



# SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

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**10** YEARS  
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# **SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL**

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## TRIBUTE TO AKHO NTANJANA



Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR. GOMOLEMO MOSHOEU

*Production editor*

Well done, Akho!

You have run your race; now, it is for us to take the baton  
and continue on your well-defined route.

*Thank you for being our guiding light.*



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AN EXAMINATION OF THE EMPLOYEE'S  
RIGHT TO STRIKE AND REPERCUSSIONS  
FOR PARTICIPATING IN AN UNPROTECTED  
STRIKE AS DEMONSTRATED IN THE CASE  
OF *NGOBENI v INTERSPRAY DURBAN*  
(JS739-18) [2024] ZALCJHB 80  
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## Abstract

The right to strike is a constitutional guaranteed right found in Chapter 2 of the Bill of Rights and it is protected in the Labour Relations Act of 1995. Furthermore, it is important to note that the right to strike is an essential component of employment rights, and the impact of strikes, either protected or unprotected, clearly depends on various factors relating to the context, adherence to legal procedures, and of course willingness of parties to engage in constructive dialogue and negotiation. As demonstrated in the case of *Ngobeni v Interspray Durban* (JS739-18) [2024] ZALCJHB 80 (21 February 2024), an unprotected strike can have significant repercussions for employees. Against this background, this case note will examine employees' right to strike and repercussions for participating in an unprotected strike. Towards the end, the case note will explore possible solutions aimed at providing awareness and the need for adherence to legal procedures.

## I INTRODUCTION

The right to fair labour practice and the right to strike are entrenched in section 23 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution). Section 23(1) of the Constitution states that 'everyone has the right to fair labour practices' while section 23(2)(c)

provides that 'every worker has the right to strike'. The two sections are the foundation of the legislative right to strike envisaged in section 64(1) of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA), which states that every employee has the right to strike. According to Subramanien and Joseph, three elements constitute a strike: (1) the stoppage of work; (2) undertaken by the employees; and (3) aimed at resolving a matter of mutual interest between employees and their employer (DC Subramanien & JL Joseph 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA' (2019) *Potchefstroom Electronic Law Journal* at 6).

According to Gernigon employees may embark on a strike with their workplace union to promote and protect their social and economic interests (B Gernigon, A Odero & H Guido 'Principles concerning the right to strike' (2000) *International Labour Organization* at 11). Section 67 of the LRA makes it clear that employees are protected from dismissal when engaging in a strike that complies with the provisions of the LRA. Section 67(2) states that:

- (a) *a person does not commit a delict or a breach of contract by taking part in a protected strike or a protected lock-out; or*
- (b) *any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.*

Furthermore, according to section 68 of the LRA, employees participating in a strike that does not comply with the LRA are not protected and may be dismissed by their employer. Section 68(5) states that:

*participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal.*

More often than not, employers, after having decided to dismiss employees who participated in a strike, will decide to re-employ them. The employer, in doing so, seeks to evade employees whom he perceives as challenging.

Against this background, the case of *Ngobeni v Interspray Durban* (JS739-18) [2024] ZALCJHB 80 (21 February 2024) relates to a matter involving dismissal of the employees based on participation in an unprotected strike. Furthermore, the employees were dismissed without a hearing, however, they subsequently rejected the opportunity of an appeal hearing.

## II THE FACTS OF THE CASE

The case *Ngobeni v Interspray Durban* relates to a matter of dismissal of 56 employees for engaging in an unprotected strike at the workplace. The employer,

who is the respondent in the case, has a painting business that services large building projects and it has offices in Durban, but operates only in Johannesburg (*Ngobeni v Interspray Durban* para 5). Due to the decline in the demand for work and services, the respondent issued a letter in November 2017 to its employees regarding their contemplated dismissals (*Ngobeni v Interspray Durban* para 6). It is significant to highlight the fact the employer explored alternatives to dismissal, however, it was determined that placing the employees on a short time or implementing a lay-off system would be an adequate alternative to dismissal. In this regard, work was rotated among two groups in four-week intervals. However, the employees were not happy with the short-time arrangements, expressed a desire for permanent employment and opted for retrenchment packages. It is noteworthy that, they did not have written employment contracts setting out their length of service and they were also unhappy with the hourly rate and made wage demands. Furthermore, the employees requested the issue of such employment contracts to be resolved for them to determine the amount of severance packages they would receive upon being retrenched. They engaged the assistance of a representative from the Economic Freedom Fighters (EFF), namely Ms Fikile Mafuyela (*Ngobeni v Interspray Durban* para 8).

