UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW, HOWARD COLLEGE

Balancing the right to strike by public health care workers against the right of patients: Lessons from abroad.

ZINZI MVELASE

220106677

This mini dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Labour Studies at the College of Law and Management Studies and School of Law, Howard College

Supervisor: Dr Ernest Tenza

2022

DECLARATION REGARDING ORIGINALITY

I, Zinzi Mvelase, declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

D. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

    a. their words have been re-written, but the general information attributed to them has been referenced;

    b. where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

E. Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.

F. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation/thesis and in the References sections.

Signed: Zinzi Mvelase

Date: 6 February 2022

ACKNOWLEDGEMENTS

This dissertation would have not been possible without Almighty God.

I would love to give thanks to my parents, Mr Mandla Gilbert Mvelase and Mrs Mazo Mvelase, for all your love, prayers and support during my studies.

This dissertation was written in honour of my late grandparents, Mr Cyril Sipho Mhlongo, Thethi Benedette Mhlongo, Simon Mvelase and MaMiya.

This dissertation is dedicated to my parents, the Mhlongo Family and my future child.

I am indebted to the astute supervision of Dr Ernest Tenza, who consistently guided me in the right direction. I am grateful for all the assistance, and this dissertation would not have been possible without his supervision.

ABSTRACT

The research will address the right to strike by public health care workers versus the fundamental right to access to health care. The objective of this research is to establish what the right to strike by health care workers entails. Furthermore, the research will establish how to balance the right to embark on a strike by health care workers and the right of patients to access health care. The goal of the research is not only to find remedies that will reduce strikes within the health sector in South Africa but to also to ensure that both the right to strike and the right to access health care are not violated. The research will focus on the labour laws of South Africa which regulate the right to strike. In this regard, the research will highlight not only the right to strike in terms of the Labour Relations Act 66 of 1995 and the Constitution of the Republic of South Africa, 1996, but also the international norms of such right as well as the substantive and procedural limitations. The research will further establish to what extent health care workers can exercise the right to strike. Such laws will be compared with laws of Canada and Australia in relation to the right to strike by health care workers and the right to access health care.

The research will further discuss recommendations for curbing strikes within the health sector.

Key Words: Constitution, Health Care Workers, Labour Relations Act, Strike, Collective Bargaining, Essential Service Committee.

ABBREVIATIONS

ESC	Essential Service Committee
FWA	Fair Work Act, 2009
GAWU	General and Allied Workers Union
HWA	Health Workers Association
LRA	Labour Relations Act 66 of 1995
LRA 1956	Labour Relations Act 28 of 1956
PSSRA	Public Service Staff Relations Act
SA	South Africa
SAHRC	South African Human Rights Commission
SAPSA	South African Police Service Act

TABLE OF CONTENTS

CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND

The right to strike is a fundamental right guaranteed by section 23 of the Constitution of the Republic of South Africa.[1] Every worker has the right to strike and collectively bargain under the Constitution. However, this right is conditionally limited by section 36 of the Constitution. The Labour Relations Act (LRA)[2] has further internal limitations in terms of its section 65(1). One such limitation is for workers employed in essential services, such as nurses.[3]

Strikes are one of the bargaining tools that workers use to advance their interests.[4] Despite the fact that workers in the health sector are described as essential services, they do from time to time go on strike.[5] When this does happen, strikes in the public health sector often result in health care workers being attacked and health care facilities being destroyed or damaged, which results in patients being denied access to or prevented from being treated at healthcare facilities and clinic services.[6] These strikes often have a serious impact on the wellbeing of people who are vulnerable and in need of health care services. Even though the sections of the LRA and the Constitution allow employees to strike, it must be noted that section 27 of the Constitution enshrines the right to access to healthcare. Healthcare is regarded as one of the socioeconomic rights established by the Constitution and is available to all people in South Africa.[7] The term "right to health care" is widely used, and it comes from international documents such as the International Covenant on Economic, Social and Cultural Rights to which many civilized states, including South Africa, have signed. The

