A CRITICAL ANALYSIS OF THE EMPLOYEES' RIGHT TO STRIKE AND REPERCUSSIONS FOR PARTICIPATING IN AN UNPROTECTED STRIKE: INCONSISTENCY ON SELECTIVE RE-EMPLOYMENT.

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ABSTRACT

The study will analyse the legal position of the right to strike and the consequences of participating in an unlawful strike. The study will provide a brief practical implication of employees dismissed for participation in an unlawful and/or unprotected strike and the employer's right to reemploy any employee dismissed for a misconduct relating to unlawful and/or unprotected strike.

The study will further make a brief comparison with the labour law position relating to strikes in the United Kingdom ("UK"). At the end provide recommendations on how the law on participation on unlawful and/or unprotected strikes and reemployed of employees dismissed on misconduct relating to participation in an unprotected strike can be developed and improved.

DECLARATION BY SUPERVISOR

I, Adv. Lufuno Tokyo Nevondwe, hereby declares that this mini-dissertation by Mr. Thukwe Solly Mmakola for degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

Signed 

Date 3 February 2022

Adv. Lufuno Tokyo Nevondwe

DECLARATION BY STUDENT

I, Mr. Thukwe Solly Mmakola, declare that this mini-dissertation for the degree of Masters of Laws in Labour Law in the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me for degree at this or any other university, this is my work in design and execution and all material contained herein has been duly acknowledged.

Signed 

Dated 3 February 2022

Mr Thukwe Solly Mmakola

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DEDICATION

This work is dedicated to the following people:

1. To my parents, Masese Phillip Mmakola and Phaswane Evelyn Mmakola for their financial, social and emotional support throughout my life more in particular for the support on my studies.

2. To my family at large, my sisters and brothers and my daughter Neo Moso Mmakola may this work inspire confidence in you, that the sky is the limit and the sky has never limited anyone you can still go beyond the sky.

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LIST OF ABBREVIATIONS

BCEA – Basic Conditions of Employment Act

CC – Constitutional Court

CCMA – Commission for Conciliation, Mediation and Arbitration

ILO – International Labour Organisation

LRC – Labour Relations Act

LAC – Labour Appeal Court

LC – Labour Court

NEHEWU – National Education, Health and Allied Workers' Union

NUM – National Union of Mineworkers

NUMSA – National Union of Mineworkers of South Africa

PER/PELJ – Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad

SABC – South African Broadcasting Corporation

SACTWU – South African Clothing and Textile Workers Union

SCA – Supreme Court of Appeal

TAWUSA – Transport and Allied Workers Union of South Africa

CHAPTER ONE - INTRODUCTION

1. Historical Background of the Study

Workplace dispute between employers and employees is inevitable, with employers having more economic power over employees, strike is the most effective bargaining tool employees invoke to demonstrate their concerns at workplace.[1] In addition, according to the Constitutional Court in the case of *National Union of Mineworkers v Bader Bop*, a workplace strike serves not only as a bargaining tool, but also as a mechanism that balances economic power between employers and employees so that employers do not abuse their economic power and exploit employees.[2] Therefore, many States have been conscious about the need to protect employees that engage in a strike and the right to strike has been widely recognised even in the international perspective, with the International Labour Organisation("ILO") attempting through its Convections to facilitate how member states should regulate their respective labour laws.[3]

The Ex Parte: Constitutional Assembly case is the ground laying precedent with regard to the incorporation of the right to strike in South African Constitution, 1996, whereby the Chaskalson J concurred with the Constitutional Assembly's inclusion of the employee's right to strike in section 23(2)(c) of the Constitution, which states that every worker has the right to strike.[4] Section 23(2) of the Constitution, together with the ILO Convection 87[5] thus had a vital influence to the South African labour statutes[6] to provide for a comprehensive

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[1] Subramanien D.C and Joseph J.L 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and the possible factors for consideration that would promote the objectives of the LRA' (2019) *PELJ* 6.

2. Also see, the *Chairperson of the Constitutional Assembly Ex Parte: In re certification of the Constitution of the republic of South African* 1996 4 SA 744 (CC) para 841A (Hereinafter referred as *the Ex Parte: Constitutional Assembly)*.

[2] *National Union of Mineworkers of South Africa v Bader Bop* (2003) 4 ILJ 305 (CC) para 307C, (Hereinafter referred as *NUMSA v Badar Bop*).

[3] Gernigon *et al* 2000 *International Labour Organisation* 11.

[4] *Ex Parte: Constitutional Assembly* para 841A-C.

[5] C087 – Freedom of Association and Protection of the Right to Organise Convection, 1948 (No.87).

[6] Labour Law statutes such as the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act

labour regulations and advanced protected right to strike for South African employees who engaged in a lawful (or protected) strike.

Therefore, employees that participate in a protected strike in South Africa are protected against many harsh decisions such as dismissal and unfair labour practices by their employers.[7]

Since employees have the right to strike, such right is limited to the extent that the exercise of the right to right to strike may not be exercise beyond the bounds of the law and parameters the employer and employee may consent to when engaging in a strike. It is plainly clear that participation in an unlawful strike can have severe consequences and in certain instances employer can impose harsh sanction such as dismissal.[8]

The issue arises when employers after dismissing employees that participated in an unprotected strike and later decides to offer re-employment to some employees but to the exclusion of other employees who as well participated or were dismissed for same reason i.e., participation in an unprotected strike. This kind of conduct by employers is called "selective non-employment" and according to the case of *South African Clothing and Textile Workers Union v Filtafelt (Pty) Ltd* this kind of conduct of employers amounts to arbitrary and discriminatory practice[9] as in the case of *Chemical Energy Paper Printing Wood and Allied Workers Union v Mentrofile (Pty) Ltd* the court emphasised that employees that have committed the same kind of misconduct must be treated in the same manner.[10]

Furthermore, an employer's conduct to offer re-employment to some employees and refuse to re-employee others after when such employees were all dismissed for committing the same kind of misconduct does constitute unfair

[7] Section 67 of the Labour Relations Act 66 of 1995.
[8] Sections 64, 65, 67 and 68 of the Labour Relations Act 66 of 1995.
[9] *South African Clothing and Textile Workers Union v Filtafelt (Pty) Ltd* (JS26315) [2017] ZALCJHB 483 para 66 (Hereinafter referred as *SACTWU v Filtafelt case).* See also, *Food and general Workers Union v Design Contract Cleaners (Pty) Ltd* (1996) 17 ILJ 1157 (LAC) para 1166A-G.
[10] *Chemical Energy Paper Printing Wood and Allied Workers Union v Mentrofile (Pty)* (2004) 25 ILJ 231 (LAC) para 35.

dismissal in terms of section 186 (1)(d) of the Labour Relations Act (LRA)[11]. One major concern is that the employer's decision to offer re-employment of other employees and refuse to re-employ others that have been dismissed for the same misconduct does constitute dismissal but just not unfair dismissal on its own. This is due to the fact that inconsistency is an element of fairness in a disciplinary hearing or process and with that been said, every case will be decided on its circumstances.[12]

Furthermore, an employer can justify the reasonableness of his/her decision that led to inconsistency. With every case dealt according to its own merits without any well-established guideline to assist courts to assess the circumstances of each case also leads to inconsistency on judicial precedent. *In the TAWUSA obo MW Ngedle v Unitrans Fuel and Chemical (Pty) Limited*[13] the court had to consider its implications on the rights of employees to participate in a strike. It implicates whether the strike was protected and, in particular, whether the inclusion of impermissible demands with a permissible demand converts a protected strike. The court delivered descending judgments on whether or not the employer was correct in imposing a dismissal as an appropriate sanction.

This research will examine the system of dismissal for participating in an unprotected strike. This dissertation will elucidate amongst others the following, Firstly, the rights of employees, i.e., right to strike. Secondly, the consequences of employees' participation in an unprotected strike and Lastly, analysing court's decisions when adjudicating matters concerning employer's inconsistency when deciding to re-employ and/or not re-employ some of its former employees.

2. The Statement of the Research Problem

Legal matters relating to consequence management of employees participating in an unprotected strike are not new in South Africa. A number of case law

[11] Section 186 (1)(d) of the LRA states that "an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another". /.
[12] *Minister of Correctional Services v Mthembu* (2006) 27 ILJ 2114 (LC) para 9.
[13] *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited [2016] ZACC 28.*

deals with this dispute almost on daily basis. Employers react differently, in certain instances contrary to the prescripts and ethos governing labour relationships, when imposing a dismissal as a sanction when disciplining employees who participated in an unlawful strike. The courts in certain instances delivers conflicting judgments when dealing with dismissal relating to participation in an unprotected strike. In most cases certain employers use this as a tool to dismiss employees and at later stage re-employ some of the employees to the exclusion of the other. Therefore, the employer's unfairness when offering re-employment to employees that have been dismissed for the same kind of misconduct will also be discussed.

Courts decide every matter on its own merits and the courts have a duty to assess the merits when adjudicating these kinds of matters and make an appropriate finding. The issue is that is there is a lack of guidelines to assist courts when assessing the circumstances whenever matters relating of selective re-employment. The lack of the said guidelines has led to courts being inconsistent when adjudicating legal matters of selective re-employment when the employers have decided to offer re-employment to some employee and not others. This inconsistency mainly prevails in cases with similar or close related circumstances heard by different courts and one court orders reinstatement of all employees and the other court confirms dismissal of employees that have not been offered re-employment.

3. Literature Review

The literature of this study will focus on the employee's right to fair labour practice and right to strike entrenched in both the Constitution of South Africa and Labour Relations Act. In addition, the core focus will be issues related to selective re-employment after dismissal due to participation in unprotected strike and also the manner in which courts adjudicate matters related to selective re-employment. Moreover, it will compare South African legal position and the legal position in Canada, looking at both differences and similarities, and which lessons South African can learn from Canadian legal position.

Both the right to fair labour practice and the right to strike have be entrenched in section 23 of the Constitution. Section 23(1) of the Constitution states that everyone has the right to strike while section 23(2)(c) states that every worker

has the right to strike. The two sections are the foundation of the legislative right to strike envisaged in section 64(1) of the LRA, which states that, every employee has the right to strike. According to Subramanien and Joseph, there are three elements that constitute a strike with are, stoppage of work, undertaken by employee and with aim to resolve a matter of mutual interest between employees and their employer.[14]

According to Gernigon employees may embark on a strike with their workplace union in order to promote and protect their social and economic interests.[15] Section 67 of the LRA makes it clear that for employees to be safe from dismissal when engaging on a strike, they should engage on a strike that is compliant with LRA hence they will be immune to dismissals.[16] In terms of section 68, if employees engage on a strike that is not in compliance with the LRA, they are not protected and may be dismissed by their employer. More often than not employers will after have taken a decision to dismiss employees who participated in a strike take a decision to re-employ them. The employer in doing so turns to avoid employees who in his view a problematic.

Thus, an employer may select to re-employ some employees and refuse to re-employ other employees among all employees that got dismissed due to participating on unprotected strike. Such conduct by an employer is called "selective re-employment". According to Section 186(1)(d) of the Labour Relations[17] when an employer dismisses employees for the same or similar reasons and has offered to re-employ one or more of them, but has refused to re-employ another it constitutes a dismissal. A selective re-employment has been challenged mainly in terms of section 186(1)(d) stated above and thus, has led to a number of court decisions on whether or not such conduct is fair and if not what could be the appropriate remedy in the circumstances.

