THE DILEMMA FACED BY POLITICAL OFFICE BEARER-CUM-SENIOR MANAGERIAL EMPLOYEES IN EXERCISING THEIR LABOUR RIGHTS: A SOUTH AFRICAN PERSPECTIVE

By

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2022

MINI-DISSERTATION

Submitted in partial fulfilment of the requirements for the degree of

MASTER OF LAWS

in

LABOUR LAW

in the

FACULTY OF MANAGEMENT AND LAW

at the

UNIVERSITY OF LIMPOPO

SUPERVISOR: PROF I.C TSHOOSE

JANUARY 2024

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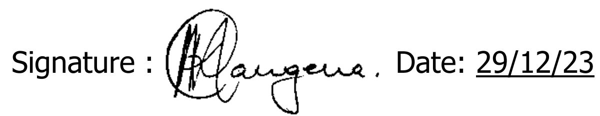
DECLARATION

I, **Kgwara Calvin Mangena,** hereby declare that the work on which this mini-dessertation is based is, except where acknowledgement indicate otherwise my original work.That neither the whole work nor any part of it has been, is being, or is to be submitted for another degree here at this university or at any other institution of higher learning. I therefore authorise this university to reproduce for the purpose of advancing the research project either the whole or any portion of the contents in any manner whatsoever.

Signature :  Date: 29/12/23

DEDICATION

This mini-dessertation is dedicated to my late sister, Modjadji Alice Mamabolo who was unfortunately called to a higher service in the year 2020. My sister though miles away from me was an oasis of support and inspiration throughout my entire academic life. I therefore unequivocally dedicate this study in honour of her memory.

Ke re Robala ka khutso Mohlapa, robala ka khutso Mmirwa!!!

ACKNOWLEDGEMENTS

It is unimaginable and impractical for one to think of embarking on a postgraduate project without people offering all kinds of support.It is against this background that I feel highly indebted to different categories of people for the different roles they played towards the realization of this project.

First and foremost, I would like to extend my profound words of gratitude to my fellow LLM classmates who we struggled together to burn the midnight oils.The following classmates deserve mention. Mutshidzi Makwarela, my class representative and studymate, Mogau Hapiness Mokgata, James Morero, Kevin Vukeya,Moses Molepo and Grace Bambisa for providing a shield when the going was tough.

My words of appreciation go to my support structure, my wife, Mokgadi Lucy Mangena for keeping hunger at bay, my children, Modjadji Alice, Matome Hoseah and Lekgaloa Caiphus for keeping the fires burning by making sure that the 'studio' I kept myself hours on end remain conducive for critical thinking. My mother, Maite Dorah for always providing me with a spiritual meal.

I will be ungrateful if I don't mention my colleagues, notably Adv Lufuno Tokyo Nevondwe, Mr James Morero, Dr Adv Bongani Stanley Nkosi (Mthakathi), Dr Mmatipe Isaaih Sefoka for proofreading the study and adding value, Dr Lesetja Monyamane and Winnie Milazi-Matlou for always believing in me.

I deliberately saved the best for last. My deepest and innermost gratitude goes to my Supervisor and Mentor Professor Itumeleng Clarence Tshoose whose expertise, encouragement and guidance were a fountain of strength and resilience.

Last but not least, the Deity One for always providing me with oxygen to breathe.

Ke a leboga Bana ba Tsie-Kgalaka!!!

One Love!!!

1.**ABSTRACT**

This study analyses the precarious situation of between a 'rock' and a 'hard place' political office bearers-cum- senior managerial employees regularly find themselves in at the workplaces when exercising their labour rights. The study investigates the impact of the conflict of interest that manifests itself when these senior employees are expected to discharge their duties during an industrial action. Political office bearers-cum-senior managerial employees in this context refer to employees who also hold political offices. In terms of the Municipal Systems Amendment Act,[1] a political office in relation to a political party or structure means:

> "the position of chairperson, deputy chairperson, secretary, deputy secretary, treasurer or an elected or appointed decision-making position of a political party nationally or in any province, region or area in which the party operates."

In the context of this study, employees who hold political office will refer to employees occupying positions of power in their employee organizations (and not political parties) such as those listed above by the Act and who also occupy senior and more influential positions such as senior managers or directors in an employment organogram. The dilemma arises out of a hard choice these managers have to embark on between collegiality and solidarity towards their fellow colleagues who may at times be their comrades and their trade union respectively on one hand and their common law duty of loyalty and trust towards their employers on the other hand. The study focuses on what role these highly ranked employees should play in the event of a labour dispute where the employer may sometimes respond to a strike action by enforcing a lockout or alternatively, in the event of a protest action where the employer may sometimes instruct the political office bearer-cum-senior employee to provide the employer with a documentary evidence in the form of a list of striking employees who have 'downed tools' and not report for duty for the purpose of the employer implementing the 'no work, no pay' rule[2] given the fact that these senior employees are clothed first with the responsibility of being the employer' representatives

[1] Municipal Systems Amendment Act 3 of 2022, (Hereafter MSAA).
[2] See Government Gazette No 21050 of 2000 titled 'Regulations Regarding the Role of Managers Prior to Strike Action.'

and an integral part of management at the workplaces and therefore enforcing the employer's instructions at the workplace and second to discharge discipline against their junior employees and colleagues who may sometimes be their comrades in their employee unions for work-related misconducts (School managers for an example have the responsibility to charge their fellow colleagues for acts regarded as misconduct). Strikes as used in the context of this study will in some instances also imply protests action especially when dealing with employers and employees in the public sector. The study also juxtaposes the seemingly compromised position of the political office bearer-cum- senior employee during a lockout or alternatively during a protest action. The study puts a spotlight on the dilemma these shop stewards-cum-managers face during the period of a lockout or in the event of a protest action. The preliminary findings of this study confirms that this conflict of interest highly compromises these senior employees and subsequently brings the employment relationship into disrepute.

Key words: conflict of interest, employer, labour disputes, lockout, political office bearers, protest action, senior managerial employees, shop stewards, strikes.

CHAPTER 1: INTRODUCTION & LAYOUT OF THE STUDY

1.1. Introduction

An employment contract is designed in a manner that an employee is obliged to place his services at the employer's disposal and the employer in turn has an obligation to remunerate the employee for the services rendered.

In fact, Scoble's[3] much older writing lays the foundational theory for an employment contract. The writing states in part that:

> "the legal obligation of an employer to pay wages is dependent entirely on the servant having performed his part of the contract in rendering the services stipulated for by the parties."

Historically, the employer and employee relationship was known as a master/servant relationship and although the master/servant relationship is still in existence, it has been reformed and somewhat diminished through the enactment and promulgation of a host of statutes.[4]

However, from time immemorial, the nature of work has always been based on the common law principle of "*locatio conductio operarum*"[5]. In other words, the employment relationship is originally by design and not by choice that:

> " the employer is in a stronger bargaining position than the employee and can dictate the terms and conditions of the contract of employment to a large extent."[6]

This result in the employment relationship being a contract, the relationship of which is inherently unequal wherein partners have different and divergent interests. Grogan[7] could not argue more:

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[3] Scoble, C.N. *The Law of Master and Servant in South Africa* (Butterworth, 1956) 203.

[4] Refer to the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998, Compensation for Occupational Injuries and Diseases Act 130 of 1993 among others.

[5] A contract of service which is a reciprocal contract in terms of which an employee places his services at the disposal of another person or organization, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee's services.

[6] McGregor,M & Dekker,A (Eds). *Labour Law Rules'* (4th Ed Siber Ink 2021) 3.

[7] Grogan,J. *Collective Labour Law'* (Juta and Company Ltd 2007) 1.

> "the rules of collective labour law, on the one hand, flow from acceptance of the facts that employees and employers, though linked by a common enterprise, constitute different interest groups with different objectives-the employees, for the most part, to ensure that they receive a fair return for their labour, and the employers, for their part, to strive to maximize profits."

The Constitution of South Africa has somehow attempted to address this state of inequilibrum in the employment relationship. It provides in part that: 'everyone has the right to freedom of association"[8] and that "every worker has the right - (a) to form and join a trade union[9]; (b) to participate in the activities and programmes of a trade union[10]; and (c) to strike."[11]

The LRA[12] also gives every employee the right to join a trade union. In *Food and Allied Workers Union v The Cold Chain*[13], the court renewed the assertion that an employee's right to be a member of an employee union is an absolute right.

From the provisions and accompanying case law cited above, it is clear that senior managers by virtue of being human beings born and clothed with rights, also have a right to belong to employee organizations of their choice and a right to constructively engage in the political life and affairs of the chosen employee organization including the right to hold political office as shop stewards/shop stewards or even as branch, regional, provincial or national office bearers[14].

It is this right to belong to an employee organization and to engage constructively in the political life of such an employee organization including the right to hold office that places these employees at the crossroad and at odds with their employer(s).

Thus in the pursuit of exercising his labour rights which include freedom of association which subsequently leads to a right to belong to a labour union of his/her choice which is counterveiled by an obligation to avail his/her service at the disposal of the employer, a conflict of interest

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[8] Section (Hereinafter s) 18 of the Constitution.
[9] s 23 (2) (a).
[10] s 23(2)(b).
[11] s 23 (2)(c).
[12] The Labour Relations Act 66 of 1995 (Hereinafter LRA).
[13] *Food and Allied Workers Union v The Cold Chain* (2007) (LC) C324/2006.
[14] Congress of South African Trade Unions (Hereinafter COSATU) Constitution (as amended in 2018) For more information on COSATU see page 23.

ensues on the part of a political office bearer- senior managerial employee which conflict of interest compromises him/her and this conflict of interest is a recipe for disputes in the employment relationship.

1.2 Research Problem

The quagmire faced by shopstowards in relation to taking part in the union activites has been acknowledged by Grogan when he maintained that:

> "shop stewards occupy an ambiguous position in the workplace; as employees, they are subject to the employer's disciplinary authority; as union representatives, they play a key role in union structures and act as intermediaries between employers and union members."[15]

To the extend that:

> "the primary duty of employees is to place their personal services at the disposal of the employer."[16]

Moreover:

> "shop stewards are first and foremost employees: like all employees, they are obliged to serve their employers honestly and faithfully during ordinary working hours…."[17]

Thus Lane[18] defines shop stewards as:

> "a person 'with two masters', namely the employer and the membership who elected him or her as a worker leader. They are responsible for championing and defending workers' interests, be it on dismissals, improved working conditions, organising social activities and other issues of interest to workers. The most difficult

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[15] Grogan,J. *Dismissal* (Juta and Company 2010) 296.
[16] Grogan,J. *Workplace Law* (12th Ed., Juta and Company 2017) 26.
[17] Grogan,J. *Dismissal* (Juta and Company 2010) 297.
[18] Lane, T. *The Union Makes Us Strong: The British Working Class, its Trade Unionism and Politics* (Arrow Books, London, 1974) 197.

> task these men and women face is dealing with the constant pressure and dilemma of managing the conflicting interests of their two 'masters': their employer who pays their salaries and their union which requires representation, often against the employer."

It should never be forgotten that a trade union has been defined as a coalition of employees whose primary aim is to forge and strengthen the relations between the workers and their employers including the employeres' organizations.

The primary role of these workers' movements is among others to:

> " engage in collective bargaining with their members' employers, and to represent their members in grievance and disciplinary matters."[19]

Nxumalo[20] adds:

> "trade unions can play a vital role in the workplace. They are constitutionally recognised as one of the pertinent stakeholders in strengthening democracy and promoting sound labour relations."

Sight should not be lost to the fact that senior managerial employees are the representatives of the employer in the workplace who:

> "represent the employer in dealings with the workplace forum."[21]
> or
>
> "determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace."[22]

However:

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[19] Grogan,J. *Workplace Law* (12th Ed., Juta and Company 2017) 346.
[20] Nxumalo, L, 'The Role of Trade Unions in South Africa: Towards the Inclusion of Persons with Disabilities in the Workplace (2020) 41 (10) *Industrial Law Journal* (Juta) 2311.
[21] s 78 (a) (i) of the LRA.
[22] s 78 (a) (ii) of the LRA.

> "no man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."[23]

As stated in the paragraphs above, the constitution gives every worker including senior employees, the right to form, join and belong to trade unions of their choice as well as the right to stand for a position as a leader within the trade union movement. The enjoyment of the rights above is figuratively speaking a 'poisoned chalice' for it unfortunately has the potential to place the employee in question in an unenviable position with his/her employer. The enjoyment of the rights inevitably leads to a conflict of interests for Rycroft & Jordaan[24] have long established that:

> "a conflict of interest is inherent in the employment relationship because of the inequality between the owners of means of production and owners of labour."

Hence Heathfield[25] concludes by stating that, a conflict of interests:

> "causes an employee to experience a struggle between diverging interests, points of view, or allegiances."

Ivan Israelstam[26] warns against a managerial employee who joins a trade union. He cautions that he/she joining a trade union could lead to a conflict of interest because too often management and the trade union become adversaries. This is usually because in most cases, they bargain against each other during wage negotiation seasons, trade unions organize strikes against the employer and the managerial employee sometimes sits (and chairs) disciplinary hearings involving the misconduct of fellow colleagues and comrades which may at times lead to the dismissal of these comrades.

Steward[27] notes that:

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[23] Matthew 6:24.
[24] Rycroft, A.J, & Jordan, B.' *A Guide to South African Labour Law* (Juta, 1992) 114.
[25] Suzan Heathfield www.balancecareers.com. (Accessed 7 May 2022).
[26] www.labourlawadvice.co.za (Accessed 7 May 2022).
[27] Steward, A, 'The Characteristics of State as Employer: Implications for Labour Law' (1995) *Industrial Law Journal* 15.

> "Historically, South African labour law distinguished between private and public sector employees with the Labour Relations Act of 1956[28] appying to the private sector and the Public Service Act[29] to the public sector."

This study recognises that there are two categories of employees, the public sector employees and the private sector employees. Public sector employees in the context of this study refer to those employees whose main employer is the state and private sector employees are employees employed by private companies and business enterprises. Public sector employees are mostly government employees employed to work in state departments and state owned entities.

However, according to Rycroft[30], the Labour Relations Act of 1995 does not differentiate between public sector employees and private sector employees.

In South Africa, the terms and conditions of the employment for government employees is regulated by a piece of legislation[31]. According to an online source:[32]

> "The primary difference between public-and private sector jobs is that public sector jobs are generally within a governmental agency, while private sector jobs are those where employees are working for non-governmental agencies. This includes jobs within individual businesses as well as within other types of company organizations."