Between 25 July 2018 and 08 August 2018, there were several text messages exchanged between the employer and Ms Mafuyela trying to resolve the impasse. On 09 August 2018 at 15h58, the employer eventually issued an ultimatum to the employees, and the employees whom the respondent believed had not complied with the ultimatum were dismissed summarily on 10 August 2018 (*Ngobeni v Interspray Durban* para 16). In its defence, the employer contended that the situation had become volatile, and it was not appropriate to hold disciplinary hearings regarding the misconduct of those participating in unprotected strike action (*Ngobeni v Interspray Durban* para 17). Some of the dismissed employees honoured the invitation to lodge an internal appeal and they were reinstated after the respondent considered their submissions (*Ngobeni v Interspray Durban* para 19). Unsatisfied with the dismissal, an unfair dismissal dispute was referred to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation on 15 August 2018. The referral to the CCMA contained a list of 56 employees (*Ngobeni v Interspray Durban* para 20).

### III LEGAL ISSUES

The Labour Court was faced with, among others, two significant legal questions which needed to be addressed. The primary question was whether the employees who were properly before the Court committed the misconduct of participating in an unprotected strike and whether their dismissal for doing

so was substantively fair (*Ngobeni v Interspray Durban* para 4). Section 68(5) states that:

*participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice Dismissal in Schedule 8 must be taken into account.*

The secondary question was whether the dismissal of the said employees without a hearing renders their dismissal procedurally unfair, and if so whether they are entitled to any compensation (*Ngobeni v Interspray Durban* para 4). Section 68 states that:

- (1) *in the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lockout, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—*
- (b) *to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct... .*

#### IV INTERPRETATION AND APPLICATION OF THE LAW ON THE RIGHT TO STRIKE.

Just as in the case of *Ngobeni v Interspray Durban*, the courts have significantly influenced labour law development in South Africa by interpreting employees' right to strike in labour disputes. The right to strike is universally recognised through international conventions, and regional legal instruments, and in South Africa is further recognised in the Constitution and labour legislation (*Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) para 23). The courts have clearly established the right to strike through case law.

##### (a) *Employees' right to strike*

A landmark judicial development in South Africa was outlined in *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA* (2006) 27 ILJ 1483 (LAC) whereby the Court outlined three categories of strike. The court stated that there are three categories of strike and every employee's strike may fall into one or more of these categories which are, '(1) a strike where the employees have a demand, (2) a strike where there is a grievance rather than a demand, and (3) a strike which arises from a dispute' (*TSI Holdings v National Union of Metalworkers of SA* para 1492E-F). In the end, exercising the right to strike in South Africa must adhere to the law and judicial interpretations.

(b) *The judicial development and interpretation of the right to strike*

The Constitutional Court has emphasised the importance of employees' right to strike in the case of *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 (4) SA 744 (CC). The *ex parte: In re Certification of the Constitution* judgment involved certification of constitutional provisions by the Constitutional Court and affected parties were also invited to raise contentions for or against inclusion or exclusion of any right in the Constitution. The contentions concerning the right to strike were that including only the right to strike in the Constitution and excluding the right of employers to lock out has two material effects that are detrimental to employers in South Africa (*Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* para 840C-D).