Van Zyl J ruled in the case of *Minister of Correctional Services v Mthembu* that an employer's inconsistency on its own is not a rule but rather element of fairness when an employer offers to re-employ other employees while not doing the same to others, thus the court will decide every case based on its

[14] Subramanien D.C and Joseph J.L (2019) *PELJ* 6.
[15] Gernigon B, Odero A and Guido H, 'Principles concerning the right to strike' (2000) Vol.137 (4) International Labour Organisation 11.
[16] Labour Relations Act 66 of 1995.
[17] Act, 66 of 1995

circumstances.[18] The issue caused by this precedent is that deciding every case without well-established guidelines often lead to inconsistency in court's decisions within the same domestic legal system. This lack of guidelines is the main cause of inconsistency in regard to decision by the courts when adjudicating cases involving selective re-employment by employers who are alleged to have acted arbitrarily and thus, unfairly.

The existence of this inconsistency can be substantiated by the decision in the case of *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group* whereby the court ruled that due to the employer's selective re-employment of offering re-employment to some employees and excluding other employees, its conduct has amounted to unfair dismissal and thus all the dismissed employees must be reinstated.[19] The above judgment can be further substantiated with the ruling in the case of *NUMSA obo Jan v W E Geysers* whereby Barnes AJ stated that it is the refusal to re-employ others that constitute to dismissal if some employees were re-employed after when all employees were dismissed for the same misconduct.[20]

In contrast, the case of *SACTWU v Filtafelt* it has been stated that even though the employer's selective re-employment may amount to not offering to re-employ all dismissed employees, such an employer should establish the legitimacy and fairness of its decision.[21] Furthermore, AJ Snyman in the case of *SACTWU v Filtafelt* stated that the decision of the employer to decide to re-employ only two employees only among all employees that were dismissed for participating in an unprotected strike should not benefit the other employees that were dismissed. Such that the dismissed employees that were not re-employed should not be reinstated according to the court after it had looked at the circumstances which are ordinary like other cases and not whether there were no exceptional circumstances be reinstated.[22]

According to Stansfield, in any incident concerning selective re-employment, any employee seeking re-employment should be afforded a fair opportunity to

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[18] *Minister of Correctional Services v Mthembu No* (2006) 27 ILJ 2114 (LC) para 9.
[19] *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group* [2018] 11 BALR 1217 (CCMA). Hereinafter referred as *LMUSA obo Molefe v Harvest Group*.
[20] *NUMSA obo Jan v W E Geysers* (JS162/16) [2017] ZALCJHB 152 para 10 and 11.
[21] *SACTWU v Filtafelt case* para 64.
[22] *SACTWU v Filtafelt case* para 78.

give reasons to justify re-employment sought and refusal re-employ him should be for justified reasons.[23] Stansfield opinion seem to be in line with the *obiter dictum* made by AJ Snyman in the case of *SACTWU v Filtafelt* above confirming that at certain circumstances an employer's decisions to re-employ other employees and not re-employ others after when all employees were dismissed for one and same reason may be fair and justifiable, thus not constituting unfair dismissal.[24]

4. Aims and Objectives

This study aims at identifying the gaps when employers impose a dismissal as a sanction when disciplining employees who participate in an unprotected strike. The decisions taken by court when the decision of the employer to dismiss was a cause of dispute on matters before it. This study further aims at identifying the selective approach employers use when deciding to re-employ employee dismissed for participating in an unlawful strike. The objective is to opine a scientific approach in closing the gaps and providing a uniform approach in dealing with participation in an unprotected strike as a misconduct.

5. Significance of the Study

The study provides a legitimate and profound analysis and case that may help understand matters that are prejudicial to the social and economic interests of employees in South Africa. In addition, the elucidation that will be provided on comparative analysis will be essential to learning from other States that their legal positions are ahead and better than the South African legal position in respect of the issues outlined on the heading of statement of the research problem. Furthermore, the recommendations will provide empirical solutions that if considered, can close the loophole in respect of how selective re-employment should be conduct.

[23] Stansfield G, 'All for one and one for all: The consequences selective re-employment following dismissal' www.labourguide.co.za.
[24] *SACTWU v Filtafelt case* para 78.

6. Research Methodology

The research for this dissertation will be conducted with the use quantitative method. This method will involve the use of primary sources of laws and secondary sources which are journal articles, textbooks, international instruments, policy documents, the South African Constitution and legislation relevant to the research title. Furthermore, case law analysis will form part of major research method to ensure that the study has enough sources.

7. Scope and Limitations

The study comprises of 5 chapters which will be arranged in the following manner with scope of content stated for each chapter.

a. Chapter 1 – Introduction

The research proposal will be the first chapter of this dissertation and it will among other things concisely discuss and outline the structure of the dissertation and other chapters to be discussed in this dissertation. The research proposal will also outline problem statement and the background to problem statement together with the objectives of the research. In addition, the dissertation will outline the literature review and the method that will be used to research and gather information.

b. Chapter 2 – Policy and Legislative framework

The employer's right to strike will be chapter 2 of this dissertation and it will deal with the employees' legislative right to fair labour practice and strike and the Constitutional right to strike. The section 23 of the Constitution and the Labour Relations Act will form part of major discussions of this chapter.

c. Chapter 3 – Case law analysis

Case law analysis will discuss how courts often deliver contradictory judgments sue to lack of proper guidelines when adjudicating matters of selective re-employment. This part will form chapter 5 of this dissertation and the burning issues of this research will be discussed looking entirely looking at court judgments.

d. Chapter 4 – Comparative study

The implications of unprotected strike and selective re-employment will form chapter 3 of this research and its core focus will be a comparative study. The

comparative study will articulate the similarities and differences between South African legal position and legal position in the United Kingdom.

e. Chapter 5 – Conclusion and Recommendations

Conclusion and recommendations will be chapter 5 and within it, the author will give a briefed overview of the discussions of all chapters of this study and draw an inference. Also, the author will make recommendations based on the lessons learnt from the United Kingdom legal position.

CHAPTER TWO: POLICY AND LEGISLATIVE FRAMEWORK

2.1. Introduction

The right to strike and fair labour practice has been described as a fundamental human right and is being widely recognised not only by various domestic legal systems but even by international organisations such as the International Labour Organisation (ILO).[25] Consequently, conventions such as the Freedom of Association and Protection of the Right to Organise Convention[26] and the Right to Organise and Collective Bargaining Convention[27] have been adopted at international sphere to regulated labour relations.

Furthermore, legislation such as the Basic Conditions of Employment Act[28] and the Labour Relations Act[29] together with the Constitution[30] have been promulgated to regulate the rights of employees (and employers). These mentioned legal frameworks will entirely form the basis of the discussion of this chapter and will be articulated on the below sub-headings.

2.2. Regulations of the right to strike

The right to strike in South Africa has found it source from international legal instruments and such international legal instruments have been incorporated into the South African Constitution and the statutes of parliament. The right to strike and right to form and join trade unions are fundamental human rights.[31]

2.2.1. Conventional legal framework

Historically, the right to fair labour practice and strike in South Africa was heavily regulated by the Roman-Dutch law, which was based on the contract

[25] García L & Andrés J 'The right to strike as a fundamental human right: Recognition and limitations in international law' (2017) *Revista Chilena De Derecho* 44(3) 782.
[26] Hereinafter referred as Convention No. 87 of 1948.
[27] Hereinafter referred as Convention No. 98 of 1951.
[28] 75 of 1997.
[29] 66 of 1995.
[30] The Constitution of the Republic of South Africa 1996. (Hereinafter referred as "the Constitution."
[31] Odeku K.O 'An Overview of the Right to Strike Phenomenon in South Africa' (2014) *Mediterranean Journal of Social Sciences* 5(3) 695-696.

of letting and hiring.[32] These legal mechanism of regulating labour relations focused entirely on the essence of a commercial contract and gave little attention to the employees' needs for fair treatment.[33] Giving tiny concern to employees' fair labour practices, including the employee's right to strike triggered the need to enact international conventions and domestic legislation to regulate and protect the employees' right to strike and fair treatment at workplace.[34] The ILO genuinely realised a necessity to protect employees' interests at workplace by means of trade unions and this necessity was due to impurities and vicious treatment most employees undergone during the First World War ("WW1").[35]

Consequently, the ILO instigated enactment and adoption of the two the Freedom of Association and Protection of the Right to Organise Convention (Convention 87 of 1948) and the Right to Organise and Collective Bargaining Convention (Convention 98 of 1951). The ILO through article 3(1) of Convention 87 of 1948 affords employees the right to organise as it states that "workers and employers organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes."[36]

The Convention 98 of 1951 advances the right to organise by Convention 87 of 1948 as the former convention affords employees a wide range of protection against conduct of anti-union discriminations.[37] Article 1 of the Convention 98 of 1951 states that employees cannot be dismissed or suffer any form of unfair labour practice on a mere account that they are members of a workplace trade

[32] Conradie M, 'The constitutional right to fair labour practices: A consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) *Fundamina* 22(2) 164. See also, *Ongevallekommissaris v Onderlinge Verskerings Genootskap AVBOB* 1976 (4) SA 446 (A) at 450B-C.

[33] Gericke S.B, 'The interplay between international law and labour law in South Africa: Piercing the diplomatic immunity veil' (2015) *PER/PELJ* 17(6) 2601. Also see, Conradie (2016) *Fundamina* 164

[34] Conradie (2016) *Fundamina* 165.

[35] Kujinga T & Van Eck S 'The Right to Strike and Replacement Labour: South African Practice Viewed from an International Law Perspective" (2018) *PER / PELJ* 4.

[36] This article outlines rights of employees in regard to workplace trade union, employees forming part of trade union or members of a trade union have right to elect shop stewards, draft union's constitution and formulate their union's programs.

[37] Articles 1 and 2 of the Convention 98 of 1951.

union and state should also not interfere with the right to organise. The ILO has directly recognised the to strike in 2005 when it adopted a policy that employees and employers shall have the right to take industrial action purported to enforce their respective legitimate workplace interests.[38]

Although these conventions do not directly stipulate the right to strike, it was however submitted with reference to ILO Digest that employees' workplace right to organise is intrinsically corollary to the right to strike.[39] This means that through trade unions, employees may be able to organise a strike and enforce their employment interests. It was submitted that as practiced by many countries such as Canada and Germany, the ILO also adopts the practice that employees derive their right to strike from their right to organise.[40] Therefore, although the international conventions do not afford employees with direct right to strike, they however have furnished them with a mechanism, as the right to organise, that they will invoke whenever they are aggrieved by their employer and strike could be the only technique to resolve such issue.

The recognition and application of the international conventions in South African legal system was emphasised by the Constitutional Court in the case of *S v Makwanyane.*[41] The court in *S v Makwanyane* affirmed that courts are empowered in terms of section 39(1) of the Constitution to interpret and apply that international law in South African judicial system.[42] Section 39(1)(b) of the Constitution stipulate that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law."