However, employees in both the public and the private sector in this country and elsewhere are treated using the same legislation. Le Roux & Cohen[33] could not agree more:

> "In South Africa, Namibia, Botswana, Malawi, Swaziland, Mozambigue and Zambia, public and private sector employees are subject to the same legislation. The South African LRA removed the

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[28] Labour Relations Act 28 of 1956.
[29] Public Service Act 111 of 1984, which was repealed by the Public Service Act 103 of 1994.
[30] Rycroft, A, 'Labour' (1996) 7 *South African Human Rights Year Book* 141.
[31] Public Service Act 103 of 1994.
[32] https://www.recruiter.com/recruiting/know-the-major-differences-between-private-and-public-sector-companies/# (Accessed 1 April 2023).
[33] Le Roux,R & Cohen,T 'Understanding the Limitations of the Right to Strike in Essential Services and Public Services in the SADC Region' (2016) 19 *Potchefstroom Electronic Law Journal* 10.

> traditional distinction made betyween public and private sector employees, and applies to all employees with the exception of the National Defence Force and State Security Agencies."

However, in some instances, their conflict of interest will or will not be different influenced by their employment dynamics.

It is important at this stage to indicate that this study intends to explore the conflict of interest emanating from two angles, from an office bearer public sector managerial employee where the conflict is as a result of an employer (a state department) demanding to be provided with documentary evidence for the purpose of managing and regulating the crisis occasioned by the absence of striking employees subsequently effecting consequence management and from an office bearer private sector managerial employee where the employer (private business/company) demands its 'representative employer' to manage a strike by effecting a lock out.

The employment dynamics mentioned in the paragraph above place the senior employee in question right into the eye of a storm. The dynamics at play capture the unintended predicament that political office bearer-cum-senior managers are sometimes confronted with in the workplace.

The senior managerial employees in question are faced with a dilemma of having to choose which 'master' to serve or to put it the other way, which hat to wear? The employees are faced with a catch-22 situation of having to balance their loyalty and collegiality towards their employee organization and colleagues respectively against their allegiance and trustworthiness to their employer since trust and loyalty are the foundation upon which an employment relationship is laid. In fact Tshoose & Letseku[34] put it more succinctly:

> "The employment relationship is grounded on the fundamental values of trust, confidence, reliability, loyalty, mutual respect and good faith. Consequently,these fundamental values form the heart of the employment relationship which ought to be exercised by both

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[34] Tshoose,C.I & Letseku R,' The Breakdown of the Trust Relationship Between Employer and Employee as a Ground of Dismissal: Interpreting the Labour Appeal Court's Decision in Autozone' (2020*) SA Mercantile Law Journal* 156.

> the employee and employer at all material times during the subsistence of their relationship."

This tug-of-war between two opposing interests result in " blood on the floor"[35] and lends credence to the saying that in every employment relationship "conflict is natural,inevitable, necessary and normal"[36] and perhaps endemic.

These disagreements are usually resolved through mechanisms such as collective bargaining. It sometimes happens that collective bargaining processes do not produce the envisaged results or a settlement and in such situations a deadlock between the negotiating parties occurs. When a deadlock becomes a *cul-de-sac*[37], the parties go their separate ways. The employees usually resort to their most potent weapon which is the withdrawal of their labour or their services and the employer may respond by enforcing a lockout. In the words of Creamer[38]:

> "strikes and lock-outs have been widely viewed as countervailing forms of industrial action available to workers and employers for the assertion of their respective interests in the collective bargaining process."

In other words,

> "workers exercise collective power primarily through the mechanism of strike action."[39]

Madhuku[40] on the other hand argues that:

> "the right of workers to withdraw their labour as a means of advancing their interests in the face of the resistance or

[35] Used in this context to mean a chaotic or violent situation.
[36] Mayer,B.S. *The Dynamics of Conflict Resolution* (Wiley Publishers,2010) 3.
[37] Figuratively a dead end.
[38] Creamer,K, 'The Meaning and Implications of the Inclusion in the Constitution of a Right to Strike and the Exclusion of a Lock-out Right: Towards Asymmetrical Parity in the Regulation of Industrial Action' (1998) 19 *Industrial Law Journal* 1.
[39] Botha, M.M & Lephoto, M 'An Employer's Recourse to Lock out and Replacement Labour: An Evaluation of Recent Case Law' (2017) *PER/PELJ* 2.
[40] Madhluku, L, 'The Right to Strike in Southern Africa' (1997) 136 (4) *International Labour Review* 511.

> unwillingness of an employer is a central feature of many industrial relations system."

Employers have a number of alternatives to counteract the employees' industrial action. Employers may:

> "through a range of weapons , such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a 'lock out').[41]

The exclusion as used in the context above can have both a denotative and a connotative meaning. In the denotative sense, exclusion can convey a meaning of gatekeeping which relates to barring the employees from accessing the premises of the workplace through for an example, the locking of workplace gates. In the connotative sense, lock out conveys a negative perception of being separated or being marginalized and being left out in the cold and consequently not being party to the affairs of an establishment. It should never be forgotten that in the event where the employer is absent from the workplace senior managerial employees:

> "become officials of the employer and have to perform duties on behalf of the employer." [42]

Thus a myriad of questions arise from these dynamics and permutations in respect of the position of a political office bearer-cum-senior managerial employee.

Firstly, in the event of an industrial action emanating from a deadlock in the collective bargaining process and the employer enforcing his constitutional recourse to a lockout, whose mandate should the employee in question serve? Can the same political office bearer employee who represents the employer and consequently is the employer at the workplace lock himself/herself out? In the absence of an employer, who should enforce the exclusion/the gatekeeping of employees including the employee in question? Secondly, in the event of a deadlock where the

[41] Re Certification of the Constitution of the Republic of South Africa, 1996 4 SA 744 (CC) para 66.
[42] Rossouw, J.P. *Labour Relations in Education: A South African Perspective* (2nd Ed., Van Schaik Publishers 2010) 46.

employees (mostly in the public sector) resort to a protest action in the form of a stay away and the employer instructs the very same senior employee to provide with a list of striking absent employees, how practical will the senior managerial empoyee who leads an industrial action and is on a stay away physically access the workplace and provide with a genuine and 'undoctored' document? This taking into account, the administrative law stringent principle of *delegare delegatus non potest.*[43] These questions in respect to the position of the political office bearer-cum- senior manager during the duration and lifespan of a lockout or alternatively a stay away have in the opinion of this study, the potential to create a conundrum of an unparalleled magnitude.

1.3. Research Question(s)

1.3.1.Main question

The critical question is, based on the balance of forces between the interests of the employer and the interests of an employee organization which the senior managerial employee belongs to and is an office bearer and given the dynamics at play at the workplace, what role should the political office bearer-cum- senior managerial employees play during the subsistence of a lockout or alternatively a protest action?

1.3.2. Sub-questions

(i) On whose best interest between the employer and the employee organization should the office bearer-cum- senior managers serve during a labour dispute? In other words, which of the two interests must come first or receive first priority in the life of a unionized senior managerial employee during a labour dispute?

(ii) What impact during the subsistence of a labour dispute does the conflict of interest of office bearer-cum senior managerial employees have in the workplace?

[43] An Administrative Law rule which simply states that a party holding derivative authority cannot delegate it to a third party.

1.4. Research Aim

The primary aim of this study is to explore the impact of the conflict of interest that manifests itself on the office bearer-cum- senior managerial employee during an industrial action especially when the employer is compelled by circumstances to trigger the lock out option.

1.5.Research Objectives

(i) To measure the acrimony and the magnitude of the divergence of the conflict of interests that manifest itself on the office bearer-cum- senior employee during the lifespan of an industrial action.

(ii) To find out which of the two 'masters' a senior employee in question prioritize during an industrial action.

(iii) To determine whether a lock out or a protest action mitigates or exacerbates a labour dispute.

1.6. Research Methodology

This mini-dissertation intends to adopt a library-based research methodology. This means that the dissertation will rely mostly on materials sourced from the library such as hard copies and online publications, reports, legislations, international and continental instruments, case law, articles, journals, magazines and periodicals, internet sources as well as relevant papers presented at gatherings and conferences. The study will be desktop-based and will not require data collections and experiments which in most cases call for ethical clearance.

1.7. Significance and Rationale of the Study

This study intends to contribute significantly in the development of jurisprudence of employment law. The study highlights the dilemma occasioned by the conflict of interest that resides in the senior managerial employees holding positions of power in their employee organizations and aims to assist content creators, thought leaders, policy-makers and legislators in drafting policies and guidelines to address this issue and other related issues that flow from senior managerial employees joining and subsequently assuming positions of power in employee organizations. The rationale for embarking on this mini-dissertation was sparked in part by the desire to explore the implications of frosty relations and the subsequent fallouts that ensue when employees join

employee organizations and subsequently assume positions of authority in those organizations which situation puts them at varience with their employers.

1.8. Literature Review

There is little doubt that conflicts and disputes will occur when employees join trade unions. In the course of a labour dispute, employees can resort to their most potent weapon, which is a strike and employers may respond by locking the striking employees out of the workplace. According to Basson:[44]

> "strikes and lock-outs are seen as essential elements of the collective bargaining process- they provide the sanction which parties may use to back-up their demands and they therefore play a vital role in giving effect to collective bargaining."

De Waal[45] however argues that: "strikes and lockouts are two sides of the same coin" whereas Donalsdon[46] hilariously remarks that: "one man strike is another man's lock-out."

Both the lock outs and the strikes should be seen as the outcomes of an collective bargaining process.They should also be seen as ammunition or weapons that may be used by their respective parties to force the other party back to the negotiating table.

There has always been fierce debates as to why the right to strike is entrenched in the Constitution whereas the right to a lockout is not clearly spelt out. In other words, although the right to strike is clearly provided for in section 23(2)(c) of the Constitution, nowhere in the Constitution is the right to a lock out provided. The question as to whether a lock out can be regarded as a tit for tat against a strike emerged in the *National Association of South African Workers v Kings Hire*[47]. Moodley[48] is of the opinion that:

"the strike and lock out are countervailing powers."

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[44] Basson, A, et al *The New Essential Labour Law Handbook* (Labour Law Publications 2017) 83.
[45] De Waal,P, 'Deadlock on the Lock-out' (1996) 4 *Juta Business Law* 132.
[46] Donalsdon,P, 'Bloomfield' (1972) *Industrial Cases Reports (NIRC)* 93.
[47] *National Association of South African Workers ("NASAW") obo Members v Kings Hire CC* [2002] 3 BLLR 312 (CC).
[48] Moodley, I, 'The Key to Unlocking Lock out' (1990) 11(1) *Industrial Law Journal* 4.

That a lock out and a strike are not equivalent is argued further by Brassey[49] when he concretizes that:

> "the two [the lock out and the strike] should be treated differently is not purely a matter of historical accident or political expediency. Formally they may seem symmentrical, but in practice they play different roles. When employers want to change terms of employment, they do not reach for the lock-out; provided they negotiate the impasse first, they can implement the changes unilaterally. Then, if the workers refuse to accept the change, the law gives their employer the right to retrench or dismiss them. If they refuse to leave the premises, the law provides a range of sanctions that range from judicial interdicts to the police baton. The strike in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitationand give teeth to the demands that they make at the bargaining table. For them it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour themat the expense of their employers. Those who believe in the free interplay of market forces would be quick to condemn this as wrong. What they forget, however, is how much employers are favoured by the legal and social institutionsof our society."

However, in *Re- Certification of the Constitution of the Republic*[50], the debate on whether the right to lockout can be equated with the right to strike received a *coup de grace*[51] as it was aptly summarised by the Constitutional Court when it held that:

> "…the principle of equality requires that, if the right to strike is included in the NT [the proposed new Constitution], so should the right to lockout be included. This

[49] Brassey, M 'Sam's Missiles: Entrenching Industrial Action in a Bill of Rights' (1993) 10 *EL* 28.
[50] *Ex parte Chairperson of the Constitutuent Assembly*: In Re Certification of the Constitution of the Republic of South Africa, 1996 (CC 6 September 1996 23/96).
[51] Literally, a final blow.

argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action . In theory, employers on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock[-]out). 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.[52]"

In support of this decision, the Constitutional Court held in *NUMSA v Bader Bop (Pty) Ltd*[53] that:

> "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."

When employees join trade unions, tensions and frictions with their employers become inevitable. This was confirmed in the *IMATU*[54] case cited below. In that case the judge remarked that:

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[52] *Ex parte Chairperson of the Constitutuent Assembly*: In Re Certification of the Constitution of the Republic of South Africa, 1996 (CC 6 September 1996 23/96) at para 66.
[53] *NUMSA v Bader Bop (Pty) Ltd* (2003) 2 BLLR 182 (CC) at para 13.
[54] *Independent Municipal and Allied Trade Union & others v Rustenburg Transitional Council* (1999) 12 BLLR (LC) J1543/98 at para 4.

> "when employees join a union they commit themselves to a body whose primary object is to maximise the benefit its members derive from their relationship with their employers…by joining a union, an employee commits himself to a body that stands in opposition to his employer."

To recap, the South African literature landscape and in particular labour law is flooded with content relating to strikes and lock outs[55]. There are two types of lock outs at the disposal of an employer namely the defensive lock outs and the offensive lock outs. Defensive lock outs are used as a response to the employees' industrial action. Defensive lock outs permit an employer to hire replacement or scab labour[56] during the subsistence of the workers strike whereas offensive lock outs are provocative actions instigated by an employer to compel the employees to accept a particular demand. It is interesting to note that both the strike action and the lock out fall outside the armpit of the definition of unfair labour practice.[57]

In South Africa, the tribunals are replete with litigations emanating from disputes between trade unions (acting on behalf of employees, that is their members) and the employees' bosses with regard to the application of the lockout rule. Debates are now, emerging that when employers resort to lock outs as reactions to strikes, such actions are viewed as being tantamount to the employer applying double jaopardy[58] on the 'already weakened' striking employees. The concept of double jeopardy though it exists in labour law, has a completely different meaning but could be dovetailed here to suit in the current scenario to mean a 'second punitive' action taken by the employer against a group of employees who had engaged in acts of industrial action. This is because, besides the action of a lock out, employees who engage in strikes have already resigned

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[55] Reputable South African Labour Law authors and other international authors such as Grogan, Van Niekerk, Basson, Cheadle,Mischke and others have written extensively on strikes and lock outs.