First, it was contended that it violates constitutional principles II and XXVIII and secondly that it entails that the employees' right to organise collectively is much more significant than the employers' right to organise collectively and that violates the employer's right to collective bargaining (*Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution* paras 839H-840A). These contentions were based on the argument that the employees' right to strike and the employer's right to lock out are significantly equal and should both be treated equally. Further entrenching one of them in the Constitution and excluding the other, therefore, constitutes a serious infringement of the persons whose right has been excluded (*Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution* para 840C-D). Section 213 of the LRA defines the meaning of 'strike' in the legal sense. The Labour Court in the case of *Simba (Pty) Ltd v FAWU* 1998 19 ILJ 1593 interpreted the definition of strike as contemplated in the stated LRA provisions. The Labour Court interpreted and developed the definition of a strike by stating that although the definition in the LRA does not specifically incorporate the term 'issue in dispute', this term can be read into the definition, and such read-in is justified by referring to section 64(1) of the LRA (*Simba* para 1596D). Section 64(1) of the LRA holds a legal position that employees should strike with a purpose to resolve an issue in dispute between them and their employer. The judicial interpretation of section 213 clarifies the intent behind strikes and strengthens labour relations jurisprudence. It highlights that those wishing to strike must meet the employee definition criteria in section 213 and section 200A of the Labour Relations Act (LRA). Section 213 of the LRA defines an employee as:

*any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer.*

Considering the above, section 200A of the LRA provides a clearer version of section 213 of the LRA and it (section 200A) serves as a presumption as to who is an employee regardless of the nature of the contract entered or where an employment contract was verbally or tacitly entered.

According to the LAC in the case of *Chemical Workers Industrial Union v Plascon Decorative (Inland)* (J2162/98) [1998] ZALAC 27 (30 September 1998) paras 20–22, the definition of strike entrenches three elements within itself and these elements are, firstly, refusal to perform work *Plascon Decorative Inland* (paras 20–22). See also *Steel Mining & Commercial Workers Union v Brano Industries (Pty) Ltd* 2000 21 ILJ 666 paras 668B–D. Secondly, the refusal must be undertaken by employees and lastly, such a refusal of work must be purposed to resolve a matter of mutual interest (*Plascon Decorative Inland* para 22). In addition to these elements, the court in the *SA Breweries Ltd v FAWU* 1989 10 ILJ 844 (A) case has indicated that the term ‘work’ should be narrowly defined, and its interpretation should not exceed the boundaries of the work that employees are bound to render in terms of their contract of employment (*SA Breweries Ltd* para 844–J). Section 200A may be regarded as the basic summary of the common-law tests applied to determine whether a specific person may be regarded as an employee. There are three common-law tests, which are (a) the control test, (b) the organisation test, and (c) the dominant impression test (A Basson, PAK Le Roux & EML Strydom *The New Essential Labour Law* 7ed (2019) LexisNexis at 61–69. In order to ensure the precise boundaries for lawful strike activities, the LRA does not provide the right to strike only, but also provides protection to employees that engage in a strike. Such protections are provided to striking employees engaged in a protected strike in terms of section 67 of the LRA as it regulates strikes that are in adherence with the LRA (section 67(1) of the LRA states that a protected strike means ‘a strike that complies with the provisions of this Chapter’).

It should be noted that any strike that commences while in adherence with the elements of the strike but along the way becomes conducted in a manner that is no longer compliant will be deemed to be an unprotected strike. This legal position was confirmed by the Constitutional Court in the matter of *TAWUSA v Unitrans Fuel and Chemical (Pty) Ltd* [2016] 11 BLLR 1059 (CC) whereby it was ruled that any lawful strike action that is being conducted in a manner that exceeds the statutory limitations provided by the LRA automatically becomes an unlawful and thus unprotected strike and all employees taking part in such strike are not entitled to section 67 LRA protections. The strike was unprotected because impermissible demands were also included by workers as subject of the strike. This judgment strikes a balance that furnishes equitable benefit and protection of the law between employers and employees as none of them benefit from unlawful conduct despite the nature and value of the right they purported to exercise.

Since employees have the right to strike, such right is limited to the extent that the exercise of the right to right to strike may not be exercised beyond the bounds of the law and parameters the employer and employee may consent to when engaging in a strike. It is plainly clear that participation in an unlawful strike can have severe consequences, and in certain instances, employers can impose harsh sanctions such as dismissal. As demonstrated in the present case of *Ngobeni v Interspray Durban*, it was found that the applicants were guilty of participating in an unprotected strike action and it was not in dispute that the respondent's business suffered as a result of this misconduct (*Ngobeni v Interspray Durban* para 91).