In addition, the above constitutional provision[43] has been acknowledged by the Angolan High Court in the case of *Republic of Angola v Springbok Investment*[44] wherein it was stated that, "Republic of South Africa has embraced the doctrine

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[38] ILO 2015 https://goo.gl/ksw9Pg.
[39] Kujinga & Van Eck (2018) *PER / PELJ* 6–7. See also, ILO Digest of Decisions 2006 para 523. Subramanien & Joseph (2019) 5 asserted that *"Workers are compelled to work together in order to exert their power in the form of a strike, which is an employee's only weapon against the employer".*
[40] Kujinga & Van Eck (2018) *PER / PELJ* 12.
[41] *S v Makwanyane* 1995 3 SA 391 (CC). (Hereinafter referred as *S v Makwanyane* case).
[42] *S v Makwanyane* case para 39.
[43] Section 39(1)(b) of the Constitution.
[44] *Republic of Angola v Springbok Investment (Pty) Ltd* 2005 (2) BLR 159 (HC) 162. (Hereinafter referred as *Angola v Springbok Investment case*).

of incorporation, which holds that the rules of international law or the *ius gentium* are incorporated automatically into the law of all nations and are considered to be part of that law unless they are in conflict with the statutes or common law."[45]

Furthermore, the Constitutional Court has in the judgment of *Murray v Minister of Defence*[46] acknowledged the essential role played by the International Labour Organisation in moulding and developing South African employment law. The court has stated that "the International Labour Organisation has through a large number of Conventions and Recommendations, such as the International Labour Organisation Convention, 158 of 1982, played a formative role in the development of South African labour law."[47] The application of the above conventions has been envisaged in section 23 of the South African Constitution and both the Labour Relations Act and the Basic Conditions of the Employment Act and will be articulated below.

2.2.2. Constitutional framework

The Constitutional Assembly was guided by convention of the ILO, particularly Convention 87 of 1948, when incorporation the right to strike and fair labour practice in the South African Constitution.[48] The incorporating of the labour relations clause in section 23 of the Constitution was judicially challenged in the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa.*[49] The challenge was brought with a view that section 23 of the Constitution has entrenched only the employees' right to strike and does not contain the right to employer's lock, which (the latter right) was argued to be equally fundamental as the former right.[50] And the employers' organisations sought the employers' right

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[45] *Angola v Springbok Investment case* para 69.
[46] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C). (Hereinafter referred as *Murray v Minister of Defence case*).
[47] *Murray v Minister of Defence case* para 23. See also, Candice A, 'International Labour Standards and Private Employment Agencies –Are South Africa's Recent Legislative Amendments Compliant?' *SASLAW* 11.
[48] Subramanien D.C & Joseph J.L (2019) *PELJ* (22) 2.
[49] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 17 ILJ 821 (CC). (Hereinafter referred as *"Ex Parte: In re Certification*).
[50] *Ex Parte: In re Certification* para H840C-D. See also, Kujinga & Van Eck (2018) *PER/PELJ* 13; Subramanien & Joseph (2019) *PER/PELJ* (22) 4.

to lock out be included in section 23 of the Constitution as it was included in the South African Interim Constitution.[51] However, the right to lock out it did not find its relevance into the final Constitution. It was argued that the right to strike will likewise afford the employer an opportunity to lockout. Put differently the right to lockout is ancillary to right to strike.

On the other hand, a contrary contention was submitted which pointed out that the economic power between employers and employees is not equal as employers are at advantageous position than employees.[52] And further that the inclusion if the employees' right to strike only shall serve as a legal mechanism that balance economic power between employees and employers in respect of exercising industrial action to promote and enforce rights against one another.[53]

Chaskalson J dismissed the contentions raised by employer's organisations and concurred with the Constitutional Assembly's decision to incorporate only the employee's right to strike in section 23(2)(c) of the Constitution and tendered the following reason:

> "The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent."[54]

The right strike and fair labour practice for employees in South Africa is one of the fundamental rights entrenched in the Bill of Rights, within the South African Constitution.[55] Therefore, the Constitution of South Africa guarantees every employee with a fundamental right to be substantively and procedurally treated fairly and strike lawfully. Both the right to fair labour practice and the right to

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[51] *Ex Parte: In re Certification* para 839H-840A.
[52] Kujinga & Van Eck (2018) *PER / PELJ* 13.
[53] Subramanien & Joseph (2019) *PELJ* (22) 2.
[54] *Ex Parte: Constitutional Assembly* para 841A-C. See also, Kujinga & Van Eck (2018) *PER/PELJ* 13. See also, *National Union of Mineworkers of South Africa v Bader Bop* (2003) 4 ILJ 305 (CC) para 307C.
[55] The Constitution of the Republic of South Africa 1996. (Hereinafter referred as "the Constitution."

strike have be entrenched in section 23 of the Constitution, which should be read in conjunction with section 18 of the Constitution.[56]

The right to associate freely is recognised in terms of section 18 of the Constitution states that "everyone has the right to freedom of association." The objective underlying the right to freedom of association was stated in the Candian case of *Saskatchewan Federation of Labour v Saskatchewan*[57] whereby the Canadian Supreme Court stated that "purpose of the right to freedom of association is to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power."[58] Which means that employees have the freedom to join, form part and participate in any organisation of their choice voluntarily.

The rationale for striking collectively is that due to unequal economic power, it is not easy that only two or few employees may embark on a strike, but strike requires majority of employees to embark on it so that it becomes effective.[59] Furtherance of the constitutional right to freedom of association is in terms of section 23(2) of the Constitution as the latter section contains provisions that afford employee with the right to form or join and participate in trade union activities.

Section 23(2) states that "every worker has the right (a) to form and join a trade union and (b) to participate in the activities and programmes of a trade union; and (c) to strike." Every employee that participates in strike has a right to be treated fairly regardless of whether the strike was protected or not protected. This right to be treated fairly stems from section 23(1) of the Constitution which states that "everyone has the right to fair labour practices." The link between these constitutional provisions is that employees will exercise their constitutional right to form or join trade union and participate in trade activities in terms of section 18 and 23(2)(a) and (b) of the Constitution. And

[56] Section 18 of the Constitution affords every person with the right to freedom of association and in the labour law context, it denotes that every employee has the right to form and join trade union.
[57] *Saskatchewan Federation of Labour v. Saskatchewan* (2015) SCC 4. *(*Hereinafter referred as *Saskatchewan case).*
[58] *Saskatchewan case* para 55.
[59] Subramanien & Joseph (2019) *PER/PELJ* 5.

thereafter exercise their right to strike collectively with other union members in terms of section 23(2)(c) of the Constitution.

Finally, when participation in a strike, they are entitled to fair labour practices which include procedural and substantive fairness when handing issues that transpired due to strike. Therefore, the relation between the employees' right to strike and the right to form and participate in workplace union is that the right to join and take part in union activities is a fundamental component of the employees' abilities to use strike mechanism as a tool to further their interests.[60] Employees that participate in a protected strike in South Africa are constitutionally protected against dismissal and unfair labour practices by their employers.[61] The above constitutional provisions are the skeleton ratification of the international convections[62] discussed above and they are the ground laying provisions which have been given more precise effect through enactment of legislation such as the Labour Relations Act and the Basic Conditions of Employment Act.

2.2.3. Legislative legal framework

One of the 4 primary objectives of the Labour Relations Act[63] (the LRA) as entrenched in section 1 of the Act is to give effect to and provide advanced regulations of the constitutional labour relations clause in section 23 of the Constitution.[64] The LRA provides regulations for labour related matters including the right to strike, dismissal for participation on unprotected strike and employee protections for being part of a strike in compliance with the provisions of the Act.[65] Section 64(1) of the LRA gives effect to section 23(2)(c) of the Constitution as both provisions afford every employee with the right to strike. The latter provision has been discussed above and the former provision states that "every employee has the right to strike."

[60] Manamela E and Budeli M 'Employees' right to strike and violence in South Africa' (2013) *The Comparative and International Law Journal of Southern Africa* 46(3) 308.
[61] Section 67 of the Labour Relations Act 66 of 1995.
[62] The Convention 87 of 1948 and The Convention 98 of 1951.
[63] 66 of 1995.
[64] Subramanien & Joseph (2019) *PELJ* 2.
[65] In terms of sections 67, 68, 186 and Schedule 8 of the LRA.

As noted from section 23(2)(c) of the Constitution and section 64(1) of the LRA that the right to strike is only afforded to employees only and not any other persons. What follows is that anyone who intends to exercise the right to strike must ensure that he/she falls within the ambit of 'employee definition and presumption' contemplated in section 213 of the LRA and section 200A of the LRA. Section 213 of the LRA defines an employee as "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer."

Section 200A of the LRA provides clearer version of section 213 of the LRA and it (section 200A) serves as a presumption as to who is an employee regardless of the nature of the contract entered or where an employment contract was verbally or tacitly entered. Section 200A(1) of the Labour Relations Act states that, "until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person,

(b) the person's hours of work are subject to the control or direction of another person,

(c) in the case of a person who works for an organisation, the person forms part of that organisation,

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

(e) the person is economically dependent on the other person for whom he or she works or renders services,

(f) the person is provided with tools of trade or work equipment by the other person or

(g) the person only works for or renders services to one person."[66]

[66] Section 200A of the Labour Relations Act 66 of 1996.

Section 200A may be regarded as the basic summary of the common law tests applied to determine whether a specific person may be regarded as an employee. There are three common law tests, which are: the control test, the organisation test, and the dominant impression test.[67] As stated before that the LRA does not provide the right to strike only, but also provides several protection to employees that engage on a strike. Such protections are provided to striking employees engaged on a protected strike in terms of section 67 of the LRA as it regulates strikes that are in adherence with the LRA.[68] Section 67(1) must be read in conjunction with the common law elements of a lawful strike, which are "stoppage of work, undertaken by employee and with aim to resolve a matter of mutual interest between employees and their employer.[69]

Section 67(2)(a) of the LRA provides immunity from infringement of employment of employment contract by employees that engage in a stoppage of work as they engage in a protected strike. This immunity denotes that an employer may be precluded from dismissing employees on a ground that they refused to perform work duties that they are obliged in terms of the employment contract.[70] In addition to non-infringement of the employment contract, section 67(4) of the LRA provides "an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.[71]

These section 67 LRA protections are available to strikes that are protected and in compliance of the LRA from the commencement till to an end of the strike. The Constitutional Court in the matter of *Transport and Allied Workers Union*

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[67] Basson A, Le Roux P.A.K & Strydom E.M.L, '*The New Essential Labour Law* (2019) 7th Edition LexisNexis 61-69.

[68] Section 67(1) of the LRA states that a protected strike means "a strike that complies with the provisions of this Chapter."

[69] Subramanien D.C and Joseph J.L (2019) *PELJ* 6.