---

[1] The Constitution of the Republic of South Africa, 1996.
[2] The Labour Relations Act 66 of 1995
[3] The Labour Relations Act 66 of 1995, section 65.
[4] Note 2.
[5] JK Gathongo and LA Ndimurwimo "Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa"(2020) Vol23 No1 *PER* http://dx.doi.org/10.171759/17272-3781/2020/v23i0a5709 (accessed on 12-09-2021).
[6] K Masweneng Patient dies during strike in Klerksdorp hospital *Sunday Times*, (25 April 2018), available at https://www.timeslive.co.za/news/south-africa/2018-04-25-patient-dies-during-strike-in-klerksdorp-hospital/ (accessed on 06 August 2021).
[7] SB Gericke, Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law (2012) p.568, available at https://repository.up.ac.za/bitstream/handle/2263/21787/Gericke_Revisiting(2012).pdf?sequence=1;Du Toit et al (eds) Labour Law Relations: A Comprehensive Guide 5th ed, (2015) 333.

ultimate right to strike is one of the inherent prerogatives of workers organisations such as the Congress of South African Trade union.[8]

The historical development of the right to strike originated during the Cold War as a result of an artificial distinction between socioeconomic rights, civil rights and political rights.[9]

Over the past sixty years, the ILO constituents have recognised that a positive right to strike is inextricably linked with and an inevitable corollary of the right to freedom of association.[10] The recognition of the right to strike as a fundamental right in resulted primarily from the work of two of its supervisory bodies. Access to healthcare service should not only be for the wealthy who can afford it, but for everyone. This right is indispensable and ought to be guaranteed to all human beings. The goal of guaranteeing access to health cannot be achieved only by an individual state independently, but involves working as a team with the co-operation of the international community by acknowledging the value of human existence and the significance of health care services in relation to human life.[11] However, it must be noted that the right to have access to healthcare is a fundamental human right and has expressly and impliedly been supported by international organisations as well as international law instruments of which South Africa is a member and signatory respectively.[12] If the right to access health care services is adequate, the supply of such services can be used as a basic tool that can protect the poor, who are in dire need of access to such services to be able to survive.

In the recent years, the state has taken the position, as defined by the essential services committee (ESC), that all employees in the public health sector are forbidden from striking unless the trade unions agree that total restriction is unfair.[13] This was also previously reinforced by the 1978 Nursing Amendment Act,[14] which made nurse strike action a

---

[8] E Kahn "The Right to Strike in South Africa: An Historical Analysis" (1943) Vol11 No1 *Wiley Online Library* p.312. https://dpo.org/10.1111/j.1813-6982.1943.tb0291.x (accessed on 6-10-2021).
[9] Bob Hepple, "The Right to Strike in an International Context", 15 *Canadian Lab.& Emp*. L.J. 133 (2009–2010).
[10] JR. Bellace "The ILO and the right to strike" (2014) Vol153, No1 *Wiley Online Library* p.29-31 https://doi.org/10.1111/j.1564-913x.2014.00196.x (accessed on the 9-10-2021).
[11] D Ames et al The public's attitude towards strike action by health care workers and health services in South Africa (2011) Vol4 No 2 *South African Journal of Bioethics and Law* pg58–62. http://www.sajbl.org.za/index.php/sajbl/article/view/163/159 (accessed on 11-10-2021).
[12] P Sidley "Strike cripple health service in South Africa" *The BMJ* (16 June 2007) 1240–1241 https://www.ncbi.nIm.gov/pmc/articles/PMC1892462/ (accessed on 14-10-2021).
[13] Ibid.
[14] 50 of 1978.

statutory infraction punishable by fines of up to R500.00 or a year in prison. Strikes by individuals who provide essential services without the minimum service agreement are in violation of the LRA[15] and directly infringe on a patient's fundamental rights to access healthcare services, as outlined in section 27, and more importantly in section 11 of the Constitution, the right to life.[16] The right to healthcare is inextricably linked to the right to life and dignity, because not receiving vital treatment could mean the difference between life and death.[17] The National Health Act[18] recognises the right to health care, including the National Patients' Rights Charter[19] of the South African health sector, which extends this right further. Patients have been denied access to healthcare due to an escalation in strike violence.[20] Strikes in the healthcare industry have resulted in a significant number of deaths and have stopped medical doctors from fulfilling their duties.

1.2 HYPOTHESIS

In order to mitigate the right to strike affecting the public health care services, the state and unions representing workers in public health care need to enter into a minimum service level agreement this will held to resolve grievances employers and employees may have with each other. Salaries can be also negotiated, as well as addressing the basic conditions of employment services.

