its planning and a clear understanding of all relevant factors enabling management to devise a corporate strategy. A legal consideration of certain relevant selected provisions from

labour legislation serves to highlight the dynamic and complex nature of such provisions and also serves to show opportunities and threats may arise from the juristic interpretation thereof.

HR management is an integral part of the total management effort in a company and is regarded as an important consideration in drafting company strategy. HR policy is greatly affected by labour legislation and as such the importance of taking cognisance of relevant legislation in the strategising and planning activities is evident again.

Depending on the unique circumstances affecting any business at any time, potential commercial threats and opportunities may emerge from any number of legislative provisions and may be presented in many ways. Sections 189 and 197 LRA regulating retrenchments and mergers and acquisitions, sections 5 and 6 EEA aimed at addressing unfair discrimination, sections 13(1) and 14 EEA focussing on equal opportunities and affirmative action, section 20 (1) EEA aimed at achieving employment equity and introducing employment equity plans, Schedule 1 to the EEA listing fines for contraventions of the EEA, sections 2(1)(a) and (b) SDA promoting personal, social and professional improvement of employees through training and Regulations 7 & 8 issued in terms of the SDA providing for financial assistance to employers that actively participate in skills development activities, are all provisions that had been identified as likely to affect many South African businesses. The selected provisions have legalistic implications as well as managerial- and commercial value.

Achieving corporate goals and steering a company toward commercial prosperity is clearly the task of management. All managers in the organisation, irrespective of their individual functional responsibilities, are responsible for the labour relationship between the organisation and its employees.

People play the central role in all corporate functioning and are also the source and beneficiaries of social- and business norms and values. Ethics and values are central to management principles and labour legislation alike. Managers, non-managerial employees, customers and society in general are all participants in the social process of creating and setting norms, values and expectations affecting the functioning of businesses functioning in such a society. The centrality of social norms and values to both business ethics and labour legislation presents an opportunity to exploit society's positive sentiment toward entities that promote and further social norms and values. In South Africa so much emphasis is put on empowerment and equity

that a commitment to these initiatives may present a business with an opportunity to gain a competitive advantage over competitors.

Sections 189 and 189A LRA present management with an opportunity to access important information and gain important insight that may affect commercial performance through the prescribed process of consultation. This provision also poses a threat to a company's continued commercial welfare or potential commercial prosperity by providing a mechanism for easy retrenchments. Due to the ease with which retrenchments may be affected, retrenchments are too easily reverted to as a cost cutting initiative resulting in a loss of valuable skills and knowledge without gaining any other significant advantage.

The obligation to take over contracts of employment of all employees involved in a merger or acquisition, as contained in sections 197 and 197A LRA, presents an organisation with an opportunity to acquire skills and knowledge that may be converted to substantial commercial advantage.

Empowerment provisions present an enterprise with the opportunity to gain commercial advantage by facilitating academic and professional advancement of employees resulting in increased employee satisfaction and productivity and ultimately culminating in improved customer service to a diverse client base and a sustainable competitive advantage. A major threat to the performance in a company may arise in the form of internal conflict resulting from employee discontent due to empowerment initiatives.

Perhaps the most subtle but significant opportunities arising from the selected provisions may lie in marketing. In using the common social identification with values entrenched in the selected provisions, blended with an understanding of good business practices and market expectations, marketing may be used as a powerful tool to sustained competitive advantage and commercial gain. Specific marketing opportunities arise from selected provisions. These opportunities relate to employee training, employee involvement and workforce diversity. Alexander Forbes, KPMG and Tasca de Belém are three dynamic companies prescribe to the spirit of fairness, empowerment and prosperity embedded in labour legislation. These companies have achieved successes and derived commercial benefit from avoiding threats and exploiting opportunities in labour legislation, especially the selected provisions relating to training and empowerment.

These companies, to varying degrees of success, have also employed marketing strategies to exploit further opportunities arising from selected provisions.

The unique situation each business finds itself in will determine whether a given situation presents an opportunity or a threat to the business, how significant the threat or opportunity is or whether the situation even affects the company at all. Any given set of circumstances will affect different organisations differently. That which may pose an enormous threat to the commercial welfare of company X may be irrelevant to company Y and may be a once in a lifetime opportunity to company Z.

In chapter 5 above reference is made to the opinion held by Kuzwayo (2000:100) that believing merely because a company is doing the right thing as far as empowerment goes, it will be successful, is a big mistake and that other factors such as product quality and price still need to be addressed. The writer believes that he is only partially correct.

Government tenders and many projects seem to be awarded purely on the discriminating factor that a company tendering for the project has a black empowered ownership. The result of such a policy is that black empowerment companies with nominal skills and resources have a distinct advantage over highly skilled well-established companies that do not actively support black empowerment. In competing for lucrative government tenders a company boasting a black empowerment policy accordingly has no other marketing to do. The sustainability of an advantage gained through the exploitation of empowerment provisions also seems beyond question. In a recent statement by the Labour Minister, Membathisi Mdladlana (2004) honourable minister confirmed the government's position that affirmative action was here to stay. In the *Grutter v. Bollinger* (no further reference found) matter, which served before the United States Supreme Court on 23 June 2003, this court also voiced its support for affirmative action (World Socialist Web Site, 2003). If affirmative action in the USA is still deemed necessary and is still enforced after so many decades it seems highly unlikely that government policy in South Africa will change in the near future.

Due to the multi disciplinary nature of the research undertaken in this dissertation, very few literary works focussing on this theme exists. I believe that the contents of this dissertation may be helpful to some as it may be of no interest to others. Since management is an integrated function affecting every aspect of corporate functioning and in turn being affected thereby, I believe that a need exists for as much research as possible into the practical mechanics of

marrying different management functions and incorporating specialist knowledge in an early stage of corporate planning. Many opportunities to establish a substantial sustainable advantage may be found and many serious threats may be avoided by employing such a multi-functional, multi-disciplinary approach in corporate planning.

The research objectives of this dissertation was stated as being:

- To show that SA labour legislation creates an environment in which opportunities and threats exist that may either help a business gain a significant competitive advantage or severely restrict the progress of a business' efforts; and
- To show that the nature of labour legislation is such that it may create the opportunity to market the HR component of an enterprise, and to gain real competitive advantage as a result of HR policy, irrespective of the product, services or sector in which the enterprise competes.

The writer is satisfied that the research objectives of this dissertation were achieved through a discussion of the theoretical principles involved, a consideration of literature and research into practical execution in practice.

Research should be constructive and beneficial in nature in the writers' opinion. Further research on topics related to the theme of this dissertation will serve to highlight positive aspects in labour legislation and will assist in eliminating an often very negative perception of the economic sensibility and value of labour legislation in South Africa. Business in general, the national economy and society may all benefit greatly from a more positive view of labour legislation and labour relations. Any contribution that research can make to facilitate such an increased positive sentiment must be welcomed.

Commercial entities operate in a very dynamic environment in which legislation and conditions constantly change, often at a very rapid rate. Persistent research will accommodate such changes and will provide relevant commentary and insight on current issues. In a song by the metal rock band Megadeth, the group very aptly claims that "yesterday's answers have nothing to do with today's questions".

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