[70] Gernigon B, Odero A and Guido H, 'Principles concerning the right to strike' (2000) Vol.137 (4) *International Labour Organisation* 11. See Also, https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practiceareas/downloads/Employment-Strike-Guideline.pdf

[71] Section 67(5) of the LRA should be noted when considering immunity from dismissal when engaged in a protected strike as the state section provides that *"(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements."*

of South Africa obo Ngedle v Unitrans Fuel and Chemical"[72] stated that any protected strike that is being conducted in a manner that exceeds the statutory boundaries set out by the LRA turns into unprotected strike and strikers engaged in such strike will therefore not be protected in terms of section 67 of the LRA.[73] The incident commonly described as the Marikana massacre can be referred as a relevant example of a strike that starts lawfully and along the process becomes unlawful for various reasons, mainly due to that employees engaged in what is called 'the wildcat strike' contrary to collective agreements or violent strikes and therefore, rendering their strike action unprotected.[74]

The Marikana strike started as a lawful and peaceful strike in August 2012 and was thus protected. The strikers alleged that their salaries are unfairly low and demanded that the management increases their salaries from R4000 to R12 000. Due to due to management of Marikana mine refusing to meet the demands of the strikers, the strikers then engaged in an unlawful strike dominated by serious of assaults and intimidation which led to 34 strikers killed by the police.[75] The manner in which the strike was conducted was no longer on compliance with the LRA and thus unprotected. Another unprotected strike in mining industry in 2012 took place in 2012 leading to 12 000 mine employees dismissed as their strike was not in compliance with the provisions of the LRA and therefore unprotected.[76] It is evidently clear that the right to strike is not an absolute right but under certain circumstances it can be limited by legislation and acting against limitations on the right to strike amount to unprotected strike.

What constitute an unprotected strike has been determined in terms of section 68 of the LRA. Section 68(1) of the LRA provides that any person who engages in a strike action that is not in compliance with Chapter IV of the LRA engages in an unprotected strike. moreover, section 68(5) of the LRA states that "participation in a strike that does not comply with the provisions of this

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[72] *Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty)Ltd* [2016] 11 BLLR 1059 (CC). (Hereinafter referred as *TAWUSA obo Ngedle* case).
[73] *TAWUSA obo Ngedle* case para 47.
[74] Odeku K.O (2014) *Mediterranean Journal of Social Sciences* 5(3) 697.
[75] Selala K.J, 'The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis' (2014) *International Journal of Social Sciences* 3(5) 121.
[76] Selala K.J, (2014) *International Journal of Social Sciences* 3(5) 122.

Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account." Meaning that according to section 68(5) LRA, an employer is entitled to dismiss employees taking into account relevant circumstances and employees may not rely on section 67(2) LRA protection.

2.3. Selective re-employment

Employees can be dismissed for a number of reasons when participating in a strike, but one main reason is participating in an unprotected strike and the LRA allows fair dismissal of employees participating in unlawful strike.[77] As section 68(5) of the LRA permits employers the right to fairly dismiss employees that participate in an unprotected strike, sometimes employers may decide to re-employ some employees that it has dismissed. Selective re-employment takes place when an employer has decided to re-employ some employees and refused to re-employ other employee among all employees that an employer has dismissed due to their participation in an unprotected strike. Selective re-employment constitute dismissal in terms of section 186(1)(d) of the LRA.

Section 186(1)(d) states that "dismissal means that an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another." It was held in the case of *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group*[78] that the employer's inconsistency when deciding to re-employ some employees and decide to refuse to re-employ other employees that it dismissed for similar reasons constitute unfair dismissal.[79] In addition to section 186(1)(d) of the LRA, unfair selective re-employment amounts to unfair labour practice that has been defined I terms of section 186(2) of the LRA as "any unfair act or omission that arises between the employer and employee

[77] Section 68(5) of the LRA allows an employer to *mero motu* and fairly dismiss employees that take part in an unlawful or in a strike that does not comply with the provisions of the LRA.
[78] *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group* [2018] 11 BALR 1217 (CCMA). (Hereinafter referred as *LMUSA obo Molefe v Harvest Group*).
[79]https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-28-january-all-for-one-and-one-for-all-the-consequences-of-selective-re-employment-following-dismissal-.html.

involving unfair conduct by the employer, unfair suspension, failure to reinstate a former employee or occupational detriment."

Furthermore, unfair selective reemployment constitutes unjustifiable infringement of the constitutional right to fair labour practice entrenched in section 23(1) of the Constitution. Section 23(1) of the Constitution affords everyone the right to fair labour practice. In explaining what actually constitutes to fair labour practice, the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town*[80] stated that "the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices."[81]

All employees in the case of *LMUSA obo Molefe v Harvest Group* that were, according to section 186(1)(d) and 186(2) of the LRA subjected to formal dismissal that constituted unfair labour practices were granted reinstatement remedy.[82] It should be noted that the fact that an employer has decided not to re-employ some employees does not automatically constitute unfair dismissal and such employees entitled to be reinstated. Section 2(4) of the Code of Good Practice in Chapter 8 of the LRA gives an opportunity to show a good and fair reasons for reemploying other employees and refuse to re-employing other employees. Therefore the principle of *audi alteram partem* should be applied adjudicate matters concerning selective re-employment.

2.4. Conclusion

There always interrelation between international legal instruments and domestic labour laws in a sense that international instruments are used as the guiding tools to drafting domestic laws. Furthermore, International Labour Organisations and other organisation set international minimum standards

[80] *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (hereafter referred as *NEHAWU v UCT*).
[81] *NEHAWU v UCT* para 40.
[82] https://labourman.co.za/consequences-of-selective-re-employment-following-dismissal/.

through conventions and every country that is a party to a certain convention or a member of certain organisation is bound to rectify international conventions into domestic laws.[83] Furthermore, section 39(1)(c) recognises the application of international law by South African courts as the indicated constitutional provision states that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law."

The right to strike and organise have been intertwined and recognised as fundamental human right at international sphere.[84] It is therefore submitted that unfair denying employees the right to strike and right to form and join trade union or subjecting them to unfair treatment due to them exercising their right to strike constitute a gross infringement of their fundamental human right.

[83] Preamble of the LRA.
[84] García L & Andrés J (2017) *Revista Chilena De Derecho* 44(3) 782.

CHAPTER THREE: CASE LAW ANALYSIS

3.1. Introduction

Courts have played a very significant role in the development of the labour laws, through interpretation of the employees' right to strike when called upon to adjudicate labour related disputes in South Africa. The right to strike is universally recognised through international conventions, regional legal instruments and in South Africa is further recognised in the Constitution and labour legislations.[85] The courts have advanced or made through case laws the right to strike so much plain to understand.

This chapter will expound case law analysis in respect of the right to strike and re-employment after dismissal due to employees participating in unlawful strike. It will further analyse in particular the manner in which judicial officers interpreted and developed right to strike and procedural requirement of issuing a notice before striking.

3.2. The employees' right to strike

The foremost judicial development of the right to strike in South Africa was made in the case of *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA*[86] whereby the Court outlined three categories of strike. The court stated that that there are 3 categories of strike and every employees' strike may fall in one or more of these categories which are, "(1) a strike where the employees have a demand, (2) a strike where there is a grievance rather than a demand, and (3) a strike which arise from a dispute."[87] The implications of exercising the right to strike in South Africa are subject to compliance with the law, judicial interpretations and development through uncountable cases.

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[85] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) para 23 whereby the court has recognised the role played by conventions to mould the South African labour law.
[86] *TSI Holdings (Pty) Ltd v National Union of Metalworkers of South Africa* (2006) 27 ILJ 1483 (LAC) (hereinafter referred as *TSI Holdings v NUMSA case*).
[87] *TSI Holdings V NUMSA case* para 1492E-F.

3.2.1. The judicial development and interpretation of the right to strike

The most remarkable judicial acknowledgment of the vitality of employees' right to strike has been emphasised by the Constitutional Court in the case of *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA.*[88] The e*x parte: In re Certification of the Constitution* judgment involved certification of constitutional provisions by the Constitutional Court and affected parties were also invited to raise contentions for or against inclusion or exclusion of any right in the Constitution. The contentions in respect of the right to strike were that the including only the right to strike in the Constitution and excluding the right of employer's to lock-out has two material effects that are detrimental to employers in South Africa.[89]

Firstly, it was contended that it violates constitutional principles II and XXVIII[90] and secondly that it entails that the employees' right to organise collectively is much significant than the employers' right to organise collectively and that violates the employer's right to collective bargaining.[91] These contentions were based on the argument that the employees' right to strike and the employers' right to lock-out are significantly equal and should both be treated equally. And further that entrenching one of them in the Constitution and excluding the other therefore constitutes a serious infringement of the persons whose right has been excluded.[92]

Chaskalson P dismissed both objections and reasoned that the right to strike is essential for preserving the employees' dignity as employees organise

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[88] *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of SA* 1996 4 SA 744 (CC) (hereinafter referred as (*Ex Parte: In re Certification of the Constitution)*.

[89] *Ex Parte: In re Certification of the Constitution* para 840C-D.

[90] The Constitutional Principle II states that "Everyone shall enjoy all universally accepted Fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution"; Constitutional Principle XXVII states that "Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organizations and trade unions and to engage in collective bargaining shall be recognized and protected. Provision shall be made that every person shall have the right to fair labour practices".

[91] *Ex Parte: In re Certification of the Constitution* paras 839H–840A.

[92] *Chairperson of the Constitutional Assembly* para 840C-D.

collectively and strike together for enforcing their demands at work.[93] And further that it is reasonable and justifiable to include the right to strike only has employers have better mechanism such as dismissals and replacement of employees to enforce their demands at workplace.[94] The manner in which the Constitutional Court interpreted the right to strike connoted that employers automatically possess more economic power than employees at workplace notwithstanding that employers often exercise such power individually. In order to establish balanced economic power, employees have to act collectively by exercising their right to strike and this proves the significance of the right to strike.

The Constitutional Court's judgment can be further justified with fact that a lawful strike action must be undertaken by two or more employees[95] (but an employer may lawfully lock-out individually) and this necessitated the inclusion of the right to strike in the Constitution so that when organising a strike, all employees may be encouraged by being aware of the significance of their right to strike. The Constitutional Court's reasons above substantiating its ruling may be further substantiated with reference to the case of *National Union of Mineworkers v Bader Bop*,[96] whereby O'Regan J made a critical emphasis of the significance of the right to strike. O'Regan J stated that employees use strike as a tool to equalise their bargaining power with employer's bargaining power when dealing with workplace relations.[97] In *NUM v Bador*, the matter involved a strike undertaken by union with minority representation and its members in attempt to persuade its employer to recognise its workplace shop steward.[98] An employer unsuccessfully applied for an interdict at Labour Court to regard the strike unlawful.

The employer's application for interdict was however upheld by the Labour Appeal Court.[99] The Labour Appeal Court (LAC) reasoned that the Labour

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[93] *Chairperson of the Constitutional Assembly* para 307C.
[94] *Chairperson of the Constitutional Assembly* para 841A-C.
[95] As stated by section 213 of the LRA as the said provision defines what is meant by strike action and requires that a strike action must be undertaken by two or more employees acting jointly and collectively to resolve a matter of mutual interest.
[96] *NUM v Bader Bop* 2003 (3) SA 513 (CC) (hereafter *NUM V Bader Bop*).
[97] *NUM v Bader Bop* para 307B.
[98] *NUM v Bader Bop* paras 8 and 9.
[99] *NUM v Bader Bop* para 10.