[56] s 76 (1) provides: An employer may not take into employment any person-

(a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

[57] s 186 provides a detailed definition of an unfair labour practice.

[58] s 35(3)(m) of the Constitution read together with s 106(1) of the Criminal Procedure Act guarantees the fairness and finality of a criminal matter by preventing a person from being repeatedly prosecuted by the state for the same criminal conduct or <u>being punished more than once</u> for the same offence. (The contextual meaning of double jeopardy for this study finds expression in the underlined words above).

themselves to a punitive measure of forfeiting their wages in the common law and legislative provision of the 'no work no pay ' rule[59].

This study has in part been sparked by the *IMATU* case cited above. The case is regarded as a 'litmus test' and a landmark case dealing specifically with a dispute and a conflict of interest emanating from managerial employees holding positions of leadership in trade unions.

Flowing from the *IMATU* case, one finds himself open to a minefield of other relevant and pertinent questions such as first whether a 'go slow' fits into the definition of a strike, and further whether an employer can lock out employees who engage in a 'work to rule' type of an industrial action and thirdly, whether there is a yardstick to measure the 'work to rule' industrial action for the purpose of implementing the 'no work no pay' rule. Writing for De Rebus, Olivier[60] once stated that:

> "one of the crucial problems confronting an employer who has to deal with a partial strike such as a go-slow is how to prove the existence of a go-slow and participation in such action."

The conclusion arrived at is that there is enough literature and case law on the issues of strikes on the part of the workers and the subsequent resort to lock outs by the employers. In other words, the South African labour law literature landscape and case law are replete with strikes and in particular legal and sometimes wildcat (illegal strikes). However, there is very little literature written on the plight and predicament of a political office bearer senior employee during the lifespan of an industrial action. This study therefore intends to explore the dilemma confronting senior managerial employees holding positions of leadership in their trade unions and how this arrangement or configuration somehow complicates the employment relationship.

1.9. Scope and Limitation of the Study

This study dully admits that a lot of literature exists on strikes and lock outs but equally admits that very little literature exists on protest action owing to the fact that this dispute although it has some labour elements does not necessarily take place in the employment setting but is more of

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[59] s 67 (3) of the LRA provides in short that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock out.
[60] Olivier, M, 'De Rebus' (1992) *Journals* 807.

a societal issue (hence its definition relates to socio-economic interests) and therefore multidisciplinary if not political in nature. The dust has not settled and the jury is still out on the highly contentious issue of the hiring of replacement/scab labour during an industrial action. The study however, confines itself to the application of the lock out rule on the private sector employees and the role of the senior managerial employee holding a political office in a trade union (in the event of a protest action) and in particular, the dilemma faced by senior managerial employees holding influential positions in trade unions during labour unrests where the affected employer chooses to implement the lock out rule. Not much has been explored on whether senior managers who are clothed with the authority to manage the workplace can resort to a lock out in the event of an industrial action by their fellow comrades and colleagues and how they too should apply the rule on themselves. Thus, this study only focuses mainly on the predicament that exists on a political office bearer-cum- senior managerial employee when he/she is faced with the dilemma of having to implement the lock out rule on employees (inclusive of himself/herself) and the predicament of a sister employee in the public sector (in the event of a protest action) and only focuses on protest action as a type of a strike (in the case of a public sector employee) and does not necessarily venture deeply into the domains of the strikes and their dynamics.

1.10.Organization of the Study

This mini-dissertation consists of five chapters which are divided as follows:

1.10.1. Chapter 1

This chapter provides a synopsis of the mini-dissertation by setting out the introduction and background of the study.

1.10.2. Chapter 2

The chapter explores some legal instruments (international and local) and landmark case law dealing with lockouts and strikes/ protests action.

1.10.3. Chapter 3

This chapter puts a spotlight on the nature of the lock outs and strikes/protests action in South Africa.

1.10.4. Chapter 4

The chapter focuses on the application of the lock out rule and its impact on the political office bearer-cum- senior managerial employee and the subsequent dilemma faced by these office bearer-cum- senior managerial employees during the lifespan of a lock out as well as the dilemma faced by an office bearer-cum-senior manager during a protest action.

1.10.5. Chapter 5

The chapter reflects on the findings learnt on the dilemma as outlined in the previous chapter(s) and attempts to provide solutions through recommendations and a way forward.

1.11. Summary

This chapter provided a bird's eye view of the mini-dessertation. The chapter presented a brief overview of the entire study through the presentation of the topic, the research problem, the research questions, the aim and objectives, the methodology that the study intends to pursue, the significance and the rationale of the study, the literature review, the scope and limitation of the study as well as how the mini-dessertation is organised.

CHAPTER 2: LEGAL FRAMEWORK ON STRIKES/PROTESTS ACTION AND LOCK OUTS

2.1. Introduction

The phenomena of strikes and lock outs form an integral part and is a lexicon of the workplace. These industrial strifes are universal and as such deserve special attention starting from the local, regional, continental and the international platforms. The critical question is whether the international community which is acutely cognizant of these workplace interruptions has developed mechanisms and strategies in place to deal effectively with these challenges. The next question is whether there are legal instruments at the domestic,regional and finally international level to address the issues of strikes/protests action and subsequent lock outs. (It should as a point of departure be indicated that strikes here will also cover protest actions). This is because protests action are forms of strikes and having asserted that:-

Grogan[61] agrees:

> "protest action can take the same form as any type of strike."

The ensuing paragraphs put a spotlight on the legal framework pertaining to strikes and lockouts. In other words, the chapter attempts to answer the question as to whether the issue of strikes/protest actions and lock outs are protected and recognized in both the domestic and the international law or whether there are instruments relevant enough to address the challenges brought about by strikes and lock outs. The point of departure is a closer look at the local or domestic legal instruments.

2.2. Strikes /Protests Action and Lock outs in the International Fora

2.2.1. Domestic Instruments

[61] Grogan,J, *Collective Labour Law* (2nd Ed Juta,) 291.

It is important as a point of departure to emphasize that South Africa has ratified the ILO[62] Conventions 87 and 98 on 18 February 1996[63]. Historically:

> "The ILO was established by the Treaty of Versailles, signed in 1919. What was then the Union of South Africa was a signatory to the Treaty, which also established the League of Nations. All members of the League of Nations became founder members of the ILO….[64]"

It therefore does not come as a surprise that South Africa is the founding member of the ILO and therefore most of the country's labour legislations are in sync and as such compatible with most of the organization's labour standards.

In South Africa, employer and employees organizations are given recognition and protection by the Constitution which explicitly provides for employers and employees to freely join these organizations and these organizations are further given the right to bargain collectively. There are also a pluralistic regulatory framework[65] to protect and to regulate relations at the workplace. The LRA is by far the most important piece of legislation that among others addresses relations at the workplace.The LRA also establishes "dispute–resolution avenues"[66] to mitigate industrial conflicts by among others, eliminating unfair workplace discriminations and redressing past discriminations. These avenues are the NEDLAC[67], the Labour Court[68] and the CCMA.[69]

The Constitution of the Republic of South Africa:

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[62] International Labour Organization (Hereinafter the ILO).
[63] ILO 2012 RSA http://www.ilo.org/dyn/normlex/en/f? (Accessed 21 December 2023).
[64] Van Niekerk, A. et al, *Law@work* (3rd Ed., LexisNexis 2015) 21.
[65] Mabece, S**,**'The Use of Public Procurement for Socio-Economic Reform in Democratic South Africa: Triumphs and Challenges Two Decades On' (2023) 48 (2) *Public Contract Law Journal* 301.
[66] Van Eck, S, 'Labour Dispute Resolution in the Public Service :The Mystifying Complexity Continues' (2007) 28 (4) Industrial Law Journal 795.
[67] The National Economic Development and Labour Council, NEDLAC in short, is a replica of the ILO at the local level.It is seen as the country's apex social dialogue structure whereby representatives of labour, business (employers) and the government meet to discuss challenges relating to economic, labour and development issues.
[68] Formerly the Industrial Court.
[69] Commission for Conciliation, Mediation and Arbitration.

> "has been described as the birth certificate of a new nation because its adoption heralded the establishment of a free South Africa in which the dignity of all people was restored.[70]"

This document contains a section which provides that: "everyone has the right- to strike."[71]

Manamela & Budeli[72] emphasise that the right to strike is:

> "one of the weapons wielded by trade unions when collective bargaining fails."

It is important at this stage to explain that the word 'everyone' as used in the section has been used in the context to refer specifically to employees. Employers and other citizens who are not working may engage in other forms of industrial action but not necessarily in strikes.

Nowhere in the constitution is there a mention of a word lock out. The right of employers to lock out striking employees does not enjoy the same recognition and acceptance in the labour arena. In other words, the Constitution of the Republic of South Africa does not have a provision on lock outs nor does it recognize the right to lock out. This may partly be due to the fierce struggle that employee organizations and more particularly the Congress of South African Trade Unions[73] waged in opposition to the inclusion of a lock out clause in the country's final constitution. Madokwe[74] took note that:

> "during the negotiations of the Constitutional Assembly in 1996, the Congress of South African Trade Unions (COSATU) objected more vehemently to the inclusion of the lock out in the final Constitution,…"

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[70] Ebrahim, H, 'Decisions, Deadlocks and Deadlines in Making South Africa's Constitution' in Ginsburg T, & Bisarya S, *Constitution Makers on Constitution Making* (Cambridge 2022) 126.
[71] s23(2)(c).
[72] Manamela, E & Budeli, M 'Employees' Right to Strike and Violence in South Africa' (2013) 46 (3) *The Comparative and International Law Journal of Southern Africa* 309.
[73] Congress of South African Trade Unions (COSATU). COSATU is one of the largest predominantly black labour federations in South Africa which was formed in 1985. It is one of the alliance partners of the African National Congress which is currently the ruling party in South Africa.
[74] Madokwe,D.B ' The Law Relating to Lock outs' (2003) *University of Port Elizabeth* 42.

It is only in the LRA in s 64[75] that a mention is made of a lockout. The section however, places a number of conditions to be followed before a lock out can be effected. (These conditions which relates both to a strike and a lock out are detailed elsewhere in the study).

The apex court was once called upon to adjudicate whether the right to a lock out should be given the same status the right to strike. The court decided against equating the right to a lock out with the right to strike. The decision not to have the right to a lock out was arrived at during the certification of the Constitution of the Republic of South Africa, 1996[76]. The reasoning of the Constitutional Court for the exclusion of the lock out clause was that:

> "while workers are limited to exerting pressure on employers through industrial action, employers have a host of mechanisms available to them to counteract such pressure, including , for an example, 'dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace."[77]

Samuel[78] argues in favour of the right to strike over the right to a lockout and maintains that:

> "it is in consideration of the inherently skewed relationship in terms of social and economic powers between the owners of capital (capitalist) and the proletariats (workers) that the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") under the democratic dispensation, consciously provided workers with the right to strike (s 23(2)(c)."

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[75] s 64 provides that "Every employee has the right to strike and every employer has recourse to a lock out."

[76] First Certification case.

[77] Colliers, D & Fergus, E (Eds). *Labour Law in South Africa: Context and Principles* (Oxford University Press, 2018) 365.

[78] Samuel, O.M 'Protracted Strikes and Statutory Intervention in South Africa's Labour Relations Landscape' (2016) *Journal of Contemporary Management* 1014.

The conclusion is that the right to strike is enshrined in the constitution and the LRA whereas recourse to a lock out is mentioned in the LRA. Recourse to a lock out only gets recognition and protection from the LRA.

2.2.2. Regional Instruments

Fenwick et al[79] observe that:

> "From the early 1990's major labour law reforms were implemented in Southern Africa. These reforms were driven by the adoption of new national constitutions (some entrenching the right to strike), a desire to democratise the workplace, and trade liberalization."

Therefore the Southern African Development Community[80] has a treaty known as the Charter of Fundamental Social Rights[81]. Although the treaty looks like it addresses fundamental social rights, it is essentially an instrument that regulates both the labour and social security rights. It is regrettable that even though some countries have formally endorsed the ILO instruments and the organization is actively involved in the promotion of its labour standards[82] and despite the fact that these countries are also the signatories of the Social Charter, the right to strike remains less developed in most countries except South Africa. Equally, the right to strike in the essential services and in the public sector in the region is severely restricted. The Charter has therefore not significantly impacted on the development of labour law in the sub-region. This lack of influence may among others be attributed to:

> " the long-established presence and international recognition of the ILO.[83]"

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[79] Fenwick, C. et al,' Labour Law: A Southern African Perspective' in Teckle T (ed) *Labour Law and Worker Protection in Developing Countries* (Hart Oxford 2010) 175.
[80] The Southern African Development Community (Hereinafter SADC) is one of the economic blocks on the African continent. It consists of 14 countries in the southern tip of Africa. South Africa is one of the prominent members of SADC.
[81] Charter of Fundamental Social Rights (Hereinafter the Social Charter).
[82] ILO Report on the First Tripartite Seminar.
[83] Collier,D & Fergus,E (Eds), *Labour Law in South Africa: Context and Principles* (Oxford University Press, 2018) 57.

It is unfortunate that almost all other regions of the African Union such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC) for an example have instruments that do not make mention of the right or even recourse to lock outs. What is mentioned though is that according to Madhuku[84] countries in SADC fall into two groups, those in which:

> "the right to strike is expressly provided for in the Constitution-i.e Malawi,[85]Namibia[86] and South Africa[87]-and those whose constitutions do not expressly provide for it."

Like the international instruments, regional instruments regard protests action as another form of a strike action.

2.2.3. Continental Instruments

South Africa is party to the ACHPR,[88] an instrument of the African Union, a continental body. There is an overlap of the provisions in the ACHPR with some of those in the ILO conventions. For an example, Article 15 of the ACHPR contains a right to work. Given the continent's unemployment rates, the provision remains a populist and often controversial issue that occasionally forms an item for discussion in labour conferences and symposiums.

It is interesting however, to note that almost all ILO Conventions and Recommendations are silent on the use of lock-outs as counter measures of workplace strikes. The absence of a labour standard does not mean that the circumstances and situations did not call for such measures. The reason why the option has been revoked with a sense of caution is the controversy surrounding lock outs and the use of replacement labour. It can safely be concluded that the continental instrument of the (African Union) is ostensibly silent on issues pertaining to lock outs.