Another matter of refusal to work was considered in the case of *FAWU v Rainbow Chicken Farms* [2000] 1 BLLR 70 (LC). The *FAWU* case concerned 13 applicants who were employed by the defendant until their dismissal and among them, 12 were employed as the defendant's butchers and one was employed as the 12 butchers' supervisor (*FAWU* para 1). The factual cause of the legal dispute between the applicants and the respondent is that the applicants were absent from work with no prior permission from the respondent and the respondent dismissed them (*FAWU* para 7). The main reason the applicants were absent from work is that they were all Muslims and decided to be absent from work because they wanted to celebrate their Muslim tradition with their families and religious mates (*FAWU* para 7).

After considering these contentions, the Labour Court reasoned that although their absence from work was done collectively and for mutual interest, their actions did not constitute strike action since they did not intend to resolve a matter of mutual dispute. In addition, they had no demand that they submit to their employer, and they merely did not go to work because they wanted to celebrate Eid, therefore, their conduct was the same as employees who for any reason decided to be absent from work (*FAWU* para 24). The Labour Court ruled that the applicants were indeed unfairly dismissed and granted them a reinstatement remedy (*FAWU* para 37).

The second element identified was that there should be a dispute between an employer and its employees, and the strike action should be to resolve their disputes. In *SA Scooter & Transport Allied Workers Union v Karras t/a Floraline* 1999 20 ILJ 2437 (LC) the Labour Court ruled that employees who had no valid or legal reason to leave their employers' premises and continued not attending work had engaged in an unprotected strike since there was no valid dispute between them and their employer (*SA Scooter & Transport Allied Workers Union* para 2448E-F). Refusal to work and failure to attend work under the impression that it's a strike action while there is no valid dispute constitutes work absconding and may justify dismissal. The issue of invalid demand was a matter to be adjudicated in *TAWUSA obo MW Ngedle v Unitrans Fuel and Chemical (Pty) Ltd* [2016] ZACC 28 whereby the court

had to consider its implications for employees who engage in strike action to enforce impermissible demands. The court delivered a dissenting judgment that invalid demands render the strike action unlawful and thus unprotected (*TAWUSA* para 3).

In *Pikitup (SOC) Ltd v SAMWU* 2014 35 ILJ 983 (LAC), the third element requiring that the demand or dispute be a matter of mutual interest was considered by the court. The main cause of the issue in this case was the employer introducing a breathalyser test for all Pikitup drivers. The motive behind introducing the breathalyser test was to reduce the incidents of employees coming to work drunk as the majority of employees who worked as drivers went to work while drunk (*Pikitup* para 984D-E). The defendant as the representative union opposed the introduction of the breathalyser test and the issue remained unresolved after conciliation and thereafter the employees embarked on a strike (*Pikitup* para 984D-E). The applicant successfully instituted an application to interdict their strike and declare it unlawful and the court reasoned that the issue in question was not a matter of mutual interest, but it related to the operational management of the company. On the return date, the court declared the strike lawful on the basis that the motive behind the strike was based on mutual interests. The court accepted the contention that the employer's objective to introduce breathalyser testing at the workplace was legitimate and justifiable since the aim was to promote a safer working environment. And since the employer's strategy for safe a working environment through the use of breathalyser tests before work commencement every day affected all employees and not only a few employees, this caused the court to rule that the matter in dispute mutual among all employees. This entailed that a matter of mutual interest denotes employees having the same issue that affects them collectively and all engage in strike having the same issue in mind (*Pikitup* para 984D-F).

These cases have proved that strike action is recognised as a valued and fundamental right but is, however, subject to limits and should be exercised within the prescripts and ethos of the appropriate legislative provisions.