Relations Act (LRA)[100] vests to unions the right to recognition of their shop stewards at workplace provided that a union applying for recognition of its shop stewards represents majority of the workers in a workplace.[101] The LAC further reasoned that it will not constitute a lawful demand if a union does not represent majority of employees at workplace but yet demands an employer to recognise its (union) shop stewards.[102]

The applicants then approached the Constitutional Court contending that the LAC's interpretation of the provisions conferring unions with the right to recognition of shop stewards at workplace infringed their right to strike entrenched in section 23(1) of the Constitution.[103] They further submitted an alternative contention that if the judgment of the LAC and its interpretation of the LRA provision above are considered being correct, it consequently means that such provision of the LRA makes an unjustified limitation of the right to strike and therefore should be declared unconstitutional.[104]

In considering the arguments above, the Constitutional Court firstly considered it worthy to note that section 23 of the Constitution recognises the significance of fair labour relations and the right of employees to form and join trade unions and to engage in strike action. And as this the case concerned the right to strike, it should be further noted that this right is both of historical and contemporaneous significance in ensuring that the dignity of employees prevails and none of them during this constitutional dispensation may be treated as coerced employees.[105] O'Regan J further stated that:

> "It is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood."[106]

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[100] 66 of 1995.
[101] *NUM v Bader Bop* para 11.
[102] *Same as above.*
[103] Section 23 provides that: "(1) Everyone has the right to fair labour practices. (2) Every worker has the right – (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike."
[104] *NUM v Bader Bop* para 12.
[105] *NUM v Bader Bop* para 12 and 13.
[106] *NUM v Bader Bop* para 13.

Accordingly, employees are bound to organise industrial action collectively order to exercise their power by means of strike and that therefore draws a close link between the right to strike and right to organise.[107] This link is justified by an employer alone being able to exert its power through various mechanisms such as replacement of labour, withdrawing salaries, lock-out and dismissals against many employees. And since employees have no such mechanisms, their reliance is only on striking collectively. This has therefore signified the importance of the employees' right to strike as a fundamental human and consequently had been incorporated in the South African constitution[108] and the employer's right to lock-out precluded in the Bill of rights.[109]

The Constitutional Court further relied on the recognition of right to freedom of association internationally recognised by the International Labour Organisation (ILO).[110] The Court stated that the significance of the right to freedom of association is to afford unions an opportunity to recruit members and "the right represent those members at least in individual workplace grievances and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands."[111] In South African perspective, the ILO's right to organise closely links with the constitutional freedom of association contained in section 18 of the South African Constitution.[112] Section 18 of the Constitution confers everyone the right to organise and can be intertwined with the right to form and join a trade union in terms of section 23(2)(a) and the right of trade unions to organise in section 23(4)(b) of the Constitution.

The Constitutional Court set aside the decision of the LAC and concluded that the interpretation by the LAC is not the constitutionally appropriate and not justifiable and therefore should not be upheld.[113] *NUM v Bader Bop*

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[107] Ex Parte: In re Certification of the Constitution para 841A-C.
[108] Entrenched in section 23 of the Constitution.
[109] *Ex Parte: In re Certification of the Constitution* para 841C; *R v Smit* 1995 1 SA 239 (K).
[110] *NUM v Bader Bop* para 34. In *NUM v Bader Bop* para 29 it was stated that "there are two key ILO Conventions relevant to the issue at hand: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)."
[111] *NUM v Bader Bop* para 29 and 34.
[112] *NUM v Bader Bop* para 39.
[113] *NUM v Bader Bop* para 46.

supplements the significance of the right to strike as indicated by the Constitutional Court in the *Ex Parte: In re Certification of the Constitution* judgment. These judicial interpretations of the right to strike has unclouded most aspects envisaged in the right to strike such as the purpose strike, the value of the right to strike and the manner in which the right to form and join trade unions interlinks with the right to strike. What then follows is the manner in which the courts have interpreted and developed the definition of the word "strike".

As section 213 of the LRA defines the meaning of "strike" in legal sense.[114] The Labour Court in the case of *Simba (Pty) Ltd v FAWU*[115] made an interpretation of the definition of strike as contemplated in the stated LRA provisions. The Labour Court interpreted and developed the definition of strike by stating that although the definition in the LRA does not specifically incorporate the term of "issue in dispute", this term can be read into the definition and such read-in justified by referring to section 64(1) of the LRA.[116] Section 64(1) of the LRA holds a legal position that employees should strike with a purpose to resolve an issue in dispute between them and their employer.

According to the LAC in the case of *Chemical Workers Industrial Union v Plascon Decorative (Inland),* the definition of strike entrenches 3 elements within itself and such 3 elements are, "firstly, refusal to perform work,[117] secondly, the refusal must be undertaken by employees and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest."[118] In addition to these elements, the court in *SA Breweries case*[119] has indicated that the term "work" should be narrowly defined and its interpretation should not

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[114] The definition of strike in terms of section 213 of the LRA provided in 24 of this dissertation.
[115] *Simba (Pty) Ltd v FAWU* 1998 19 ILJ 1593 (Hereinafter referred as *Simba V FAWU*).
[116] *Simba V FAWU* para 1596D.
[117] *Plascon Decorative Inland* paras 20-22; *Steel Mining & Commercial Workers Union v Brano Industries (Pty) Ltd* 2000 21 ILJ 666 para 668B-D the court held that "the employees' refusal to work amounted to a strike. This decision was held even though the employees alleged that they had not engaged in a strike but rather a meeting over the dismissal of the shop steward, where they demanded that disciplinary proceedings be suspended. The court stated that the partial refusal to work, even though not for a lengthy period, can amount to a strike. Furthermore, the LRA provides that an act can constitute a strike even if there is only a retardation or obstruction of work."
[118] *Plascon Decorative Inland* para 22.
[119] *SA Breweries Ltd v FAWU* 1989 10 ILJ 844 (A) (hereafter *SA Breweries v FAWU*).

exceed the boundaries of a work that employees are bound to render in terms of their contract of employment.[120]

It should be noted that any strike that commences while in adherence with the elements of strike but along the way becomes conducted in manner that is no longer compliant will be deemed to be unprotected strike. This legal position was confirmed by the Constitutional Court in the matter of *TAWUSA obo Ngedle v Unitrans Fuel and Chemical*[121] whereby it was ruled that any lawful strike action that is being conducted in a manner that exceeds the statutory limitations provided by the LRA automatically becomes unlawful and thus unprotected strike and all employees taking part in such strike are not entitled to section 67 LRA protections.[122] This judgment strikes a balance that furnishes equitable benefit and protection of the law between employers and employees as none of them benefits from unlawful conducts despite the nature and value of right they purported to exercise.

Another matter of refusal to work employment was considered in the case o *FAWU v Rainbow Chicken Farms.*[123] The *FAWU case* concerned 13 applicants who were employed by the defendant until their dismissal and among them, 12 were employed as the defendant's butchers and 1 was employed as the 12 butchers' supervisor.[124] The factual cause of the legal dispute between the applicants and the respondent is that the applicants were absent from work with no prior permission from the respondent and the respondent dismissed them.[125] The main reason the applicants were absent from work is that they were all Muslims and decided to be absent from work because they wanted to celebrate their Muslim tradition with their families and religious mates.*[126]*

The applicants were taken to hearing and the sanction imposed by the president of the hearing was offering the applicants to choose between "dismissal subject to appeal and accepting final warning without right of

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[120] *SA Breweries v FAWU* para 844-J.
[121] *TAWUSA obo Ngedle and others v Unitrans Fuel and Chemical (Pty)Ltd* [2016] 11 BLLR 1059 (CC). (Hereinafter referred as *TAWUSA obo Ngedle* case)
[122] *TAWUSA obo Ngedle* case para 47.
[123] *FAWU v Rainbow Chicken Farms* [2000] 1 BLLR 70 (LC) (hereinafter referred as *FAWU v Rainbow Chicken).*
[124] *FAWU v Rainbow Chicken* para 1.
[125] *FAWU v Rainbow Chicken* para 7.
[126] *FAWU v Rainbow Chicken* para 7.

appeal." The applicants chose to be dismissed and the dismissal was upheld at an appeal hearing."[127] The applicants thereafter went on to challenge their dismissal at the CCMA and as they were unsuccessful, they then decided to appeal at the Labour Court.

The applicants argued that defendant dismissed them unfairly and such dismissal constituted automatically unfair in terms of section 187(1)(f) of the LRA and they alternatively raised a contention that in accordance with section 188 the LRA, their dismissal was substantively and procedurally unfair.[128] The respondent contended that the applicants' conducted constituted an organised strike as contemplated in the LRA and such strike was unprotected and accordingly justified their dismissal owing its non-compliance to the LRA.[129]

After considering these contentions, the Labour Court reasoned that although their absent from work was done collectively and for mutual interest, their actions did not constitute strike action since they did not intend to resolve a matter of mutual dispute. In addition, they had no demand that they submitted to their employer and they merely did not go to work because they wanted to celebrate their religious belief called Eid for Muslims beliefs and therefore their conduct was exactly the same as employees who for any reason decided to be absent from work.[130] The Labour Court ruled that the applicants were indeed unfairly dismissed and granted them reinstatement remedy.[131]

The second element identified was that there should be a dispute between an employer and its employees' and the strike action should be to resolve their disputes. In *SA Scooter & Transport Allied Workers Union v Karras t/a Floraline*53[132] the Labour Court ruled that employees who had no valid or legal reason to leave their employers' premises and continued not attending work had engaged in unprotected strike since there was no valid dispute between them and their employer.[133] Refusal to work and failure to attend work under the impression that it's a strike action while there is no valid dispute constitutes

[127] *FAWU v Rainbow Chicken* para 13.
[128] *FAWU v Rainbow Chicken* para 17.
[129] *FAWU v Rainbow Chicken* para 22.
[130] *FAWU v Rainbow Chicken* para 24.
[131] *FAWU v Rainbow Chicken* para 37.
[132] *SASTAWU v Karras t/a Floraline* 1999 20 ILJ 2437 (LC) (hereafter referred as *SASTAWU v Karras*); see also *Samancor Ltd v National Union of Metalworkers of SA* 1999 20 ILJ 2941 (LC).
[133] *SASTAWU v Karras*) para 2448E-F.

work absconding and may justify dismissal. The issue of invalid demand was a matter to be adjudicated in the *TAWUSA obo MW Ngedle v Unitrans Fuel and Chemical (Pty) Ltd*[134] whereby the court had to consider its implications employees that engage in strike action so to enforce impermissible demand. The court delivered descending judgment that invalid demand renders the strike action unlawful and thus unprotected.[135]

In *Pikitup (SOC) Ltd v SAMWU*[136] the third element requiring that the demand or dispute be of the matter of mutual interest was considered by the court. The main cause of the issue in this case was the employer introducing a breathalyser test for all Pikitup drivers. The motive behind introducing the breathalyser test was to reduce the incidents of employees coming to work drunk as majority of employees that worked as drivers went to work while drunk.[137] The defendant as the representative union opposed introducing of breathalyser test and issue remained unresolved after conciliation and thereafter the employees embarked in a strike.[138] The applicant successfully instituted an application to interdict their strike and declare it unlawful and the court reasoned that the issue in question was not a matter of mutual interest, but it related to the operational management of the company.[139]

On the return date, the court has declared the strike lawful on the basis that the motive behind the strike was based on mutual interests.[140] Furthermore, the court accepted the contention that the employer's objective to introduce breathalyser testing at workplace was legitimate and justifiable since the aim was to promote a safer working condition. And since the employer's strategy for safe working environment by use of breathalyser tests before work commencement everyday affected all employees and not only few employees, this caused the court to rule that the matter in dispute mutual among all employees.[141] This entailed that a matter of mutual interest denotes employees having the same issue that affects them collectively and all engage in strike

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[134] *TAWUSA obo MW Ngedle v Unitrans Fuel and Chemical (Pty) Ltd* [2016] ZACC 28.
[135] *TAWUSA obo MW Ngedle* para 3.
[136] *Pikitup (SOC) Ltd v SAMWU* 2014 35 ILJ 983 (LAC) (hereafter *Pikitup case*).
[137] *Pikitup case* para 984D-E.
[138] *Pikitup* case para 984D-E.
[139] *Pikitup case* para 984F
[140] *Pikitup* case para 1003A-B.
[141] *Pikitup* case para 984G-H.

having the same issue in mind. These cases have proved that strike action is recognised as a valued and fundamental right but is however subject to limits and should be exercised within the priscripts and ethos of the appropriate legislative provisions.