2.2.4. International Instruments

[84] Madhuku, L 'The Right to Strike in Southern Africa' (1997) 136 (4) *International Labour Review* 512.
[85] s 31 (4) of the Constitution of Malawi (1994).
[86] Article 21 (1) (f) of the Constitution of Namibia (1990).
[87] s 27 (4) of the Interim Constitution (1993) and s 23 (2) (c) of the Final Constitution (1996).
[88] African Charter on Human and People's Rights.

The point of departure is the recognition that the International Labour Organization is the custodian of global labour-related matters. According to Manamela & Budeli[89]:

> "the basis of international labour law is International Labour Conventions adopted by the ILO."

Even though none of the ILO's conventions expressly acknowledges the right of employees to strike, the body's Committee on Freedom of Association[90] and the Committee of Experts on the Application of Conventions and Recommendations[91] have discovered that the right is:

> "an intrinsic element of the right to freedom of association, recognised by the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948."[92]

The two bodies also acknowledge that the right to strike is critical to the right to bargain collectively compatible with the Right to Organise and Collective Bargaining Convention 98 of 1949.

It can thus be concluded that a strike is recognised internationally as a human right. This assertion which is contained in the ICESCR[93] does not explicitly mention the right to strike, it only recognises it as an intrinsic corollary to Article 3 (1) of Convention No 87 which accepts the right to Trade Union and Employer's Organizations to organize activities and to formulate programmes. The right to strike is therefore inferred from two Conventions of the ILO, namely ILO Convention 87 of 1948 and ILO Convention 98 of 1949.These conventions respectively regulate the right to freedom of association and the right to organise and bargain collectively. Thus the supervisory bodies of the ILO have concluded that these rights may be derived from these two conventions. The Universal Declaration on Human Rights[94] does not make any reference to the right to strike.

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[89] Manamela, E & Budeli, M 'Employees' Right to Strike and Violence in South Africa' (2013) 46 (3) *The Comparative and International Law Journal of Southern Africa* 313.

[90] Committee on Freedom of Association, (Hereafter CFA).

[91] Abbreviated as CEACR.

[92] Collier, D & Fergus, E (eds) *Labour Law in South Africa: Context and Principles* (Oxford University Press 2018) 364.

[93] See Article 8(1)(d) of the International Convention on Economic, Social and Cultural Rights, Article 6 (4) of the European Social Charter and Article 8 (2) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

[94] Universal Declaration of Human Rights (Hereinafter UDHR).

It, however protects the general right to "freedom of association and the right to peaceful assembly."[95]

However, from an avalanche of literature in international labour law, one may be tempted to conclude that the participants, members and stakeholders to the international body tasked to deal with labour-related issues, which is the International Labour Organization, have always been warry to robustly deal with issues relating to strikes and lock outs because in the opinion of one of the academics at the Universities of Liege (Belgium) and Gerona (Spain)[96]:

> "strikes are certainly one of the most complex phenomena regulated by labour law, and one of the most difficult to grasp in all their dimensions."

The reluctance to deal decisively with the right to strike emerged through an impasse that temporarily existed between 2012 and 2015 when the Employers Group, a tripartite alliance in the ILO refused to budge and accept the two committees' findings as authoritative.

This could perhaps have prompted the participants and policy makers at the labour conferences to preach for labour peace in the workplace. This assertion stems from the fact that:

> "no international labour Convention or Recommendation explicitly recognizes or deals with the right to strike."[97]

In other words and as explained above, the right to strike is inferred in Conventions 87 and 98.

However, Gernigon, Odero and Guido[98] argue that:

> "the absence of explicit ILO standards should not lead to the conclusion that the Organization disregards the right to strike or

[95] Article 20 of the UDHR.
[96] Professor Jean-Michael Servais, a former Director-General of the International Labour Organization.
[97] Hodges-Aeberhard J & Odero de Dios, A ' Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126 (5) *International Labour Review* 543.
[98] In Article 20 of the UDHR.

> abstains from providing a protective framework within which it may be exercised."

Hodges and Odero emphasize that the International Labour Conferences of 1947 to 1950 as well as in 1978 have attempted to discuss the right to strike in the context of preparatory work on instruments covering related subjects. However, those discussions did not reach a consensus regarding the international standards expressly covering the right to strike. However, the ILO recognizes that:

> "strike action is the most visible form of collective action during labour disputes, and is often seen as the last resort of workers' organizations in pursuit of their demands."[99]

Mthombeni[100] argues that:

> "there exist ILO standards which may be inferred from the decisions of the Committee on Freedom of Association (CFA) of the Governing Body of the ILO. These decisions guarantee the freedom to strike."

In international law, the instrument that indirectly recognizes the right to strike is the International Covenant on Economic, Social and Cultural Rights[101] of 1996 (ICESCER). The instrument provides:

> "The right to strike, provided that it is exercised in conformity with the laws of the particular country."[102]

The presence of a caveat in the provision above offers a rather interesting observation. The ICESCER is an instrument of the United Nations and not of the ILO. The ILO is a special agency of the United Nations whose mandate is to forge positive relations among parties in the employment settings. The United Nations is constituted by almost all the states drawn from the

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[99] ILO General Survey, 'Freedom of Association and Collective Bargaining' (Hereinafter ILO General Survey, 1994) at par 136.
[100] Mthombeni, R 'The Right to Freedom to Strike: An Analysis from an International Perspective' (1990) *Comparative & International Law Journal of Southern Africa* 337.
[101] The International Covenant on Economic, Social and Cultural Rights (Hereinafter ICESCER).
[102] Article 8 (d) of ICESCER.

five or six continents of the world. Unlike, the United Nations, not all the states are the signatories of the ILO conventions. The ILO prides itself on tripartism and social dialogue. It is a tripartite world body constituted by governments, employer/business organizations and organized labour of member states. In the ILO the parties mentioned have an equal voice with governments. Perhaps, one could argue that the reason why there is no clear and explicit ILO convention on the right to strike is for fear of polarizing and antagonizing relations in the stakeholders and participants of this world labour body.

Now, with regard to protest action, the international instruments perceive and treat this type of industrial action in similar fashion with the strike action.

No international instrument makes mention of the right to a lock out and neither is there a mention of a recourse to a lock out. According to Hepple:[103]

> "the right to lock-out was not universally accepted (neither is it mentioned in the International Covenant on Economic, Social and Cultural Rights or the reports of the International Labour Organization's Committee of Experts)."

2.3. Protests Action

Nkrumah[104] observes that:

> "citizens, when confronted with unjust decisions or laws, or seek to satisfy their needs, often engage in a more traditional form of political activities- including attending political meetings, persuading friends, discussing politics with acquaintances to vote in particular ways, contacting public officials, following politics in the newspapers, and working for political parties and their candidates- to the unconventional and new forms, such as blocking traffic,

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[103] Hepple, B ' The Freedom to Strike and its Rationale' in 'Laws against Strikes: The South African Experience in an International and Comparative Perspective' (2015) *FrancoAngeli* 36.
[104] Nkrumah, B ' We Will Fight This Little Struggle : Alleviating Hunger in South Africa' (2020) 53 *De Jure* 195.

withholding taxes or rent, wildcat strikes, sit-ins, occupations, boycotts, demonstrations and signing petitions."

The quotation above attempts to paint a picture of another breed of an industrial action that is not basically workplace-based. This species of 'the withdrawal of labour' unfortunately falls outside the definition of a strike action. This work stoppage is referred to as a protest action. According to Hanna,[105]:

> "protest action can take many forms (e.g.blockades, rallies, boycotts) constituting a repertoire of contention, which is subject to continuous innovation."

The differences between strike actions and protests action are explained briefly in the paragraphs below. The point of departure is whether protests action enjoy international recognition and protection by international and regional instruments. The phenomenon of protests action, although old has evolved so much with time that today it uses social media to mark and express its presence. A lot of literature still needs to be explored more especially its recognition and its presence in the international level especially in relation to strikes which regularly receive international attention. It has been observed that protests action are in most cases communities-based and intricately linked with the struggles for political emancipation. This is because in the opinion of Manamela[106]:

> "protest action is an important tool in the hands of employees beyond the workplace in order to promote and defend their socio-economic interests. It assists them to participate directly or indirectly in matters that cannot be pursued through strike action, and which are of national importance."

It can thus be concluded that in most cases, protest action in the international arena is a global geopolitical subject often carried out by different actors but mostly by a coalition of CSO[107] which target major international socio-economic events.

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[105] Hanna, P. et al, 'Conceptualizing Social Protests and the Significance of Protest Actions to Large Projects' (2016) *Elsevier* 217.
[106] Manamela, M.E, 'Protest Action within the Ambit of the Labour Relations Act 66 of 1995: *COSATU v Business Unity of South Africa* (2021) 42 ILJ 490 (LAC)' 615.
[107] Civil Society Organizations (Hereinafter CSO).

Von Bulow[108] observes:

> "When CSO's enter the international realm, they do so in different ways, while some focus on protesting in the streets, others struggle to come up with alternative proposals and ideas to influence decision-making processes, and still others engage in both direct action and the generation of alternatives. These strategies may be targeted at various actors at different levels, at rallies beyond national boundaries through campaigns and the creation of coalitions, or by lobbying domestic institutions. They may focus on influencing states' behaviour, or alternately seek to influence public opinion, international organization officials or other civil society actors."

Thus, no international, continental or regional makes provision for protest action and neither is the action provided for in the country's constitution.
Although not provided for in the constitution, protest action is sufficiently covered, given recognition and provided for in the LRA[109]

O' Connor[110] concludes that:

> "generally speaking, protest in South Africa is mostly organised by the poor and the proletariat against the rich and the political class that protect it."

This study concludes by opining that the current protests action in this country project themselves in the form of "a rebellion by the poor"[111].This is because most of these protests arise from the persistent social inequalities.

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[108] Von Bulow, M 'The Dark Side of Globalization (UN-iLibrary at https://doi.org/10./18356/b952 a016-en, 2013) 208. (Accessed 11 December 2023).
[109] See s213 of the Labour Relations Act.
[110] O' Connor,F 'The Marikana Massacre and Labor Protest in South Africa' in Donatella della Porta (eds,) *The Global Diffusion of Protest* (Amsterdam University Press 2017) 114.
[111] Alexander, P,'Marikana, Turning Point in South African History' (2013) 40 (138) *Review of African Political Economy* 605.

2.4. Case Law

The South African courts have on numerous occasions been called upon to intervene in litigations arising from matters relating to lock outs. These lockout- related matters cover various angles. Ordinarily, offensive lock outs have no specified duration or time frames. In other words, an employer can uphold the offensive lock out until the employees have unconditionally conceded to his/her demands. This was confirmed in the *NUMSA v Bumatech Calcium Aluminates*[112] case. Alternatively, the issue relating to when to apply an offensive lock out and when to resort to a defensive lock out was laid bare in the landmark case of *South Africa v PUTCO*[113]. In this case, the Apex court pronounced that an employer may not use an offensive lock-out on members of a trade union who are not party to a bargaining council where a dispute has arisen in which other members have gone on a strike. The court held that an offensive lock out is instigated by an employer in instances where there exist a dispute of interest between the two parties whereas a defensive lock out is relied upon by an employer in instances where there is a potential strike or the strike is already in existence and the employer uses the lockout as a shield against the strike. In simpler terms:

> "A lock out in response to a strike which is being held in relation to an existing dispute is considered a defensive lock out."[114]

Equally, in *Ntimane v Agrinet t/a Vetsak*[115], the court held that the abandonment of a strike does not automatically bring to a stop a defensive lock out.

Over the past few years employers have frequently resorted to lock-out as a response to labour unrests. The few cases below arose out of labour disputes involving lock outs:

112 *National Union of Metalworkers of South Africa and Others V Bumatech Calcium Aluminates* (J 303/16) [2018] ZALCJHB 364 (9 November 2018).
113 *Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7.
114 https://www.werkmans.com (Accessed 22 December 2022).
115 *Ntimane v Agrinet t/s Vetsak* [1999] 3 BLLR 248 (LC).

SA Chemical Workers Union v Noristan[116], *Food & Allied Workers Union v Royal Beech -Nut*[117], *National Union of Textile Workers & others v Jaquar Shoes*[118] , *National Union of Textile Workers & others v Stag Packings*[119]

Case law on issues relating to lock outs cannot be regarded as complete if the factual matrix[120] of the IMATU case[121] are not brought into the picture. This is because the said case is the fulcrum upon which part of this study rests.

The case dealt with the question of senior managers holding membership or holding office in a trade union. In this particular matter, the employer adopted a resolution which prohibited senior managerial employees from serving in the executive positions in trade unions and subsequently prohibiting them from participating in trade union activities. After an objection by some of its members, the employer withdrew the requirement that these senior employees were not allowed to be involved in union activities, but refused to withdraw the prohibition on senior management serving in executive positions in trade unions. The employees based their argument on the fact that the amended resolution contravened the provisions of the LRA and the Constitution of which the latter stated that:

> "everyone has the right to freedom of association"[122] and that "every worker has the right – to form and join a trade union[123] and to participate in the activities and programmes of a trade union."[124]

The employer maintained that their senior managers could not remain loyal to the employer, and at the same time remain loyal to the trade union as office bearers of their union. The employer also maintained that if a senior manager was a member or office bearer of a trade union, he could not also at the same time remain loyal to those responsible for disciplining staff in the employment organization. The employer maintained that any person joining a trade union, including its senior managers, automatically became committed to that body. The union was committed to maximise the benefits of its members as derived from employment.

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[116] *SA Chemical Workers Union v Noristan* (1987) 8 ILJ 682 (IC).
[117] *Food & Allied Workers Union v Royal Beech-Nut (Pty) Ltd* (1988) 9 ILJ 1033 (IC).
[118] *National Union of Textile Workers & others v Jaquar Shoes (Pty) Ltd* (1985) 6 ILJ 92 (IC).
[119] *National Union of Textile Workers & others v Stag Packings (Pty)Ltd & another* (1982) 3 ILJ 39 (W).
[120] The historical background surrounding the case.
[121] *IMATU & others v Rustenburg Transitional Council* [1999] 12 BLLR 1299 (LC).
[122] s 18 of the Constitution.
[123] s 23 (2)(a) of the Constitution.
[124] s 23(2)(b) of the Constitution.

The employer maintained that senior managers could not remain loyal to that type of commitment and at the same time remain loyal to the employer. The Court stated that whilst there was no direct evidence to show that senior managers would commit a breach of the duty to the employer by accepting a position on the executive of a trade union, or by becoming a member of a trade union, it was logical to assume that such a breach of duty to the employer would easily occur. It cannot be denied that a conflict between capital and labour always has been there and will continue to be there. Therefore, by committing themselves to a trade union, employees " go over to the opposition" as it were.