## V THE IMPLICATION OF THE NOTICE BEFORE THE STRIKE

It is required in terms of section 64(1)(b) of the LRA that employees should submit to their employer a written notice of their intention to strike, and such notice should be issued at least 48 hours before the commencement of the intended strike. The issue concerned was, as unions submit the required notice on behalf of the employees they represent, is there any need for each non-represented employee to individually submit their notice as required by the LRA? Ideally, the notice requirement aims to promote orderly industrial action and provide employers with adequate time to prepare. This matter

was dealt with by the Supreme Court of Appeal in the case of *Equity Aviation Services (Pty) Ltd v SATAWU* 2011 32 ILJ 2894 (SCA). This case involved SATU as a workplace union that had majority representation as it had representation of 725 out of the 1157 employees employed by the applicant.

Due to unsuccessful negotiations between the union and employers, SATAWU acted on behalf of its members and issued a written 48-hours' notice to the employer as required to show its intention to strike but the unrepented employees issued no such required notice (*Equity Aviation Services* para 5). Both the represented and non-represented employees embarked on a strike that lasted for four months (*Equity Aviation Services* para 6). Since the union issued a written notice to strike on behalf of its members only, the strike action of the represented employees was regarded to be protected and lawful. However, since non-represented employees issued no notice to strike, the employer deemed their strike action unlawful and thus unprotected. As a result of participating in an unprotected strike, the employer dismissed the unrepresented employees and reasoned that their conduct constituted prolonged absenteeism without prior permission.

The dismissed employees challenged the legality of their dismissal at the CCMA and as they were unsuccessful, they appealed to the Labour Court and contended that their dismissal constituted automatic unfair dismissal (*Equity Aviation Services* para 7). The Labour Court ruled that the union represented both unrepresented and represented employees during negotiations and issue referral steps and thus one notice issued by the union was sufficient to cover all the employees since the negotiations involved all employees (*Equity Aviation Services* paras 7–8). The employer appealed to the LAC against this judgment for further consideration but the LAC also dismissed the appeal (*Equity Aviation Services* para 8). The LAC agreed with the LC that when the matter was referred for conciliation, the union represented the interests of both represented and non-represented employees. The LC and the LAC emphasised collective representation in industrial disputes.

The matter was then taken to the Supreme Court of Appeal by the employer and the SCA delivered a dissenting judgment, but the majority judgment upheld the appeal in favour of the employer (*Equity Aviation Services* paras 9 and 30). The legal question that the SCA was called upon to adjudicate upon was 'whether the unrepresented employees were required to submit a separate notice of their intention to strike or whether the notice submitted by the union was sufficient to include the unrepresented employees that would ultimately render their participation in the strike as being lawful' (*Equity Aviation Services* para 10). The SCA found that the silent fifth purpose of the section 64 procedure is to not render having unions at the workplace less effective, the union represents its members only and non-represented employees had to submit their separate notice to strike (*Equity Aviation*

*Services* paras 2 and 27). The SCA concluded that employees who are not represented would have lawfully participated in the strike had they submitted their notice and since they failed to do so, their strike action was unprotected and thus their dismissal is upheld (*Equity Aviation Services* paras 29–30). This precedent by the SCA denoted that it is a prerequisite that non-represented employees have to issue their own written notice of intention to strike. However, this judgment did not specify whether every non-represented employee must issue a separate notice to strike such that if there are 150 non-represented employees, their employer must receive 150 notices to strike. In addition, it would mean that this judgment implied that each employee had to separately make a referral of the dispute for conciliation which would be time-consuming and inconvenient. These loopholes presented by this judgment rendered it less acceptable.

This precedent of the SCA was rejected by the Constitutional Court in the case of *SA Transport & Allied Workers Union v Moloto* 2012 33 ILJ 2549 (CC) whereby the facts of the case are the same as the ones *Equity Aviation v SATAWU*.

After failed negotiations, an issue arose, and after failed negotiations, the majority union issued the notice to strike and when the strike commenced, even non-represented employees joined it (*SA Transport & Allied Workers Union* paras 2 and 3). The employer dismissed all non-represented employees due to non-compliance with the notice procedure required by the LRA. The employees challenged their dismissal, and they were unsuccessful until they reached the Constitutional Court appealing against the decision of the court *a quo* (*SA Transport & Allied Workers Union* paras 5–8).