3.2.2. The implication of the notice before strike

It is required in terms of section 64(1)(b) of the LRA that employees should submit to their employer a written notice of their intention to strike and such notice should be issued at least 48 hours afore commencement of the intended strike. The issue concerned was, as unions submit the required notice on behalf of the employees they represent, is there any need for each non-represented employees to individually submit their own notice as required by the LRA? This matter was dealt with by the Supreme Court of Appeal in the case of *Equity Aviation Services (Pty) Ltd v SATAWU.*[142] This case involved SATU as a workplace union that had majority representation as it had representation of 725 out of the 1157 employees that are employed by the applicant.

Due to unsuccessful negotiations between the union and employers, SATAWU acted on behalf of its members and issued a written 48 hours notice to the employer as required to show its intention to strike but the unrepented employees issued no such required notice.[143] Both the represented and non-represented employees embarked in a strike that lasted for 4 months.[144] Since the union issued a written notice to strike on behalf of its members only, the strike action of the represented employees was regarded to be protected and lawful. However, since non-represented employees issued no notice to strike, the employer deemed their strike action unlawful and thus unprotected. As a resulted of participating in an unprotected strike, the employer dismissed the unrepresented employees and reasoned that their conducted constituted prolonged absenteeism without prior permission.[145]

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[142] *Equity Aviation Services (Pty) Ltd v SATAWU* 2011 32 ILJ 2894 (SCA) (hereinafter referred as *Equity Aviation* case)
[143] *Equity Aviation* case para 5.
[144] *Equity Aviation* case para 6.
[145] *Equity Aviation* case para 6.

The dismissed employees challenged the legality of their dismissal at CCMA and as they were unsuccessful, they appealed at Labour Court and contended that their dismissal constituted automatic unfair dismissal.[146] The Labour Court ruled that the union represented both unrepresented and represented employees during negotiations and issue referral steps and thus one notice issued by the union was sufficient to cover all the employees since the negations involved all employees.[147] The employer the appealed at LAC against this judgment for further consideration but the LAC has however also dismissed the appeal.[148] The LAC agreed with the LC that when the matter was referred for conciliation, the union represented the interests of both represented and non-represented employees.

The matter was then taken to the Supreme Court of Appeal by the employer and the SCA delivered a dissenting judgment but the majority judgment upheld the appeal in favour of the employer.[149] The legal question which the SCA was called upon to adjudicate upon was "whether the unrepresented employees were required to submit a separate notice of their intention to strike or whether the notice submitted by the union was sufficient to include the unrepresented employees that would ultimately render their participation in the strike as being lawful."[150]

The SCA found that the silent fifth purpose of the section 64 procedure is that in order to not render having unions at workplace less effective, the union represents its members only and non-represented employees had to submit their separate notice to strike.[151] The SCA concluded that employees that are not represented would have lawfully participated in the strike had they submitted their notice and since they failed to do so, their strike action was unprotected and thus their dismissal is upheld.[152] This precedent by the SCA denoted that it is a prerequisite that non-represented employees have to issue their own written notice of intention to strike. However, this judgment did not specify as to whether each an every non-represented employee has to issue

[146] *Equity Aviation* case para 7.
[147] *Equity Aviation* case paras 7 and 8.
[148] *Equity Aviation* case para 8.
[149] *Equity Aviation* case para 9 and 30.
[150] *Equity Aviation* case para 10.
[151] *Equity Aviation* case paras 27 and 2.
[152] *Equity Aviation* case paras 29 and 30.

his own separate notice to strike such that if there are 150 non-represented employees, their employer has to receive 150 notices to strike. In addition, it would mean that this judgment implied that each employee had to separately make referral of the dispute for conciliation and that would time consuming and inconvenient. These loopholes presented by this judgment rendered it less acceptable.

This precedent of the SCA was rejected by the Constitutional Court in the case of *SA Transport & Allied Workers Union v Moloto*[153] whereby the facts of the case are the same as the ones *Equity Aviation v SATAWU*. After failed negotiations, an issue arose, and after failed negotiations, the majority union issued the notice to strike and when the strike commenced, even non-represented employees joined it.[154] The employer dismissed all the non-represented employees due to non-compliance with notice procedure required by the LRA. The employees challenged their dismissal and they were unsuccessful until they reached the Constitutional Court appealing against decision of the court *a quo*.[155]

In this case the court had to answer the question of whether it is necessary for non-represented employees to issue their own separate notice strike or the notice issued my majority union suffices as an umbrella to cover even non-represented employees.[156] In dissenting judgment, the Constitutional Court overturned the reasons of the SCA in *Equity Aviation v SATAWU* of adding an implied fifth requirement for issuing notice to strike by non-represented employees. The court overturned this ruling and reasoned that the Constitution entrenches the right to strike and consequently making it to be much significant to the extent that no implicit requirement may be added on it in absence on necessary justification.[157] The contention that there should be 2 separate notices was thus rejected and the argument that the LRA recognises only 1 strike over 1 and same dispute concerning 1 and the same people was upheld.[158] It can therefore be deduced from this judgment that the court respected the value of the right to strike in South Africa and thus gave it the

[153] *SATAWU v Moloto* 2012 33 ILJ 2549 (CC) (hereafter *Moloto case).*
[154] *Moloto case* paras 2 and 3.
[155] *Moloto case* paras 5, 6, 7 and 8.
[156] *Moloto case* para 13.
[157] *Moloto case* paras 92.
[158] *Moloto case* paras 91 and 92.

necessary protection which implied that no limitation should be set on the right to strike if a litigant did not adequately establish the justification for limitations.

3.3. Selective re-employment after dismissal: inconsistency issues

The selective re-employment after dismissal was considered by the court in the case *Chemical Energy Paper Printing Wood and Allied Workers Union v Mentrofile (Pty) Ltd* whereby the court emphasised that employees that have committed the same kind of misconduct must be treated in the same manner.[159] The aim of this ruling is that employees who acted the same way under the same circumstance should be treated fairly and the same way. The purpose of requiring fairness in selective re-employment was described by the court in the case of *NUM v Amcoal Colliery t/a Arnos Colliery*[160] as a protective legal mechanism that protects employees against arbitrary and biased decisions of employers.[161] This protection to employees is offered by requiring employers hands down the same treatment without fear or favour to all employees who conducted themselves in a similar manner.

Therefore, if after participating in unprotected strike, if an employer decides to dismiss one employee among them, it must also dismiss the other employee otherwise that would constitute unfairness and unfair labour practice. As fairness requires that all employees under the same circumstances treated similarly, it was stated in the case of *Southern Sun Hotel Interets v CCMA*[162] that in order for employees to succeed with their claims for inconsistent re-employment, they need to identify and prove that other employees acted in the same manner but given a lenient or different sanction.[163] Therefore, it is

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[159] *Chemical Energy Paper Printing Wood and Allied Workers Union v Mentrofile (Pty)* (2004) 25 ILJ 231 (LAC) para 35.

[160] *National Union of Mineworkers v Amcoal Colliery t/a Arnos Colliery* [2000] 8 BLLR 869 (LAC) (hereinafter referred as *Amcoal Colliery* case).

[161] *Amcoal Colliery* case para 19; *South African Clothing and Textile Workers Union v Filtafelt (Pty) Ltd* (JS26315) [2017] ZALCJHB 483 para 66 (Hereinafter referred as *SACTWU v Filtafelt case).* See also, *Food and general Workers Union v Design Contract Cleaners (Pty) Ltd* (1996) 17 ILJ 1157 (LAC) para 1166A-G.

[162] *Southern Sun Hotel Interets v CCMA* [2009] 11 BLLR 1128 (LC) (hereinafter referred as the *Southern Sun Hotel).*

[163] *Southern Sun Hotel* paras 32 and 33; *Early Bird Farms (pty) Ltd v Mlambo* [1997] 5 BLLR 541 LAC).

necessary to establish similar circumstances and different treatments between employees for claims of inconsistency to succeed.

Inconsistency or unfairness when conducting re-employment after dismissal of employees that participated in unprotected strike is the main factor that employers often fail to avoid for not contravening the all for one and one for all rule. The inconsistency of employers was well articulated by Barners AJ in *NUMSA obo Jan v W E Geysers* whereby he stated that inconsistency arises wherein alike cases are not been treated alike and noted that a deliberate refusal to re-employ others while re-employed other employees who were dismissed for the same reason amount to unfair dismissal.[164]

An inconsistency in selective re-employment was a ground that prevailed in *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group*[165] case and prejudiced employees contented that such unfairness constitutes automatic unfair dismissal. The court had to consider whether the employer's inconsistency when conducting re-employment was unfair enough to amount to unfair dismissal as contended by the applicants. The court gave immense analysis to the extent and circumstance surrounding the employer's decision to re-employ some employees and refuse to re-employ other employees.

The court reached a conclusion that the employer lacked just and fair grounds for not treating all employees the same way it treated the rest of employees under the same circumstances. The court thus ruled that all employees should be reinstated as the employer's failure to apply the "one for all and all for one" rule amounted to unfair dismissal for failing to re-employ other employees that it dismissed for similar reasons constitute unfair dismissal.[166] What is required as prevailed in Molefe's case is that a mere refusal to re-employ other employees and offering to re-employ other employees after when all employees were dismissed for one and the same reason does not automatically constitute unfair dismissal. The circumstances of each case therefore need to be taken into consideration when adjudicating cases involving inconsistency

[164] *NUMSA obo Jan v W E Geysers* (JS162/16) [2017] ZALCJHB 152 para 10 and 11.
[165] *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group* [2018] 11 BALR 1217 (CCMA). (Hereinafter referred as *Molefe case*).
[166]https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-28-january-all-for-one-and-one-for-all-the-consequences-of-selective-re-employment-following-dismissal-.html

when administering re-employment after when employees were dismissed for one and the same reasons.

In contrast, the case of *SACTWU v Filtafelt* it has been stated that even though the employer's selective re-employment may amount to not offering to re-employ all dismissed employees, such an employer should establish the legitimacy and fairness of its decision.[167] Furthermore, AJ Snyman in the case of *SACTWU v Filtafelt* stated that the decision of the employer to decide to re-employ only two employees among all employees that were dismissed for participating in an unprotected strike should not benefit the other employees that were dismissed. Such that the dismissed employees that were not re-employed should not be reinstated according to the court after it had looked at the circumstances which are ordinary like other cases and not whether there were no exceptional circumstances be reinstated.[168]

This ruling can be further supported with the precedent laid by AJ Snyman in the case of *SACTWU v Filtafelt.* AJ Snyman held that under certain circumstances an employer's decisions to re-employ other employees and not re-employ others after when all employees were dismissed for one and same reason may be fair and justifiable, thus not constituting unfair dismissal.[169] These judgments therefore entail that employers should be granted an opportunity to justify or provide reasons for its inconsistency in selective re-employment.