Employers are entitled to expect a greater loyalty from senior managers, and a senior employee who took up a leadership role in a trade union was automatically placed in a position of struggle against the employer. Therefore, in terms of common law it could be said that a senior employee should not be permitted to join a trade union. However, in terms of the Constitution, every employee has the right to join and hold office in a union and to participate in its activities. The LRA provides with similar provisions.

The opinion of the court was that if it was the intention of the lawmakers to make a distinction between ordinary employees and senior employees with regard to membership of trade unions, then they would have done so - in the LRA and in the Constitution. However, no such distinction has been made. The court felt that despite these legal rights, employees who joined trade unions are still obliged to perform the work for which they were engaged - and this would include loyalty to the employer.The rationale behind this assertion is that senior employees are first employees before they are trade union members.

It would seem obvious that a senior managerial employee who is a member of a trade union or an office bearer of a trade union, would bring about a serious conflict of interest. Senior managerial employees who do not perform the duties for which they were engaged as a result of trade union membership, could be charged with misconduct and face disciplinary action. Senior managerial employees who are considering taking up membership of a trade union and making themselves available for positions of power in those employee organizations must therefore exercise great caution and seriously reflect before making such life-changing decisions.

Now, with regard to protest action that is labour law related, the most authoritative cases are two reported court decisions. In *Business South Africa v Congress of SA Trade Unions*[125], the Labour Appeals Court was called upon to deal with the envisaged protest action in support of a dispute regarding the enactment of a new Basic Condition of Employment Act. The legal question was whether the procedures that were supposed to be followed during the protest action had been complied with. The question in relation to what constitutes a protest action was a subject of litigation in *Government of the Western Cape Province v Congress of SA Trade Unions*[126]. Flowing from that case, the court held that the phrase "socio-economic interests" was open to a range of interpretations ranging from a more restrictive one to a one that is more liberal.In that case, the legal question was whether educational reform was a socio-economic issue relating to or relevant to the employees. The court found that indeed educational matters which were the issues at stake in the case were relevant to the employees as they were the direct result of past government policies and that the employees as party to the dispute had a general interest and were connected to the issue and their prayer was to ensure that their children who were the intended beneficiaries of the reform do not face the same fate that their parents went through as a result of the policies of apartheid.

It is now obvious that protest actions now form part and parcel of the labour law lexicon and parties to the employment relationship will have to acknowledge the existence of the phenomenon.

2.5. Summary

This study has found out that lock outs do not enjoy much protection and recognition in both the international and regional instruments. Some European countries such as Portugal and Spain have limited recognition of lock outs in their constitutions. The study also found out that both the international and the regional instruments neither directly give recognition to the right to strike nor the right to a protest action and the recourse to a lock out but that such rights are inferred. (lock outs and protests action are discussed briefly in the paragraphs below). In fact, protest action is a species of industrial action that is closely linked with a strike. It is a unique type of an

[125] *Business South Africa v Congress of SA Trade Unions & another* (1997) 18 ILJ 474 (LAC).
[126] *Government of the Western Cape Province v Congress of SA Trade Unions & another* (1999) 20 ILJ 151 (LC).

industrial action that also involves communities and is more often misconstrued. That the right to strikes and locks out remain debatable and contentious issues that are regular items on the ILO calendar usually pursued by the employer representatives and owners of industries on one side and employee representatives on the other side cannot be disputed.
Case law on the recognition of the implementation of lock outs in both the international and regional tribunals is few and scattered. The study finally found out that the right to strike is enshrined in the South African constitution but that the same constitution does not give recognition and protection to the right of employers to lock out their employees in the event of an industrial action.
The ensuing paragraphs put a spotlight on lock outs and protests action.

CHAPTER 3: THE NATURE OF LOCK OUTS AND PROTESTS ACTION IN SOUTH AFRICA

3.1. Introduction

The nature of labour interruption is such that it should be seen as a double edged sword for:

> "When a labour dispute goes beyond the negotiation table and results in a strike or a lock out, the result is losses for the parties of dispute and society. It hurts the labour in the form of lost wages and benefits; it hurts the employer in the form of loss of productivity in the short term and loss of business in the long term; and it hurts other stakeholders to various degrees due to interruption in economic activities"[127]

The reality of the situation is that:

> "collective labor conflicts are an inevitable part of organizational life"[128]

Whereas:

> "the nature of the employment relationship is such that disputes between an employer and employee (or trade union) occur frequently"[129]

According to Bosch[130] et al:

> "the root cause of disputes is underlying conflict between parties."

Bosch goes on to state that conflict originate when two or more parties with perceived or real differences over values or goals engage each other over either a scarce resource or control over such resources. Such an engagement in the workplace is referred to as a power struggle.
Labour disputes therefore manifest themselves as power struggles between employees or their representatives and their employer and such engagements are usually settled by negotiations through a process known as collective bargaining. According to Salamon[131] collective bargaining is a:

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[127] http://individual.utoronto.ca/homam/21CenturyWorkersStrike (Accessed 07 December 2023).
[128] Euwema, M.C. *Mediation in Collective Labor Conflicts* (Springer 2019) 4.
[129] Du Plessis, J.V & Fouche, M.A. *A Practical Guide to Labour Law* (8th Ed, LexisNexis 2015)
[130] Bosch, D. et al, *The Conciliation and Arbitration Handbook* (LexisNexis, 2004) 2.
[131] Salamon, M. *Industrial Relations: Theory and Practice* (4th Ed, Financial Times Prentice Hall 2000) 323.

> "method of determining the terms and conditions of employment and regulating the employment relationship, which utilizes the process of negotiation between representatives of management and employees and result in an agreement which may be applied uniformly across a group of employees."

Parties in the collective bargaining chambers are allowed to resort to coercive powers as part of the bargaining strategy. Since the bargaining process involves negotiations, it is possible that in some instances , the process does not produce the envisaged outcomes.When a deadlock ensues as a result of an abortive collective bargaining process, both the negotiating parties retreat and resort to their most potent weapons. The employees resort to their most reliable weapon which is a strike and the employer has a number of options, of which the most immediate one is a lock out.

The ensuing paragraphs attempt to present a bird's eye view on the nature of lock outs and protests action in South Africa respectively. The point of departure is the recipe for labour disputes in the employment setting.

3.2.The Genesis of Labour Lock outs

The relationship between the provider of labour and the beneficiary of the proceeds of labour, that is the employer is termed an employment relationship. It involves the exchange of effort or work in return for a reward in cash or in kind. In instances where there is an exchange of cash, disputes and conflicts become inevitable.

A labour dispute is thus:

> "a disagreement between an employer and employees regarding the terms of employment."

Over the course of time in the employment setting, two types of labour disputes have emerged. These are disputes of rights and disputes of interest disputes. Sometimes there appears a grey area between the two types of labour disputes. In *Eskom v Marshall*[132] it was held that sometimes there is a 'middle ground between the poles'[133] of disputes of right benefit. A dispute of right relates to:

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[132] *Eskom v Marshall* [2003] 1 BLLR 12 (LC) at para 20.
[133] *Eskom v Marshall and Others* (JR1619/01)[2002]ZALC 78 at para 20.

> "a dispute about the interpretation or application of a subsisting right in terms of a legislative, collective, or any enforceable agreement, a common law, a contract of employment, or customary practices in the workplace."[134]

Examples of disputes of rights include unfair dismissal, unfair labour practice, unfair discrimination, and breach of a contract of employment. All these disputes are regulated by existing statutes. Such disputes may be settled through negotiation or conciliation; otherwise, the final recourse is arbitration (CCMA and/or Bargaining Council) or adjudication (the Courts). In *Gauteng Provinsiale Administrasie v Scheepers*[135]a dispute of right was defined as:

> "a dispute over an already existing right that could be located in a statute, collective agreement or contract of employment."

On the contrary, a dispute of interest is a dispute which is not yet in existence, but to which a party would like to become entitled in a definite future time. Unlike in a dispute of right, the intended right is not yet in existence in terms of a legislation, collective agreement, or contract of employment, but the party intends to create such a right. This conditions of service, such as reduced working hours, improved leave days, the employer introducing of day care facilities at the workplace, etc. In *SADTU V Minister of Education*[136], the concept of a dispute of interest was explained as referring to a dispute relating to proposals for the creation of new rights or diminution of existing rights and is normally resolved by collective bargaining.

It has already been indicated that when the employees down tools as a consequence of their dispute with some aspects of labour relations, the employer reacts by enforcing a lockout.It can therefore be stated with no fear of contradiction that strikes and lockouts originate as a result of labour disputes caused by an underlying conflict.The paragraphs below attempt to paint a picture of lock outs in the South African context.

3.3. Lock Outs in the South African Context

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[134] Basson, A, et al*, Essential Labour Law* (Labour Law Publications, 2009) 356.
[135] *Gauteng Provisiale Administrasie v Scheepers* 1941 TPD 108 115.
[136] *SADTU v Minister of Education* 2001 22 ILJ 2325 (LC) par 43.

Labour law distinguishes beween two types of lock outs, the defensive lock out which is normally reactive which the employer uses to react to the industrial unrest waged by the employees and an offensive lock out which is normally pre-emptive, which is instigated by the employer to provoke the employees into accepting a particular demand. The nature of the lock out is such that the employer sometimes has the option to: "lock the gates …"[137]

It should from the word go be emphasized that the South African constitution does not recognize the right of employers to lock out their employees during a labour dispute. According to Collier & Fergus[138]:

> "The entitlement to have recourse to a lock out is nevertheless granted to employers by the LRA, provided certain definitional, substantive and procedural requirements are met."

The LRA as a result defines a lock out as:

> "the exclusion by an employer of employees from the employer's workplace , for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.[139]"

Feldman[140] alternatively defines a lock out as:

> "cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms."

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[137] Kleynhans, R, et al, *Fresh Perspectives: Human Resource Management* (Pearson South Africa, 2006) 282.

[138] Collier, D & Fergus, E. (eds) *Labour Law in South Africa, Context and Principles* (Oxford University Press, 2018) 377.

[139] s 213 of the LRA.

[140] Feldman, G, 'Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law' in Michael A McCann (ed) *The Oxford Handbook of American Sports Law* (Oxford University Press, 2017) 211.

Briggs[141] states that a lock out occurs:

> "when an employer temporarily withdraws paid work for its employees, refusing to allow their employees to enter the workplace to exert economic pressure on them to yield in a labour dispute."

It is imperative to unpack some of the phrases in the definition of a lock out above in order to have a proper understanding. The definition of a lock out identifies two main elements, the form of the action and its purpose. The exclusion of the employees must be from the workplace and nowhere else, and the excluded employees must not be any employees but those employees who have a contract with the employer in question. The locked out employees must be physically outside the employment premises. The other element relates to the purpose of the lock out. The purpose of the lock out must be to compel the contracted employees to surrender to a demand put forward by the employer as was the case in *Rand Tyres & Accessories v Industrial Council for the Motor Industry* [142].The definition talks about 'the exclusion by the employer of employees from the employer's workplace.' The meaning of this phrase is that the lock out must be the action of the employer who targets his/her own employees. This was confirmed in the case of *Adonis v Modteck Security Systems*[143] and in *Schoeman & Another v Samsung Electronics SA (Pty) Ltd,*[144] alternatively, a single employer can lock out employees for the purpose of compelling them to accept his or her demands. This is because one employer is capable of employing more than one employee.

The LRA further states that:

> " every employee has the right to strike and every employer has a recourse to lockout."[145]

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[141] Briggs, C, 'Lockout Law in Australia: The Case for Reform' 2007 2 (49) *Journal of Industrial Relations* 167-168.
[142] *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108 at para 115.
[143] *Adonis v Modteck Security Systems* [1998] 10 BLLR 1008 (LC).
[144] *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC).
[145] s 64(1) of the LRA.

The phrase 'recourse to lock out' needs to be interpreted in its proper context. According to Jenkins[146] "'recourse' may imply that the employer may only act 'in response' to or as a 'reaction' to a strike.

As already mentioned above, labour law distinguishes two kinds of lock outs, an offensive lockout and a defensive lockout. *In National Union of Technikon Workers v Technikon SA*[147] Pillay J explains the difference between the two lockouts as follows:

> " whether a lockout is offensive or defensive is characterised by the primary purpose for which it is used. If the primary purpose is to compel the trade union and employees to meet the employer's demand then it is offensive. The primary purpose of a defensive lockout is to protect the employer's rights to property, personnel and economic activity. Consequently, if the strike were to be accompanied by intimidation or were to take the form of a "work to rule" or "go slow" that disrupts the operations of the employer, the latter can resort to a lockout to protect itself."[148]

Kleynhans[149] et al have this to say about the difference between a defensive lock out and an offensive lock out :

> "Defensive lock outs-the employer locks out employees in reaction to a strike to remove the striking workers from his premises or to emphasise the seriousness of his offer to their demands. So a defensive lock out happens after a strike. The employer may lock the gates and use scab labour to get the work done until the employees accept his conditions
>
> Offensive lockouts-when a deadlock in negotiations occurs, the employer can act first by imposing a lockout on the workers so that

[146] https://www.ensafrica.com.
[147] *National Union of Technikon Employees v Technikon South Africa* JI030/00.
[148] *National Union of Technikon Employees v Technikon South Africa* JI030/00 at Para 1-2.
[149] Kleynhans, R, et al, *Fresh Perspective: Human Resource Management* (Pearson Prentice Hall, 2006) 282.

he can control the situation, rather than waiting for industrial action from the union. So an offensive lockout happens before a strike."

According to Workmen-Davies & Badal[150]:

> "An offensive lock-out is when the employees have not gone on strike but the employer uses the lock-out to force them to concede to employer demands. A defensive lock-out is when an employer does so in response to a strike, whether protected or unprotected. The distinction is critical, because Section 76 of the Act stipulates that an employer may use replacement labor only in the event of a defensive lockout"

For a lock out to enjoy full protection and recognition, it must satisfy certain legal requirements. Below are some of the requirements to be met before a lock out can be deemed to be legal. This despite the fact that the constitution does not confer recognition and protection to lock outs.