In this case, the court had to answer the question of whether non-represented employees must issue their separate notice to strike, or whether the notice issued by the majority union suffices as an umbrella to cover even non-represented employees (*SA Transport & Allied Workers Union* para 13). In a dissenting judgment, the Constitutional Court overturned the reasons of the SCA in *Equity Aviation v SATAWU* for adding an implied fifth requirement for issuing notice to strike by non-represented employees. The court overturned this ruling and reasoned that the Constitution entrenches the right to strike consequently making it to be much more significant to the extent that no implicit requirement may be added to it in the absence of necessary justification (*SA Transport & Allied Workers Union* para 92). The contention that there should be two separate notices was thus rejected and the argument that the LRA recognises only one strike over one and the same dispute concerning one and the same people was upheld (*SA Transport & Allied Workers Union* paras 91 and 92). It can, therefore, be deduced from this judgment that the court respected the value of the right to strike in South Africa and thus gave it the necessary protection, which

implied that no limitation should be set on the right to strike if a litigant did not adequately establish the justification for limitations. It is trite law that section 67 LRA protections are available to strikes that are protected and in compliance with the LRA from the commencement to the end of the strike. The Constitutional Court, in the matter of *TAWUSA v Unitrans Fuel and Chemical (Pty) Ltd* stated that any protected strike that is being conducted in a manner that exceeds the statutory boundaries set out by the LRA turns into an unprotected strike and strikers engaged in such strike will therefore not be protected in terms of section 67 of the LRA. The incident commonly referred to as the ‘Marikana massacre’ serves as a relevant example of a strike that began lawfully but became unlawful over time for various reasons – mainly because employees engaged in a wildcat strike in contravention of collective agreements or participated in violent conduct, thereby rendering their strike action unlawful (KO Odeku ‘An overview of the right to strike phenomenon in South Africa’ (2014) *Mediterranean Journal of Social Sciences* at 697).

The Marikana strike started as a lawful and peaceful strike in August 2012 and was thus protected. The strikers alleged that their salaries were unfairly low and demanded that the management increase their salaries from R4 000 to R12 000. Due to the management of Marikana mine refusing to meet the demands of the strikers, the strikers then engaged in an unlawful strike dominated by a series of assaults and intimidation, which led to 34 strikers being killed by the police (KJ Selala ‘The right to strike and the future of collective bargaining in South Africa: An exploratory analysis’ (2014) *International Journal of Social Sciences* 3(5) at 121). The manner in which the strike was conducted was no longer compliant with the LRA and thus became unprotected. Another unprotected strike in the mining industry took place in 2012 leading to 12 000 mine employees being dismissed as their strike was not in compliance with the provisions of the LRA and therefore unprotected (Selala at 122). It is evidently clear that the right to strike is not an absolute right but under certain circumstances, it can be limited by legislation and acting against limitations on the right to strike amounts to an unprotected strike.

What constitutes an unprotected strike has been determined in terms of section 68 of the LRA. Section 68(1) of the LRA provides that any person who engages in a strike action that is not in compliance with Chapter IV of the LRA engages in an unprotected strike.

## VI SELECTIVE RE-EMPLOYMENT AFTER DISMISSAL

The selective re-employment after dismissal was considered by the court in the case *Chemical Energy Paper Printing Wood and Allied Workers Union v Metrofile*

(Pty) Ltd (2004) 25 ILJ 231 (LAC), whereby the court emphasised that employees who have committed the same kind of misconduct must be treated in the same manner (*Chemical Energy Paper Printing Wood and Allied Workers Union* para 35). This case involves an appeal and a cross-appeal regarding the judgment and order of the LC. The court ruled that the dismissal of the employees was procedurally unfair but substantively fair, and as a result, they were not entitled to any relief (*Chemical Energy Paper Printing Wood and Allied Workers Union* para 1). Additionally, the employer dismissed the employees for misconduct that allegedly occurred during a protected strike, following several disciplinary inquiries, and offered selective re-employment to others. The LAC held that ‘our law requires that employees who have committed similar misconduct should not be treated differentially’. The aim of this ruling is that employees who acted the same way under the same circumstance should be treated fairly and in the same way.