Dealing with matters of inconsistency in selective re-employment thus require one to consider fairness in all circumstances. Fairness has been dealt with by the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town.*[170] The Constitutional Court has stated that "the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate,

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[167] *SACTWU v Filtafelt case* para 64.
[168] *SACTWU v Filtafelt case* para 78.
[169] *SACTWU v Filtafelt case* para 78.
[170] *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) (hereafter referred as *NEHAWU v UCT*).

where possible, these interests so as to arrive at the balance required by the concept of fair labour practices."[171]

Minister of Correctional Services v Mthembu[172] One major concern is that the employer's decision to offer re-employment of other employees and refuse to re-employ others who have been dismissed for the same misconduct does constitute dismissal but just not unfair dismissal on its own.[173] This is due to the fact that inconsistency is an element of fairness in a disciplinary hearing or process and with that been said, every case will be decided on its circumstances.[174]

3.4. Conclusion

The incorporation of the right to strike into the South African Constitution has found its roots in the *Ex parte: In re Certification* case whereby Chaskalson J confirmed that the right to strike preserves the employee's right to dignity and serves an essential tool for collective bargaining and should be valued more than the right to lock-out.[175] The Constitutional Court has also confirmed the valued of the right to strike in the recent case of *Moloto*. In the *Moloto* case, the court stated that the right to strike is a constitutional right with significant value and cannot be without any proper justifications interpreted in an manner amount to adding implicit requirement.[176]

The court in *Plascon Decorative Inland case* has interpreted the definition of "strike" and held that a legal strike comprises of 3 elements, namely refusal to perform work,[177] secondly, the refusal must be undertaken by employees and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest."[178] In case the employees' conduct falls afoul from the required

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[171] *NEHAWU v UCT* para 40.
[172] *Minister of Correctional Services v Mthembu* (2006) 27 ILJ 2114 (LC) (hereinafter referred as *Minister v Mthembu*).
[173] *Minister v Mthembu* para 13. The same ruling was at by the LC at *Abrahams v City Of Cape Town* 24 (2011) 32 ILJ 3018 (LC) para 50 and affirmed by the LC in the case of *Banda v General Public Service Sectoral Bargaining Council* [2014] ZALCJHB 46 para 50.
[174] *Minister v Mthembu* para 9.
[175] *Ex Parte: Constitutional Assembly* para 841A-C.
[176] *Moloto case* paras 91 and 92.
[177] *Plascon Decorative Inland* paras 20-22.
[178] *Plascon Decorative Inland* 22.

elements, it means they are engaged in unprotected strike and may not be protected from dismissal.

In case employees get dismissed for taking part in unprotected strike, the court in SACTWU v Filtafelt the employer has to apply the all for one and one for all use to avoid inconsistency in case of re-employment of the dismissed employees.[179] This is due to the ruling of *NUMSA obo Jan v W E Geysers* case that arbitrary refusal to re-employ other employees constitutes unfair dismissal the employer re-employed some employees when their dismissal was based on the same reason.[180]

[179] *SACTWU v Filtafelt case* para 64.
[180] *NUMSA obo Jan v W E Geysers* (JS162/16) [2017] ZALCJHB 152 para 10 and 11.

CHAPTER FOUR: COMPARATIVE STUDY: SOUTH AFRICA AN UNITED KINGDOM

4.1. Introduction

United Kingdom (UK) is among countries which have advanced respect for human rights and actively participate and influence international law hence it also forms part of ILO and United Nations and ratified many international conventions.[181] UK has ratified various conventions that relate to employees' right to organise collectively and freedom of association at workplace and some of the ratified conventions include the Right to Organise and Collective Bargaining Convention,[182] Freedom of Association and Protection of the Right to Organise Convention,[183] and Collective Bargaining Convention.[184]

Unlike South Africa with a written Constitution which is that supreme law which constitutionalised the right to strike, collective bargaining and freedom of association,[185] UK does not have a written constitution and any labour related right to recognised and protected through legislation and common law.[186] UK laws do not recognise the right to strike but do however have various statutes that regulate the right to collective bargaining and freedom of association and such statutes include the Trade Union & Labour Relations (Consolidation) Act

[181] The commitment of UK on the right to strike has seem when UK made the following ratifications: "UK has ratified the International Covenant on Economic Social and Cultural Rights (ICESCR, Article 8), the International Covenant on Civil and Political Rights (ICCPR, Article 22), the ILO instruments Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise ratified on 27 June 1949; Convention No. 98 concerning the Right to Organise and to Bargain Collectively ratified on 30 June 1950; Convention No. 151 concerning Labour Relations (Public Service) ratified on 19 March 1980 UK did not ratify Convention No. 154, Collective Bargaining Convention, 1981 European level The European Social Charter (European Treaty Series – No. 35) was ratified on 11 July 1962 (and entered into force on 26 February 1965). UK has signed but not ratified the (Revised) European Social Charter (European Treaty Series – No. 163), nor the Collective Complaints Procedure Protocol. The UK has incorporated the European Convention of Human Rights into national law through the Human Rights Act 1998 (HRA 1998)."
[182] Convention 98 of 1949.
[183] Convention 87 of 1948.
[184] Convention 154 of 1981.
[185] Section 26 and section 16 of the Constitution.
[186] Stewart A & Bell M, (2008) *The Institute of Employment Rights* 97.

(TULRCA),[187] and the Trade Union Act (TUA),[188] the Human Rights Act (HRA)[189] and other statutes that are specific to different fields of employment such as essential services and public services. The TULRCA is the main legislation that has most provisions that regulate strike law in UK and as it was recently amended, most provisions that confer to employees an immunity against dismissal for taking part in lawful strike are been entrenched in the Employment Relations Act.[190] This chapter will articulate strike law in UK and further provide comparative analysis between South African strike law and UK strike law.

4.2. Right to engage in strike action in UK

4.2.1. What is strike action?

Legislations including the TULRCA in UK do not provide the definition of the term 'strike' in labour context despite having so much regulatory framework that surrounding the manner in which employees ought to engage in industrial action and elements of strike, but there is no general definition of strike.[191] Section 246 of the TULRCA has however provided that for employees' action to constitute a strike action, there should a "concerted stoppage of work" among employees or conducted by 2 or more employees.[192]

Section 224 of TULRCA recognises that a strike action should be undertaken by employees for the purpose of furtherance of a trade dispute between them (employees) and their employer in relation to the following matters:

a) "terms and conditions of employment, or the physical conditions in which any workers are required to work
b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers,

[187] Act 1992
[188] Act of 2016
[189] Act of 1998
[190] Act of 2004.
[191] Stewart A & Bell M, The Right to Strike: A Comparative Perspective - A study of national law in six EU states, (2008) *The Institute of Employment Rights* 99.
[192] s 246 TULRCA.

c) allocation of work or the duties of employment between workers or groups of workers,
d) matters of discipline
e) a worker's membership or non-membership of a trade union,
f) facilities for officials of trade unions, and
g) machinery for negotiation and consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."[193]

As there is no even a single provision that recognises the right to strike for employees in United Kingdom, TULRCA as the main legislation that regulates strike action in UK does however provides protection to employees and unions that engage in strike action.[194] TULRCA however has concrete recognition of employees' and trade unions' right to organise and engage in strike collectively. Consequently, strike action in United Kingdom takes place whereby members of trade union acting collectively engage in work stoppage for the purpose to reinforce their mutual interest or resolve a dispute between them and their employer.[195]

Since its only members of trade union who should engage in strike action, it means the UK law does not allow employees who are not part of trade union to engage in strike action and this may be a consequential flow from lacking recognition of the right to strike but inky recognising the right to organise collectively. TULRCA recognises 2 categories of strike action in United Kingdom, which are: "strike action and action short of a strike. A union must hold a ballot before organising either form of industrial action."[196]

As strike action entails that employees completely engage in work stoppage, action short of a strike relatively entails that employees conduct themselves in a manner that negatively affect the work progress in order to demonstrate the

[193] Section 244 of TULRCA.
[194] https://www.rcn.org.uk/magazines/bulletin/2021/april/industrial-action
[195] Inversi C and Clauwaert T (2019) "The right to strike in the public sector: United Kingdom" *European Public Service Union* 5.
[196] Inversi C and Clauwaert T (2019) *European Public Service Union* 5.

extent of the seriousness of their intentions to strike.[197] Action short of a strike is notoriously known as "working to rule", which often takes place by employees rendering their work efforts in a manner that is less than the minimum standards of effort required as contemplated by the terms and conditions of their employment contract.

On the other hand, strike action requires employees to literally render no effort at all for discharging duties stipulated by terms of their employment contract. The UK laws however recognise categories of workers and as such, UK labour laws do not allow employees categorised as 'essential workers' to engage in strike action.[198] This derogation from the general practice of strike action could be understood with the following practical example. Royal College of Nursing union members engaged in strike action in Northern Ireland and all employees that fell under the essential workers category did not (were not allowed) engage in strike action. So in order to demonstrate their support for the strike that was on-going as undertook by other employees, essential workers wore badges when they went to work.[199]

4.2.2. The procedures to take strike action

There are prescribed or legislated procedures that unions in UK should follow when they intend to engage in strike action and the TULRCA is the statute that embodied the procedure to be followed for protected strike. In the circumstances whereby a there is a unresolved dispute between employees and an employer and trade union decides to engage in strike action, the TULRCA has made in compulsory that trade unions conduct ballots for employees to vote in favour or against taking strike action.[200] Section 227(1) the TULRCA confers to UK employees the right to demonstrate their individual view through voting against or in favour of taking strike action and all employees have equal right to vote in ballot.[201]

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[197] https://www.nidirect.gov.uk/articles/industrial-action
[198] Section 2 of the Important Public Service (Health) Regulation of 2017.
[199] https://www.rcn.org.uk/magazines/bulletin/2021/april/industrial-action
[200] Stewart A & Bell M, (2008) *The Institute of Employment Rights* 100.
[201] *Ibid.*

Section 226 of the TULRCA indicates that strike action that no ballot was conducted prior to striking automatically becomes unprotected strike. In addition, section 226A of the TULRCA requires trade unions to issue a notice of their intention to conduct ballots to their employers at least 7 before ballots taking place and also issue a copy of a ballot paper at least 3 days prior to conducting the ballot. Section 231 and section 231A outline the post-ballot procedures that unions ought to follow, which mainly consist of informing union members and an employer about the outcomes of the ballot conducted. The ballot outcomes are valid for 4 weeks and therefore expire after when 4 weeks has passed but may be extended through agreement between an employer and trade union representatives.[202]

In case the ballot outcomes indicted that the required percentage of employees voted in favour of taking strike action, trade union officials should pronounce strike action to employees and an employer. In addition to notice of pronouncement of strike action, a date and manner in which the strike action will be conducted should be specified in clear and unambiguous terms. It is not compulsory for employees that voted in ballot to participate in strike action even when they voted in favour of engaging in strike action.[203]

TULRCA requires 50% or more of employees who voted and any percentage above 50% of employees that support taking strike action in and this means that the ballot outcomes should have half or more of employees who opted for strike action. Practically, if 200 employees are eligible to take part in ballot, it means 100 of employees must vote and 101 or more of employees should vote in favour of taking strike action otherwise the strike action will unlawful and thus unprotected.