3.4. The Requirements for a Legal Lock out

The requirements for a legal lock out are almost identical with those of a legal strike.One such requirements is that the procedure to institute a lock out need not necessarily be followed in case where the employees have embarked on an unprotected strike as was the case in *Vanadium Technology (Pty) Ltd v NUMSA*,[151]

The LRA does not make a distinction between an offensive lock out and a defensive lock out. Since a lock out is one of the weapons at the disposal of an employer dully recognised by a national legislation[152], it stands to reason that it enjoys legal recognition albeit on a conditional basis. There are therefore certain requirements for a legal lockout. One of which is that the matter must be referred to a dispute resolution institution[153] and wait to be issued with a certificate. The employer must also give a 48 hours notice (seven days notice if the employer is the state) to the trade union or where there is no trade union to the employees involved in the

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[150] Workmen-Davies, B & Badal, K, 'The Legality of Locking out Non-striking Employees: The Perspective of the South African Labour Appeal Court' 2016 2 (1) *International Labour Rights Case Law* 47.
[151] *Vanadium Technology (Pty) Ltd v NUMSA* (1997) 18 ILJ 740 (LC).
[152] s 64 (1) of the LRA.
[153] The Council for Conciliation, Mediation and Arbitration (CCMA) or a Bargaining Council.

industrial action. These procedures involve a protected strike. However, the employer is still at liberty to institute a lock out without giving notice to the trade union or a group of employees involved in an industrial action in the case of an unprotected industrial action. These procedures are applicable in situations of a defensive lockout. A defensive lock out is more often than not in response to employees' industrial action that is already in motion, however in *Tecknikon SA v NUTESA*[154], the court held that a lockout is deemed to be in response to a strike even if the notice of a planned lockout is issued before the strike commences, provided it begins when the strike begins. In other words, it is acceptable to have a sort of an anticipatory lockout. In *NUTESA v Technikon SA*[155] it was held that a defensive lock out is ordinarily implemented for a number of purposes. These may include simply protecting the employer's " business, customers or suppliers, and economic interests from harm"

Thus, there can be no doubt that lockouts are both proactive(offensive) and reactive (defensive). From the explanation above, it can be concluded that the legislators envisaged a lockout to be in reaction to or in a response to a strike. The number of industrial unrests in South Africa in the past few years indicate that defensive lockouts have been resorted to frequently as opposed to offensive lock outs. Defensive lockouts are therefore seen as 'strategy' which when resorted to by the employer, give the employer the mandate to use replacement labour until there is a demise of the industrial action.

It is important to repeat that strikes and lock outs are countervailing events. That is why in the case of *Walker v De Beer*[156], the then Appellate Division of the Supreme Court held that a strike and a lock out could not take place simultaneously in respect of the same labour dispute.

3.5. Case Law

Case law is replete with disputes that arose as a consequence of the employer resorting to lock outs and subsequently employing replacement labour. The case of *NUCCAWU v Transnet Ltd t/a Portnet*[157] dealt with the definition of a lock out. In *Tecknikon South Africa v NUTESA*[158], the court dealt with the nature of exclusions as part of the definition of a lock out.The case of *TAWUSA of*

[154] *Technikon SA v NUTESA* (2001) 22 ILJ 472 (LAC).
[155] *NUTESA v Technikon SA (*2000) 21 ILJ 1645(LC) at para 2.
[156] *Walker v De Beer* 1948 (4) SA 708 (A).
[157] *NUCCAWU v Transnet Ltd t/a Portnet* (2000) 21 ILJ 2288 (LC).
[158] *Tecknikon South Africa v NUTESA* (*2000*) *21 ILJ 1645* (*LAC*).

South Africa obo Members v Algoa Bus (Pty) Ltd [159]focused on the issue of a demand as part of the phrase in the definition, whereas the case of *Adonis v Modteck Security Systems* (cited above) dealt among others with the application of a lock out to a number of employees and not a single employee.The case of *Fry's Metals Pty Ltd v NUMSA*[160] looked at the dismissal of employees who refused to accept a demand put forward by the employer. The case of *SACWU v Afrox Limited*[161] dealt with the dismissal of employees based on operational requirements after the employees who had embarked on an industrial action had been locked out. The case of *NCBAWU v Betta Sanitaryware*[162] dealt with misconduct of employees during a lock out. The cases of *Ntimane & Others v Agrinet t/a Vetsak (Pty) Ltd* (cited above), *SA Commercial Catering & Allied Workers Union v Sun International*[163] and *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* [164]all had in one way or another dealt with the hiring of scab labour.

Thus the application of lock outs continue to court controversy because besides the fact that they to a certain extend limit the employee's right to assembly, demonstration, picket and petition[165], this is because of the hardship the lock out creates on the striking employees more especially in accessing the employer's premises. The jury is still not out as to whether the employer can resort to a lock out in a situation where the employees have embarked on a 'work to rule'[166] type of an industrial action. The other controversy relates to a situation whether a lockout has an impact on a group of employees who conduct a sit-in as a form of an industrial action. The paragraphs below look at the application of protest action in South Africa.

3.6. The Phenomena of Protests Action in South Africa

3.6.1. Introduction

South Africa has been dubbed "the protest capital of the world"[167] This is because the country has one of the highest rates of public protests in the whole world. Although the label is genuinely

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[159] *TAWUSA of South Africa obo Members v Algoa Bus (Pty) Ltd* [2013] 8 BLLR 823 (LC).
[160] *Fry's Metals Pty Ltd v NUMSA* (2005) 26 ILJ 689 (SCA).
[161] *SACWU v Afrox Limited* (1999) 20 ILJ 1718 (LC).
[162] *NCBAWU v Betta Sanitaryware* (1999) 20 ILJ 1617 (CCMA).
[163] *SA Commercial Catering & Allied Workers Unionv Sun International* (2016)37 ILJ 215 (LC).
[164] *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* (2001)22 ILJ 414 (LAC)
[165] s 17 of the Constitution.
[166] With regard to 'work –to-rule', workers refuse to do any work that is not in their formal job description.
[167] https://ceosa.org.za/protest-action -in south africa/ (Accessed 21 May 2023).

attributed to the widespread service delivery protests. The country frequently experiences labour related protests action. The paragraphs below attempt to trace the origin of protests action in South Africa.

3.6.2. The Origins of Protests Action in South Africa

In the words of Le Roux:[168]

> " The idea that employees should be entitled to participate in some form of collective action in protest against government policies or decisions gained prominence in the late 1980's. Employees would 'stay away' from work , and participate in marches or mass rallies in support of demands made , or protests against the then Nationalist Party government."

Grogan[169] observes that:

> "During the dying days of apartheid, workers frequently engaged in widespread and orchestrated 'stay-aways' to protest against aspects of government policy."

Grogan further states that until 1994, the black working class did not have an effective institutionalized platform to ventilate their views and to pressurize the regime into making some progressive labour reforms. Under the old 1956 Labour Relations Act, stay aways were unlawful in the sense that they did not satisfy the legal requirement to constitute strike action within the statutory meaning of the term. Work stoppages should in the context of the definition of the strike be:

> "aimed at matters affecting the strikers' terms and conditions of employment."[170]

[168] www.workplace.co.za/issues/cll2603.pdf (Accessed 11 December 2023).
[169] Grogan, J, *Collective Labour Law* (2nd Ed Juta) 290.
[170] The old Labour Relations Act (28 of 1956) prohibited strikes in 'essential industries' for both black and white workers and banned political affiliations for unions.

The effect of the old legislation was such that those organizing stays away, even if organized by registered trade unions could not possibly comply with the procedural requirements for lawful strike action. The old legislation sought to remove any political motives and goals from work stoppages. The new Labour Relations Act which repealed the 1956 Labour Relations Act revolutionised and extended the protection of workers who engage in stays- away aimed at defending and promoting the 'socio-economic interest of workers.'

According to Le Roux and Van Niekerk[171]

> "The right to protest on political issues has always been a controversial issue. During the 1980s and early 1990s protest actions (or 'stay-aways' as they were called) by the working population were rife South Africa."

Du Toit[172] concurs and adds that:

> "Protest action is not a new phenomenon in democratic South Africa. In the 1980s and 1990s, many stay aways were used by workers to demonstrate opposition to government policy."

Manamela[173] is of the view that:

> "Protest action is an important tool in the hands of employees beyond the workplace in order to promote and defend their socio-economic interests. It assists them to participate directly or indirectly in matters that cannot be pursued through strike action, and which are of national importance."

Protest action relating to this study should be understood in the context of being:

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[171] Le Roux, P.A.K & Van Niekerk, A 'Protest Action in Support of Socio-economic Demands: The First Encounter (1997) 6 (10) 'Contemporary Labour Law' 81 at 81.
[172] Du Toit, D et al*, Labour Relations Law: A Comprehensive Guide* (LexisNexis South Africa, 2015)380.
[173] Manamela,M.E, 'Protest Action within the Ambit of the Labour Relations Act 66 of 1995: *COSATU v Business Unity of South Africa* (2021) 42 ILJ 490 (LAC).

> "any strike action, march or gathering organised by workers or trade unions to highlight labour disputes by any public or private sector entity."[174]

3.7. The Differences between a Strike and a Protest Action in the South African Context

The right to peaceful protest is also entrenched in the constitution[175] and therefore the LRA defines a strike as :

> " the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory."

The LRA further defines a protest action as:

> "the partial or concerted refusal to work, or retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for the purpose referred to in the definition of a strike."

From the definitions above it is clear that there is a thin line that separates a strike action from a protest action. This is because the type of actions that may amount to protest action are pretty similar to those found in the definition of a strike. However, there is a need to indulge into some interpretations to understand the differences in the meaning of the concepts. This study is of the view that a strike action affects and involves two parties, the employer on one side and the employees or their union on the other side. It also takes place at or near the workplace. A protest action on the other hand involves just more than two parties, the employer, the employees or their union as well as the communities in the proximity.

[174] S A Crime Quarterly No 64 (2018).
[175] s 17 of the Constitution.

In *Greater Johannesburg Transitional Metro Council v IMATU*[176], the judge had this to say:

> "the correct interpretation of these concepts is important as the dividing line between "matters of mutual interest" and "socio-economic interests" may at times be a thin line."[177]

It is however, necessary at this stage to attempt to differentiate the two. According to Manamela[178]:

> "The difference between a strike action and a protest action lies in their purposes. The purpose of a strike is to 'remedy a grievance or resolve a dispute in respect of any matter of mutual interest between the employer and employees. The purpose of a protest action is to 'promote or defend the socio-economic interests of the workers."

Le Roux & Van Niekerk[179] provide that the other distinct difference between the two:

> "relates to the target of the proposed action, that is, strikes are directed against the employer or employers' organization while protest actions are directed against the state or institutions that formulate socio-economic policy."

The LRA does not define the concepts of "matters of mutual interest" and "socio-economic interests"

According to Manamela[180]

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[176] *Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC).

[177] *Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC).

[178]Manamela,M.E, 'Protest Action Within the Ambit of the Labour Relations Act 66 of 1995: *COSATU v Business Unity of South Africa* (2021) 42 ILJ 490 (LAC).

[179]Le Roux, P.A.K & Van Niekerk,A, 'Protest Action in Support of Socio-economic Demands- The First Encounter' (1997) 6 (10) *Contemporary Labour Law* 81 at 81.

[180] Manamela,M.E, "Matters of Mutual Interest for Purposes of a Strike: *Vanachem Vanadium Products(Pty) Ltd v National Union of Metal Workers of South Africa* [2014] 9 BLLR 923 (LC) 2015 36(3) Obiter 791 796; *Rand Tyre and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, & Minister for Justice* (1941) TPD 108 115).

"The concept of "matters of mutual interest" refers to matters that are "work-related' or "concern the employment relationship."

In Government of the *Western Cape v Congress of SA Trade Unions*[181], the court accepted that the definition of these concepts is capable of a range of interpretations, ranging from a restrictive one to a more liberal one. The court also came to the realization that:

"in failing to define the phrase "socio-economic interests" the legislature left the determination of its meaning to the courts."[182]

According to Grogan[183]:

"socio-economic interests' of workers go beyond the workplace."

In trying to distinguish the differences between 'matters of mutual interest' and 'socio-economic interests" It is important to revisit the supreme law of the country. The Constitution provides that:

"everyone has the right, peacefully, and unarmed to assemble , to demonstrate, to picket and to present petitions"[184]

According to De Waal[185] et al,:

"The term 'assemble' in s17 of the Constitution has been interpreted to cover meetings, pickets, protest marches and demonstrations that are aimed at expressing a common opinion."

Now, based on the provided facts sourced from the constitution, employees are free to use the economic power to support their various demands. It should be remembered that s1 of the LRA aims at advancing economic development, social justice labour peace and the democratization of the workplace. These aims assist employees and their employee organizations with the right to engage in protest action

[181] *Government of the Western Cape v Congress of SA Trade Unions* (1999) 20 ILJ 151 (LC).
[182] *Government of the Western Cape v Congress of SA Trade Unions* (1999) 20 ILJ 151 (LC) at para 17
[183] Grogan,J, *Collective Labour Law* (Juta, 2019) 309.
[184] s 17.
[185] De Waal, J et al, *The Bill of Rights Handbook* (Juta 2001) 334.

It can therefore be concluded that:

> "protest action is an important tool in the hands of employees beyond the workplace in order to promote and defend their socio-economic interests. It assists them to participate directly or indirectly in matters that cannot be pursued through strike action, and which are of national importance.[186]"

In an attempt to dissect the meaning of the phrase, 'the partial or complete concerted refusal to work…' one may interpret and ultimately discern the definition to also include the 'physical absence from the workplace'. Physical absence from the workplace 'for the purpose of remedying a grievance' broadly interpreted means a stay away.

Grogan[187] is of the opinion that the definition of a protest action:

> "contemplates conduct hitherto known as 'stay-aways';conduct by workers with the same form as a strike but in support of demands not aimed directly at the protesters' employer or any other employer in particular or at employers in general."

Grogan continues to state that stay-aways are called to commemorate events regarded by workers, unions or confederations of unions as special, or in objection to the state's action, inaction or policy.

The old LRA of 1956 treated stay-aways as collective absenteeism deserving of a sanction[188].

According to the Labour Research Service[189], a stay away:

> "can involve millions of workers from many industries and sectors as well as other groups in society."

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[186] Manamela,M.E ' Protest Action Within the Ambit of the Labour Relations Act 66 of 1995: *COSATU V Business Unity of South Africa* ' (2021) 42 ILJ 490 (LAC).
[187] Grogan, J. *Workplace Law* (11th Ed Juta 2014) 435.
[188] Reference is hereby made of the cases of *Amcoal Colliery & Industrial Operations Ltd v NUM* (1992). 13 ILJ 359(LAC); *Matheus & others v Namibia Sugar Packers* (1993) 14 ILJ 1514 (IC) at 1520-7.
[189] https://www.lrs.org.za (Accessed 18 April 2023).