Therefore, if after participating in an unprotected strike, an employer decides to dismiss one of the employees among many employees, it must also dismiss the other employees otherwise that would constitute unfairness and unfair labour practice. Fairness requires that all employees under the same circumstances be treated similarly, it was stated in the case of *Southern Sun Hotel Interests v CCMA* [2009] 11 BLLR 1128 (LC) that in order for employees to succeed with their claims for inconsistent re-employment, they need to identify and prove that other employees acted in the same manner but were given a lenient or different sanction (*Southern Sun Hotel* paras 32–33; *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 LAC). Therefore, it is necessary to establish similar circumstances and different treatments between employees for claims of inconsistency to succeed.

Inconsistency or unfairness when conducting re-employment after the dismissal of employees who participated in an unprotected strike is the main factor that employers often fail to avoid for not contravening the ‘all for one and one for all rule’. The inconsistency of employers was well articulated by Barners AJ in *NUMSA obo Jan v W E Geysers* (JS162/16) [2017] ZALCJHB 152 whereby he stated that inconsistency arises wherein alike cases are not been treated alike and noted that a deliberate refusal to re-employ others while re-employing certain employees who were dismissed for the same reason amount to unfair dismissal (*NUMSA obo Jan v W E Geysers* paras 10–11). An inconsistency in selective re-employment was a ground that prevailed in the *Liberated Metalworkers Union of South Africa obo Molefe v Harvest Group* [2018] 11 BALR 1217 (CCMA) case and prejudiced employees contended that such unfairness constitutes automatically unfair dismissal. The court had to consider whether the employer’s inconsistency when conducting

re-employment was unfair enough to amount to unfair dismissal as contended by the applicants. The court gave immense analysis to the extent and circumstance surrounding the employer's decision to re-employ some employees and refuse to re-employ other employees.

The court reached a conclusion that the employer lacked just and fair grounds for not treating all employees in the same way it had treated the rest of their employees under the same circumstances. The court thus ruled that all employees should be reinstated as the employer's failure to apply the 'one for all and all for one' rule amounted to unfair dismissal for failing to re-employ other employees that it dismissed for similar reasons constitute unfair dismissal (see further at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/employment/employment-alert-28-january-all-for-one-and-one-for-all-the-consequences-of-selective-re-employment-following-dismissal-.html>). What is required, as prevailed in Molefe's case, is that a mere refusal to re-employ some employees and offering to re-employ only certain employees after all employees were dismissed for one and the same reason does not automatically constitute unfair dismissal. The circumstances of each case therefore need to be taken into consideration when adjudicating cases involving inconsistency when administering re-employment after employees were dismissed for one and the same reasons.

## VII CONCLUSION

The case of *Ngobeni v Interspray Durban* demonstrated that although employees have the right to strike, such right is limited to the extent that the exercise of the right to strike may not be exercised beyond the bounds of the law and the parameters the employer and employee may consent to when engaging in a strike. Participation in an unlawful strike can have severe consequences and in certain instances, employers can impose harsh sanctions such as dismissal. The issue arises when employers after dismissing employees who participated in an unprotected strike later decide to offer re-employment to some employees but to the exclusion of other employees who also participated or were dismissed for the same reason ie, participation in an unprotected strike. Section 64 of the LRA outlines two essential requirements for a strike to be protected. First, the dispute must be referred for conciliation to a relevant bargaining council or the CCMA. Second, notice of the intended strike action must be given to the other party involved. Failure to comply with these two requirements may lead to employee dismissal.

Ideally, the legislature should amend the LRA and insert provisions that will provide regulatory guidelines for selective re-employment after employees are dismissed for similar reasons, ie, recruitment and selection shall give preference to affected employees equally and fairly. The employer shall not prefer a

set of employees against others when re-employment is considered. Such regulations will reduce employers' inconsistencies in selective re-employment and guide judicial officers to adjudicate matters concerning selective re-employment.