Ballots should according to the TULRCA conducted confidentially and neither employees not an employer should be aware or be informed of any employee's vote. Ballots outcomes in favour of taking strike action remain effective for a period of 6 months or 9 months with an employer's consent in England, Scotland and Wales. The Northern Ireland does not have any prescribed timeframe on the prescription period of ballot outcomes for strike action

[202] Section 234 of TULRCA.
[203] https://www.gov.uk/industrial-action-strikes

subject to union commencing a strike action within 8 weeks counting from the day of ballot outcomes.[204]

4.3. Comparative study

The comparative study will be conducted and compare strike laws in UK and South Africa. The author will identify the similarities and differences and thereafter elaborate on lessons that each State can learn from one another.

4.3.1. Similarities

The study has found that there are various essential aspects that present similarities between UK labour laws and South African labour laws. Firstly, the elements of constitute a strike in UK and South Africa. Under UK law, employee should engage in strike action to resolve a mutual dispute and should involve place through "any form concerted stoppage of work".[205] The elements of strike in South African legal system we set out by the LAC in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd,* wherein it started that a strike action takes place whereby there is "refusal to perform work, the refusal must be undertaken by employees and such a refusal of work must be purposed to resolve a matter of mutual interest."[206]

Furthermore, the UK laws recognise the right to collective bargain and organise for strike and other purposes mostly exercised through unions. On the other side, the South African law recognised the right to freedom of association is in terms of sections 18 and 23(2) of the Constitution. Therefore, employees in both stated countries enjoy the right to form and gain membership to trade unions and take part in trade union activities including voting.

Both stated countries grant immunities to employees that engage in protected strikes and such immunities protect employees from unfair labour practices, dismissals, warnings, suspensions and law suits.[207] It should be noted that these immunities do not apply in both States where employees engage in unlawful strike and where a lawful strike became unlawful during the process.

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[204] Its procedure for strike are not fully regulated by the TULRCA.
[205] Sections 244 and 246 of the TULRCA.
[206] *Plascon Decorative Inland* paras *20*-22.
[207] Section 67(2)(a) of the LRA.

Furthermore, both countries recognises that essential workers cannot participate in a strike and their participation will render will render the strike automatically unprotected and such employees shall be liable for dismissal if found guilty.

4.3.2 Differences

There are various and material differences between South African and UK labour laws and one fundamental distinction is that South African law recognises the right to strike and UK laws do not have the right to strike. Employees in UK have to rely on the right to organise in order to engage in strike action where in contrary South African employees can rely on both the right to strike and collective bargaining for strike purposes. In addition, South African law recognises the right to engage in secondary strike whereas the UK law prohibits employees and their unions to engage in secondary strikes for any reason.

As it was stated in this study that UK has no written constitution and therefore none of its labour rights are constitutional recognised. Thus no supreme law in UK that recognises the right to collective bargaining and freedom of association and trade unions and employees have to rely on international law, statutes and common law to exercise and enforce their right to organise for strike purposes.[208] On the other hand, the Constitution has embodied the right to strike, the right to organise, and the right to freedom of organisation.[209] The LRA recognises the right to strike for South African employees and UK's TULRCA does not have such regulations for employees in UK.[210]

When employees are engaging in a protected strike, they are often protected against various consequences that would emanate from their strike action if it was not protected. Both UK law and South African law conferred numerous immunities to employees that engaged in protected strikes and the difference appears in time limits for immunities granted to strikers. The UK law grants

[208] Stewart A & Bell M, (2008) *The Institute of Employment Rights* 97.
[209] Section 23(2) of the Constitution provides that "every worker has the right (a) to form and join a trade union and (b) to participate in the activities and programmes of a trade union; and (c) to strike."
[210] Section 64 of the LRA.

immunities to employees for the 12 weeks of strike subject to period extension and on the other side South African employees are afforded immunities as long as their strike lasts subjected to their strikes remaining within the meaning of protected strike.

As the law in UK does not specifically recognise the right to strike and yet employees can engage in strike action, it however does not give the definition of what is meant by the word 'strike' in labour law context. The TULRCA only lays out elements of strike by regarding strike as "any concerted stoppage of work"[211] but not a definition of strike. On the other hand, as the South African law recognises the employees' right to strike section 213 of the LRA states out the definition of strike for South African labour law.[212]

4.3.3 Lessons that South Africa can learn from UK strike laws

The lesson that South African legal system can learn from UK labour law system in regard to strike is that UK laws have placed more priory to employee participation on the employees when deciding whether to strike when engaging in collective action or strike organised by their union. Therefore, the union does not take decision on behalf of employee and further that only affected employees are eligible to vote in regard to whether to take industrial action or resort to other measures.

This would ensure that union legitimately act on the interests of affected employees and not act for advertisement purposes whereby they act to attract more members instead of engaging in strike action to champion the interests of affected employees. In addition, UK realised that since it is not possible by law for a single person to engage in strike action and therefore strike requires 2 or more people acting jointly for resolving mutual dispute, they granted employees with comprehensive right to organise so that it becomes easier to collectively strike against employers.

[211] Section 246 TULRCA; Stewart A & Bell M, (2008) *The Institute of Employment Rights* 99.
[212] Section 213 of the LRA defined the meaning of strike, refer to page 24 of this dissertation.

4.3.4. Lessons that UK can learn from South Africa strike laws

South African laws including the supreme law of the Republic[213] have recognised both the right to strike and the right to organise and therefore gave South African employees a broader opportunity for employees to exercise and enforce their right to strike with fewer obstacles. UK laws can also learn from South Africa that although it is not possible for an employee to strike alone, even employees without union membership can exercise their to strike by engaging in industrial action to protest in favour of their interests.

The strike laws of South African have restricted employees and union to strike over certain matters such as dismissals and conditions of employment as such matters should be resolved through ADR and adjudication. UK strike laws have however not restricted employees and unions to strike over conditions at workplace, and suspicion and dismissal of employees and therefore can learn from South African strike.[214] Restricting employees and their unions from engaging on strike action over certain matters will ensure that the number of strike are limited and therefore harmonise the employer and employee relationship.

4.5. Conclusion

The comparative study has articulated the labour laws in UK and presented the similarities, differences and lessons that can be learnt from both countries (South Africa and UK). UK laws have concrete recognition of the right to collective bargaining and engage in strike action through trade union and do not specifically recognise the right strike. In order to ensure that unions do not derogate from serving the interests of employees, ballots have to be conducted prior to engaging in strike action and employees have a right to vote against or in favour of taking strike action and union have to act according to ballot outcomes. Unlike UK laws, the South African specifically recognise the right to strike and just like UK laws does also recognise the right to engage in collective bargaining and organise. There is however some similarities and many difference between how UK and South Africa regulate their strike laws and the

[213] The Constitution of South Africa.
[214] Section 244 of the TULRCA 1992.

differences presented formed a major part of lessons that the concerned States can learn from one another's legal sy

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusions

The main purpose of this study was to analyse the South African labour laws, particularly laws regulating strike action. After considering that there is no well-established regulations to guide courts and employers in respect of make decision on re-employment of employees after they were dismissal for taking part in unprotected strike action, this became another motive for conducting this study. The author articulate the legal framework including conventions regulating strike law, further conducted case law analyse and lastly presented comparative study by comparing South African strike laws and UK strike laws in order to accomplish the objectives and aims of this study.

As the second chapter of this study articulated the regulatory framework for strike law, it was found and indicated that there is concrete correlation between international conventions and South African domestic labour laws in respect of strike. The author found that the ILO is the leading international organisation that adopts conventions that provide international regulatory framework for labour relations and the concrete correlation stated is due to South African ratifying ILO labour conventions.[215] The Constitution and LRA are the South African Acts that regulate strike law and both Acts confer to employees an extensive right to strike, collective bargaining and organise collectively.[216]

It was further presented that the right to strike and organise have been intertwined to ensure that the right to strike is exercised effectively and are being recognised as fundamental human right at international sphere.[217] The Codes of Good Practice requiring fair labour practices require that there should be fairness and equality among all when employers conduct selective re-employment after when employees where dismissed for similar reasons.

As chapter 3 presented care law analysis, the *Ex parte: In re Certification of the Constitution* was found to be the landmark case for incorporation of the right to strike in the South African Constitution and that demonstrate the extent at which South African legislature and courts valued the employees' right to

[215] Preamble of the LRA.
[216] Section 18 of the Constitution, section 23(2) of the Constitution and section 64 of the LRA.
[217] García L & Andrés J (2017) *Revista Chilena De Derecho* 44(3) 782.

strike.[218] The *Moloto* case also outlined the value of the employees' right to strike as the Constitutional court reiterated many times that the right to strike is a constitutional right with significant value and cannot be denied to employees without *justa causa*.[219]

The *Plascon Decorative Inland case* has outlined what is meant by the term 'strike' and indicated that a lawful strike action consists of 3 elements, namely "refusal to perform work, the refusal must be undertaken by employees and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest."[220] In regard to selective re-employment after dismissal, it is clearly indicated according to the case of *SACTWU v Filtafelt* employers have to apply the 'all for one and one for all rule to ensure consistency and fairness in selective re-employment.[221]

As the comparative study is chapter 3 of this study, what transpired most in chapter 3 of this study is that UK laws have extensive recognition to the right to organise collectively but does not recognise the right to strike.[222] UK law dictates that employees should heavily rely the right ot organise and use trade unions to engage in strike action. As the LRA is the main legislation that regulates the right to strike in South Africa, TULRCA is the main legislation that regulates strike law in UK. Some of the other fundamental differences identified are that UK has no constitutionalised protection of the right to strike whereas South African protects the right to strike through its supreme law.[223] In addition, UK does not recognise the right to engage in secondary strike whereas South African makes provision for employees to take part on secondary strike.

It was the author's most valued submission is that, as a harmonised relationship between employees and their employer is crucial, South African

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[218] *Ex Parte: Constitutional Assembly* para 841A-C.
[219] *Moloto case* paras 91 and 92.
[220] *Plascon Decorative Inland* paras 20-22.
[221] *SACTWU v Filtafelt case* para 64.
[222] Stewart A & Bell M (2008) *The Institute of Employment Rights* 99.
[223] Section 23 of the Constitution; Stewart A & Bell M (2008) *The Institute of Employment Rights* 97.

laws should prescribe often use of unions to resolve workplace dispute and more alternative dispute resolution (ADR) that does not involve striking.

5.2. Recommendations

The first recommendation that the author proposes is that South Africa should learn from UK laws and make conducting of ballots a mandatory step to be undertaken before unions embark in strike action. This will ensure that union act based on the directions of their members and therefore every action or decision taken will be for the best interests of their members.

The second recommendation is that the legislature should amend the LRA and insert provisions that will provide regulatory guidelines to selective re-employment after when employees were dismissed for similar reasons. Insert such kind of regulations will alleviate employer's inconsistency in selective re-employment and also guide judicial officers to adjudicate matters concerning selective re-employment.

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