The institution accepts that stay aways are short-term actions used to pressurise the employer/s into agreeing to specific demands

Equally, the Economic Discussion[190] defines a stay away as a situation where:

> "workmen stay away from the work by organising rallies, demonstrations etc."

Writing for the periodical publication[191], Marius Olivier once stated that a stay away is:

> "a form of an industrial action whereby employees collectively launch a protest and/or exercise pressure. Whether the law countenances stay away action depends largely upon whether the action fits the strike definition."

A piece of legislation has already stated that:

> "Protest action may be taken to promote or defend the socio-economic interests of workers."[192]

The Act goes further to state the requirements for a protected protest action as follows:

(a) The participating employees must not be employed to work in an essential or maintenance service.
(b) The protest action must be instituted in support or defence of workers' socio-economic interest generally, and may not be for a purpose that may form the subject of a protected strike
(c) The protest action must be called by a registered union or union federation.

3.8. Summary

It is human nature that whenever human beings engage one another tensions and frictions become inevitable. In the workplace, disagreements about the conditions of service are

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[190] https://www.economicdiscussion.net (Accessed 18 April 2023).
[191] De Rebus, January 1993.
[192] s 77 of the LRA.

commonplace. In South Africa and elsewhere, violent and protracted labour unrests always erupt as a result of the deadlock in the collective bargaining chambers and the employer at times resorts to a defensive lock out, sometimes even going an extra mile in hiring replacement labour.The issue of the hiriring of 'scabs' as is known in South African labour law circles is a source of anger and frustration among the working class and the recipe for intimidation and subsequent polarization of the labour relations in general.

It can thus be concluded that protest actions involve work stoppages and the physical absence of employees from the workplace which in political/labour terms are known as stay aways. In South Africa, work stoppages have increasingly become associated with mass actions which are driven by political sentiments which was triggered by the policy of apartheid. Thus, a new form of protests action has found its way into the South African political lexicons and occasionally occupies the media space. This form of a protest action is known as a national 'shutdown'. A national shutdown involves mass protests and demonstrations by a sector of the population. In most cases, workers as community members are involved.

CHAPTER 4: THE IMPACT OF A LOCK OUT/PROTEST ACTION ON A POLITICAL OFFICE BEARER-CUM-SENIOR MANAGERIAL EMPLOYEE

4.1. Introduction

Section 19(3) (a-b)[193] of the constitution, read together with section 18[194] and section 23(2)(a-c) provide an office bearer senior employee with potent weapons in the workplace while equally placing the same employee in a catch 22 situation. This is in part because the enjoyment and full realization of these rights parachute the employee in question on the collision course with the employer as it is illustrated in the paragraphs below:

4.2. The Plight and Predicament of a Political Office Bearer-cum-Senior Managerial Employee

A situation sometimes arises whereby a senior employee in terms of the workplace organogram and who by the dictates of the employment organogram happens to be a representative of an employer at the workplace and who as a result of his/her activism and popularity within his or her employee organization is elected as a political office bearer[195]. In the course of an employment relationship, labour disputes sometimes erupt .

These disputes need the physical attention and presence of a political office bearer, senior employee. What should happen if the employee organization which the the political office bearer-cum-senior managerial employee leads is a majority labour organization at the workplace and which organization embarks on a project of an industrial action emanating from a deadlock in the negotiations and calls for a stay –away and suppose the employer reacts by requesting the very same political office bearer-cum-senior managerial employee who happens to be the representative of the employer to submit a list of names of employees involved in labour dispute for the purpose of implementing the principle of 'No work, no pay'[196]. How then should the senior

[193] "Every adult citizen has a right-

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, and

(b) to stand for public office and if elected to hold office."

[194]" Everyone has the right to freedom of association."

[195] In terms of s1 of the Local Government: MSAA 3 of 2022.

[196] As the Government Gazette No 21050 of 2000 dictated.

managerial employee in question be expected to tread on the side of caution or to figuratively 'walk on the eggs' and manoeuvre the situation?

Alternatively, what should happen if perhaps the employees resolve to embark on a strike action emanating from an abortive collective bargaining and as a reaction to the strike action,the employer decides to delegate its most trusted representative, the political office bearer-cum senior managerial employee to revoke a lock out in response to a strike. Can the same employee whose organization has embarked on an industrial action lock himself to a conflict of interest on the part of the senior employee in question.The conflict of interest is a culmination and a sub-total of a number of mutually inclusive factors. Below are some of the contributing factors.

4.3 Factors Leading to the Development of a Conflict of Interest

4.3.1. Intimidation vs Victimization

Snyman opines that " intimidation and victimization is rife in South Africa"[197] This reality plays itself out during the peak of industrial actions in the employment settings in South Africa. The literature landscape is replete with harrowing tales of intimidation that occur during strikes. Acts of intimidation are commonplace during strikes.This is dispite the existence of a piece of legislation[198] which puts a hefty sanction on any person found guilty of intimidation.

Von Holdt[199] reports that:

> "during the public service strike of 2007, there was persistently high levels of intimidation and violence in schools, often directed against school principals, despite the fact that the strike was extremely strong and that teachers can in no way be described as vulnerable or insecure workers, as they have a similar professional status to nurses."

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[197] Snymam, C.R. 'Criminal Law (5th Ed Butterworths, 2008) 463.
[198] Intimidation Act 72 of 1982.
[199] Von Holdt, K.'COSATU Members and Strike Violence: What We Learn from Quantitative and Qualitative Data' in Sakhela Buhlungu & Malehoko Tshoaedi. (eds) *COSATU's Contested Legacy* (HSRC Press, 2012) 207.

The term '*amagundwane*' has become synonymous with any person who commit or omit against a strike. *Amagundwane* is:

> "an Nguni word for a "rat" and is used to refer to scab labourers, a traitor is called a rat and it is not uncommon to hear striking workers call: "*Bulalani amagwundwane*!" (kill the scabs). It is not uncommon to hear people being hacked to death, thrown off trains, doused with petrol and set alight –all for being scabs and crossing the picket line.To be a rat is therefore to be forever marked for a gruesome death."[200]

The meaning of amagwundwane has been extended to also mean strike-breakers and non-striking workers.

Chinguno[201] reports that in one of the strikes:

> "At least three people were killed, 58 injured and 29 hospitalised.They were all assaulted on their way to work and believed the perpetrators were their colleagues punishing them for reporting for duty. Interviews with those assaulted indicated that this happened whilst they were on their way to work.Three workers were murdered, several had broken arms, attacked with stones, axes, machetes and other weapons."

In *Food and Allied Workers Union obo Kapesi v Premier Foods*[202], the court heard that during the strike, many non-striking employees and members of the management were subjected to violent criminal acts, these employees were threatened with physical harm and death. Some were assaulted, their homes firebombed, their cars set alight and one employee who managed to identify the attackers was shot and killed and a plot to assassinate a director was uncovered.

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[200] Dlamini, J. *Native Nostalgia* (Jacana Media 2009) 66.
[201] Chinguno, C,' Marikana Massacre and Strike Violence Post-Apartheid (2013) 4 (2) Global Labour Journal 163.
[202] *Food and Allied Workers Union obo Kapesi v Premier Foods* (2010) 32 Industrial Law Journal 1654 (LC).

Again in *Security Services Employers Organization v SA Transport Workers Union*[203], the court heard how about twenty people were thrown out of moving trains in the Gauteng province where most of the victims were security guards who were not on strike and who were as a result targeted by their striking colleagues. Two of the victims died, while others were admitted to hospitals with serious injuries.

In *Mahlangu v SATAWU, Passenger Rail Agency of SA*[204], the court learnt that the strikers visited non-striking employees' homes often at night, threatening them and in some cases assaulting or even murdering them.

Violent industrial action has prompted the courts to refer to it as "collective brutality.[205]"

Based on the few incidences above, an employee in question cannot afford to risk his life and consequently offend and antagonize his or her comrades in the employee organization by working against the organization.

Now, with regard to victimization, this study has identified certain conduct in the workplace to amount to victimization. Victimization is regulated and prohibited by a piece of legislation.[206] South African courts and other tribunals have found that the following conduct amount to victimization.

- Employees who strike over a demand for the dismissal of a fellow employee allegedly responsible for harassing shop stewards.[207]
- An employer who pays non-striking employees gratuities for not taking part in a protected strike but refuses to pay those who participated in the strike.[208]
- An employee who is dismissed for initiating grievances and for litigating against an employer.[209]

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[203] *Security Services Employers Organization v SA Transport Workers Union* (2012) 35 ILJ 1693 (CC).
[204] *Mahlangu v SATAWU, Passenger Rail Agency of SA, Third Parties* (2014) 35 ILJ 1193 (GSJ).
[205] Gernigon, B et al in ILO Principles Concerning the Right to Strike (1998) 42 state "Abuse in the exercise of the right to strike may take different forms[including]damaging or destroying premises or property of the company and physical violence against persons."
[206] Occupational Health and Safety Act 85 of 1993.
[207] *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU* (1997) 6 BLLR 697 (LAC).
[208] *FAWU & Others v Pet Products* (2000) 7 BLLR 781 (LC).
[209] *Jabari v Telkom SA (Pty) Ltd* (2006) 10 BLLR 924 (LC).

- An employer charging an employee for allegedly making false allegations during grievance meeting initiated by an employer but the employer failing to prove that an employee acted maliciously.[210]
- An employee retrenched for accepting a managerial position but refusing to relinguish posts of shop steward and union office bearer.[211]
- A senior executive demoted to a former post soon after being promoted without being counselled or found guilty of misconduct.[212]
- An employee dismissed after lodging grievance in terms of employer's grievance procedure[213].

Thus, a senior managerial employee by virtue of the position he holds in both the employment and union organogram can become both a victim and a perpetrator of victimization.

4.3.2. Insubordination and/or Insolence

It should be noted that one of the most important duties of an employee is to obey the lawful instructions of the employer.

Thus, refusing to carry out the lawful instructions of the employer is tantamount to insubordination. It should be remembered that :

> "the contract of employment is, by definition, a contract of subordination, in terms of which the employee submits herself or himself to the will of the employer.[214]"

In terms of common law, an employee is duty-bound to show a reasonable degree of respect and must obey the employer's lawful and reasonable instructions in a respectful manner. There has always been a thin line between insubordination and insolence.

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[210] *Wright/Automa Multi Stryene (Pty)* (2010) 9 BLLR 958 (MEIBC).
[211] *FAWU & Another v The Cold Chain* (2007) 7 BLLR 638 (LC).
[212] *Lehutso v SAA (*2010) JOL 24911 (CCMA).
[213] *Mackay v ABSA Group & Another* (1999) 12 BLLR 1317 (LC).
[214] Rycroft, A 'Insubordination and Legitimate Trade Union Activity' (2014) *Industrial Law Journal, Juta* 2690.

In the opinion of Maloka & Matsheta[215]:

> "Insolence has more to do with the attitude the employee exhibits towards the employer while insubordination is grounded on the refusal to act in line with the employer's instruction or mandate."

This thin line came to the fore in the *Palluci Home Deport v Herskowitz*[216] case. The labour court however,emphasized in *CCAWUSA V Wootru Ltd*[217] that whereas insolence relates to rude and disrespectful behavior in which the employee repudiates the duty to show respect, insubordination on the other hand, relates to the refusal by the employee to obey an employer's instructions. Equally, in *CWIU V SA Polymer Holdings*[218] the court held that the employee is guilty of insubordination if he/she willfully refuses to comply with a lawful and reasonable instruction issued by the employer. Erasmus[219] et al contend that:

> "insubordination, occurs when an employee refuses to accept the authority of his or her employer or of a person in a position of authority over the employee. It may be disobedience, refusal or failure to obey a reasonable and lawful instruction. An employee is a subordinate of his or her employer and has a duty to follow the reasonable instructions of the employer."

According to Grogan[220]:

> "Insubordination is a more serious offence than mere rudeness because it presupposes a calculated breach by the employee of the duty to obey the employer's instruction."

4.4. The 2007 Public Sector Strike and its Aftermath (A Mini-Case Study)

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[215] Maloka, T.C & Matsheta M.R 'The Fly in the Ointment or Simply a "Born-Again" Shop Steward Defending the Workers' Rights to Fair Representation: The Case of *Msunduzi Municipality v Hoskins* 2017 38 ILJ 582 (LAC) in Retrospect (2023) PER/PELJ 26.
[216] *Palluci Home Deport (Pty) Ltd v Herskowitz & Others* (2015) 36 ILJ 1511 (LAC).
[217] *CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC).
[218] *CWIU v Polymer Holdings (Pty) Ltd* (1996) 8 BLLR 978 (LAC) at para 12.
[219] https://ceosa.org.za (Accessed 18 December 2023).
[220] Grogan,J, *Workplace Law* (12th Ed, Juta 2017).

Maree[221] reports that the South African public service plays a vital role in the life of this country. The service constructs the infrastructure on which the country builds its economy. The service further ensures the safety and the security of its people and provides for the development, care and welfare of all its citizens. Maree further asserts that in order to achieve the above mentioned goals, the service requires employment relations and human resources policies that work effectively and care for all the public service employees. Maree asks a very critical question as to why the country's public service regularly experiences devastating strikes and what could be done to arrest the situation. Maree's concern is fuelled by the country's public sector strikes of 2007 and 2010.

According to the information available in the public domain, the 2007 public sector strike came as a result of a deadlock in the Public Service Co-ordinating Bargaining Council.[222] The Public Service Co-ordinating Bargaining Concil is a statutory body established in terms of sections 35-38 of the LRA. At the end of the 2006/7 financial year, the PSCBC consisted of four sectoral bargaining councils namely the Education Labour Relations Council[223] the General Public Service Sectoral Bargaining Council[224], the Public Health and Welfare Sectoral Bargaining Council[225] and the Safety and Security Sectoral Bargaining Council[226] as well as nine provincial chambers. At the core of the strike was the dispute over wage increase. Public service unions demanded a salary increase of 12% and the state tabled an offer of 5,3% which the public service unions rejected.It should be remembered that both the Constitution and the LRA dully enshrine the right to protest action.[227] There were fruitless attempts by the state through the then Minister of Public Service and Administration Mrs Geraldine Fraser-Moleketi (MP) to stop the strike, but the strike went

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[221] Maree, J 'Why has the Public Service in South Africa Experienced Such Devastating Strikes and What can be Done About it?' (2013) *3rd Biennial Labour Relations Conference, Irene, Gauteng*.

[222] The Public Service Co-ordinating Bargaining Council (Hereinafter PSCBC) was established with the aim of creating a culture of engagement and dialogue between the public service unions and the state. It should be stated that the desire to create this culture of social dialogue is embodied in s 36 of the LRA.

[223] Education Labour Relations Council (Hereinafter ELRC) a sectoral bargaining council for educators/teachers.

[224] General Public Service Sectoral Bargaining Council (Hereinafter GPSSBC) a sectoral bargaining council for office-based public servants.

[225] Public Health and Welfare Sectoral Bargaining Council (Hereinafter PHSSBC) a sectoral bargaining council for healthcare workers (nurses and social workers)

[226] Safety and Security Sectoral Bargaining Council (Hereinafter SSSBC) a sectoral bargaining council for policemen.

[227] s 17 of the Constitution read together with s 4 (2) (a) of the LRA.

ahead on the 1st of June 2007. The strike lasted for 28 days and only came to an end when the state put on the table a revised offer of 7,5%.

Labournotes[228] reports that:

> "On 1 June 2007, one million workers across South Africa went on a strike shutting down public services throughout the country. While their immediate demand was an across the board pay increase, the strike also reflected the workers' growing frustration with the government. The strike was the country's largest since apartheid rule ended in 1994. The strike led to a "total public service shutdown" with hospitals and schools particularly hard hit. Courts and government offices were also affected."

Mischke[229] adds that:

> "The 2007 strike was so acrimonious that the parties almost wiped each other out."

He states further that:

> "the strike took place amidst 'the strained relations' amongst the tripartite alliance brought about by the government's macro-economic policy."

According to Ceruti[230], the 2007 Public Sector strike was the biggest wave of strikes since the end of apartheid which caused a crisis in the South African politics and which shook a government that was indecisive and hesitant to increase the salaries of public servants.

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228 www.labournotes.org (Accessed 8 April 2023).
229 Mischke, C 'Looking Back at 2007' (Available at www.irnetwork.co.za, 2008) (Accessed 30 May 2023).
230 Ceruti, C 'Biggest Strikes in South Africa Since the end of Apartheid' (Available from https://www.socialistworker.co.uk/art.php?id=11905) (Accessed 30 May 2023).

Among the participants in the industrial action were school managers (principals) and senior health workers some of whom were branch chairpersons of SADTU[231] and DENOSA[232] respectively.

According to the job description and the organogram of the Public Service Administration, school managers and matrons are regarded as employer representatives at the workplace who are clothed with the responsibility to carry out the employers' lawful instructions in the workplace. During the 2007 public servants strike, school managers and matrons were instructed to submit on a daily basis, the list of names of employees who did not report for duty for the purpose of the employer[233] effecting the 'no work, no pay' rule whereas, the leadership of SADTU, DENOSA and NEHAWU[234] had instructed their members (including most school managers, most matrons and directors) not to report for duty, that is, to be on a total stay away. Morality and fairness dictated that those school managers, matrons and directors should physically be at the workplace to avoid feeding the employer with distorted information. Most school managers, matrons and directors belonging to SADTU, DENOSA and NEHAWU found themselves in a precarious situation of between a "rock" and a "hard place" during the period under review.

The million rand question is why should some senior managers gamble with their hard-fought and lucrative employment and accept leadership positions in their employees organizations thus placing themselves on the collision course with their employers? The answer to this question is succinctly provided for by Rapatsa and Matloga[235] when they state that:

> "being an active union representative or shop steward seems to be a political ticket to better job position, lucrative salary and incentives at the expense of the members."

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[231] South African Democratic Teachers Union (Hereinafter SADTU).
[232] Democratic Nurses Organization of South Africa (Hereinafter DENOSA).
[233] The employer represented by the Department of Public Service and Administration.
[234] National Education Health and Allied Workers Union (Hereinafter NEHAWU).
[235] Rapatsa, M.T & Matloga N.S, 'The Practice of Strikes in South Africa: Lessons from the Marikana Quagmire (2014) 5 (3) *Journal of Business Management and Social Sciences Research* 115.

Von Holdt[236] adds that being a shop steward is a springboard for promotion and career mobility.This is because:

"the position of shop steward has been used as a stepping stone for upward social mobility by some union leaders on the shop floor."[237]

Buhlungu[238] continues to argue that:

> "the opening of opportunities for senior positions in the public service, politics, business and non-governmental sector has seen scores of senior unionists leaving positions for greener pastures."

Torn apart between the prospect of betrayal of his/her comrades which carries the ultimate price of death and insubordination over the employer which carries the ultimate price of dismissal. It should never be forgotten that in terms of a provision in a piece of legislation, a state employee is guilty of misconduct if he/she:

> "fails to carry out a lawful order or routine instruction without just or reasonable cause."[239]

The predicament of the political office bearer-cum-senior managerial employee is indeed a bitter pill to swallow.

It is under situations like the one above that a conflict of interest develops. It is a question of an employee having a 'split allegiance', of being torn apart by divided loyalties. A loyalty towards his/her employer and an allegiance to his/her trade union. The interest comes about when the employee is confronted by hard choices he/she should navigate through to satisfy the employer and to equally appease the trade union of which he/she is a member.

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[236] Von Holdt, K ,' Transition From Below: Forging Trade Unionism and Workplace Change in South Africa (University of Natal Press, Pietermaritzburg 2003) 127.
[237] Buhlungu, S, 'I am a Manager but Some Bosses Still Regard Me as a Shop Steward' *South African Labour Bulletin* 23 (3) 61.
[238] Buhlungu, S 'The Big Brain Drain: Union Officials in the 1990 (South African Labour Bulletin 18 (3), 1994) 24.
[239] s18 of the Employment of Educators Act 76 of 1998.

Whatever happened to the employee in question during this period remains a riddle of some sort. What remains a critical question is who between the two parties or which system between the two got compromised? What is clear is that there were instances of dishonesty perpetuated by some school managers and matrons. It is either one of the two parties, the employer or the trade union was compromised and therefore cheated. An informal interview conducted by this study on a few principals indicates that many of the principals who did not report for duty for fear of intimidation used their common sense (the membership records) as the bases of their documents. In other words, the school managers concerned just submitted the lists based on who they knew to be a member of a union participating in the strike. The lists were not subjected to any formal vetting process and hence not verified and that was partly one of the reasons why some educators who did not participate in the strike and who reported for duty latter lodged complaints when their salaries were deducted.

The 2007 public sector strike can depending on which side one chooses to be, be regarded as a victory and a loss. The hallmark of the strike was the intimidation of the strike-breakers and the non-striking employees and the subsequent impunity the perpetrators of intimidation recieved. In economic terms, the country lost millions of rands and an estimated 14,4 million in earnings. To many in the healthcare sector, the strike was a victory in that the state agreed to recognise the need to implement the issue of rural allowances (many nurses had returned to work after being threatened with dismissals for firstly, taking part in a strike in total disregard for their profession which had been declared as an essential service) but to many in the education sector, most educators felt betrayed when other sectors in the PSCBC signed the collective agreement which brought the strike to its end.It is an open secret that the education unions refused to sign the agreement as they deemed the wage increase to be too low and many rank and file members felt betrayed by other unions who signed the collective agreement and an excrutiating additional pain when their salaries were later docked in line with the principle of 'no work no pay'.

The 2007 public sector strike once more brought to the fore the critical question and continuous debates on whether certain professions such as the teaching profession should be declared an essential service. Adherents of the move to declare teaching an essential service argue that the

move will consolidate s29 (1) (a), (b)[240] read together with s28 (2)[241] of the Constitution.It should be remembered that the international community has a high regard for the right to education and this respect for education is seen as fundamental right as it opens the doors for the enjoyment of other rights. That the global community places a high premium on the right to education is evidenced from the General Comment issued by the United Nations Committee on Economic, Social and Cultural Rights when it asserts that:

> "Education is both a human right in itself and an indispensable means of realising other human rights as an empowerement right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities…the importance of education is not just practical …[a] well-stocked enlightened and active mind, able to range freely and widely, is one of the joys and rewards of human existence."[242]

Critics of the move, on the other hand, cite two potentially conflicting constitutional rights at play, s29 of the constitution and s23 of the constitution.

The 2007 public sector strike produced a mixed bag of public opinion with regard to the symphathy or hostility towards the strikers.

In conclusion, Maree (cited above) warns that future collective bargaining processes should evolve from being adversarialism in nature to being more of mutual problem-solving and social partnernerships.

4.5. Summary

[240] Everyone has the right-
(a) to a basic education, including adult basic education and;
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

[241] A child's best interests are of paramount importance in every matter concerning the child.

[242] Committee on Economic, Social and Cultural Rights General Comment No 13: The Right to Education (art 13) (1999) UN Doc E/C 12/1999/10.

It is an undisputed fact that the struggle between being loyal to the employer and swearing allegiance to the trade union by the senior managerial employee is a big challenge. In the opinion of this study, the statutory institutions mandated with the responsibility of adjudicating this matter have misdiagnosed the root cause of the problem. This study partially agrees with the decision in the IMATU case which pronounced that senior managerial employees joining trade unions and subsequently holding influential leadership positions in employees organization should sign a confidentiality agreement with their employers which contract binds them not to 'disclose the employer's confidential secrets' and other important 'trade rules' to the trade union the said employee belongs to and leads. Equally, there is currently a number of fragmented pieces of legislation that attempt to bar employees from holding political positions in employee organizations and by extension on political parties. Among those pieces of legislation is the MSAA[243] and the mooted Public Service Amendment Bill. However, these two pieces of legislation face the prospect of future litigation as they are alleged to be in conflict with s 23 read together with s9 (1)[244] and (2)[245] of the Constitution.

[243] s 9 of the Municipal System Amendment Act.
[244] Everyone is equal before the law and has the right to equal protection and benefit of the law.
[245] Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

CHAPTER 5: FINDINGS AND RECOMMENDATIONS

5.1.Introduction

It is true that:

> "current South African labour legislation has its genesis in an era when employment was seen as a personal relationship between an employer and an employee that was established by a contract of employment would last for a very long time."[246]

However:

> "the social location of labour in post-apartheid South Africa has undergone dramatic shifts that underpin a reconfiguration of the material bases of the new democracy."[247]

It is also true that the relevance of trade unions more especially in post-apartheid South Africa is coming into the picture. The question of the tripartite alliance between the ruling party, the African National Congress and the biggest trade union in the country, COSATU has always been a contested terrain and a source of intense debates among thought builders and political analysists. Whether this friendship benefits the rank and file members of the federation is a question for another day. A source[248] has long observed that:

> "unions being affiliated with political parties to which workers are not affiliated with is yet another challenge"

What can not be contested is that trade unions are in a state of transition and that the alliance itself is a source of conflict of interest.

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[246] Le Roux, R 'The Purpose of Labour Law, Can it Turn Green?' in Malherbe, K & Sloth-Nielson, J (eds*)* *Labour Law into the Future: Essays in Honour of D' Arcy du Toit* (Juta & Co Ltd 2012) 231.

[247] Barchiesi, F ' Social Citizenship, the Decline of Waged Labour and Changing Worker Strategies' in Barchiesi, F & Bramble,T (eds) *Rethinking the Labour Movement in the 'New South Africa* (Ashgate Publishing Limited 2003)113.

[248] Https://www.cleanlink.co.za (Accessed 28 December 2023)

The advent of the 4th industrial revolution has triggerd in new human relations trends in the employment arena. Abraham et al assert that[249]:

> "technological innovation is accelerating the pace of change in how work is organised."

This technological innovation has triggered in among others, the emergence of the new forms of labour relationships and the labour landscape is gradually undergoing a metamorphosis of some kind.

To date, much has been written about strikes/protests action and the resort to lock outs as well as the hiring of replacement labour during an industrial action. However not enough has been documented on the plight and predicament as well as the role an office-bearer cum-senior managerial employee should play during an industrial action which culminates in the employer effecting a lock out rule or the employer demanding to be provided with documentary evidence implicating fellow employees, (and self-incriminating) who have embarked on a stay away for the purpose of effecting the 'no work, no pay' sanction.

5.2. Key Findings

This study has found out that there are no records of instances where a political office bearer employee was faced with the prospect of effecting a lock out on his fellow employees and subsequently on himself/herself. The study found out that most of the employees in question played the dual role of being the employer and the employee and as a result some simply ignored the employer's instruction to lock out and risked the prospects of consequence management. This study also found out that many school managers and other senior employees in other departments who also played the dual roles of leaders, faced with the dilemma of submitting documentary evidence for the employer to effect the principle of 'no work, no pay' submitted what could be regarded as 'doctored/fraudulent documents' because the documents were just generated without undergoing the process of vetting and verification. Some senior managerial employees were smart enough and opted to play on the safe side of caution by applying for leaves which coincided with those stay aways. The study also found out that as a result of the

[249] Abrahams, K.G et al 'The Rise of the Gig Economy: Fact or Fiction?'(2019) *American Economic Association* 357.

power dynamics within the tripartite alliance of which COSATU is the member and the African National Congress the ruling party, many political office bearers-cum-senior managerial employees did not include themselves in the lists of strikers and as such escaped the consequence management with impunity. However, their comrades and colleagues who participated in the protest action had their salaries docked. The critical question that remains unanswered is based on the complaints by some employees, what other criterion did the DPSA[250] use to identify the so called 'culprits' and subsequently slashed their salaries.

5.3. Recommendations

This study does not have a "one size fits all" approach to the solution. It however takes a leaf out of Habib[251] sentiments when he calls for:

"the reconfiguration of the public mandate of the civil servant."

Habib's assertion makes a clarion call for the 'rebirth' of a new cadre, a civil servant who is driven by selflessness and the ethos of patriotism and a desire to serve the country without the penchant for self-serving/ enrichment. There is also a need and an urgency for the legislators to enact pieces of legislation which will perform the balancing act of addressing the issue of conflict of interest of a political office bearer senior managerial employee and the interests of the other two parties, the employer and the trade union without offending the supreme law of this country, the Constitution.

[250] Department of Public Service and Administration.

[251] Habib, A 'The State of the Nation and its Public Service in Contemporary South Africa: A Critical Reflection' (2010) 3 (18) *Administratio Publica* 2.

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