Using qualified and experienced negotiators can help employees to negotiate with the public health care services. By doing so, South Africa should be able to mitigate any strike action in the public health care services. The result will be that the fundamental right to health care will be realised not only independently by the state, but also in collaboration with the international community, by appreciating the value of human life and the relevance of health care services in relation to it. If the right to health care is inadequate, supply can

---

[15] 66 of 1995.
[16] A Dhai, S Mahomed The National Education, Health and Allied Workers Union (NEHAWU) Strikes: South Africa's Healthcare Battlefield" (2018) Vol 108 No8 *South African Medical Journal (SAMJ)*, [internet] 632-633, available at https://dx.doi.org/10.7196/samj.2018.v108i8.13458. (accessed 18-06-2021).
[17] Ibid.
[18] 61 of 2003.
[19] National Department of Health 1999.
[20] P Sidley "Strike cripple health service in South Africa" *The BMJ* (16 June 2007) 1240–1241, available at https://www.ncbi.nIm.gov/pmc/articles/PMC1892462/ (accessed on 14-10-2021).

be utilised as a mechanism to safeguard the poor, who are in desperate need of access to such services in order to survive.

1.3 OBJECTIVES

The objective of the research is:

- to establish what the right to strike entails in respect of health care workers;
- to balance the right to strike by public healthcare workers and the right of patients to have access to healthcare; and
- to provide recommendation that will reduce or curb strikes within the health sector.

The goal of embarking on this research is to find ways that will not only reduce the number of strikes within the health sector in South Africa but will also ensure that the patients have ongoing access to health services. The research will therefore, examine the Australian and Canadian legislation in respect of the right to strike and how these countries deal with issues of industrial action within the health sector. The goal is to also establish how these rights, namely the right to strike and the right to access to healthcare, can be balanced as a method of reducing strikes within the health sector.

1.4 STATEMENT OF PURPOSE

The purpose of this research is to determine the right to strike by public health care workers in South Africa. In doing so, the research will examine what the right to strike entails. The goal of this study is further to establish to what extent public health care workers can exercise the right to strike in South Africa.

It must be noted that often in our country, industrial action takes place even within public health care sectors, which then jeopardises the rights of patients to have access to health, which is a fundamental right guaranteed in our constitution. The research will further examine Australian and Canadian laws in order to compare such laws with South Africa and to establish what exactly these countries do when it comes to industrial action within the sphere of public health care workers. This refers to the fundamental right to strike by nurses and the effects of such strike action on patients. A critical analysis will be done in

an attempt to balance the right to strike with the right of patients to have access to health care.

The most fundamental purpose of this research is to establish what remedies would be most suitable to prevent these two fundamental rights from conflicting with one another.

1.5 RATIONALE

This research will explore the extent to which this right can be exercised by essential services, specifically health care workers such as nurses.

The study will highlight not only the right to strike under the LRA and the Constitution, but also the international norms governing such right. It is clear that the Constitution grants every South African citizen the right to strike and the focus of this research, will be on the impact of exercising this right on the fundamental right to healthcare in South Africa.

The reason for doing this research is that strikes within the healthcare sector are still an ongoing problem in South Africa. In June 2007, a large strike broke out throughout South Africa related to wages and working conditions. This strike also included health care workers such as nurses, who marched and refused to work. This led to many South African patients being denied access to health care.[21]

As mentioned above, it has not been made clear to what extent the constitutional right to strike can be exercised by nurses. In an open and democratic society based on dignity, freedom, and equality, every right can be limited by law of general application provided that the limitation is reasonable and justifiable according to section 36 of the Constitution.[22] The LRA restricts the right to strike by imposing procedural and procedural restrictions.[23] Despite the fact that workers in essential service have a limited right to strike, the number of strikes within the health care sector has increased. This begs the question of when these restrictions be imposed when it comes to the right to strike for health care workers. Therefore, the research will look at all of these gaps which have not been covered by other researchers.

---

[21] B Slaughter. South Africa: COSATU calls off public service strike, *World Socialist Web Site* 14 July 2007,available at https://www.wsws.org/en/articles/2007/07/safr-j14.html (accessed on 27-10-2021).
[22] Section 36 of the Constitution, 1996.
[23] Labour Relations Act 66 of 1995.

The research also critically analyses the laws of Canada to see how their laws regarding the right to strike by essential services, particularly public health care workers, differ from South African laws. The research will also analyse to what extent Canada, permits this right to be exercised by public health care workers. The purpose of focusing on Australia is to highlight the impact that the right to strike by public health care workers has in Australia and the lessons that South Africa can learn from Australia. The intention of compiling the research is to look deeply further into the data that will be collected for making the comparison between Australia and South Africa.

1.6 RESEARCH QUESTION

The question to be addressed by this research is whether health care workers have the fundamental right to strike in South Africa? To what extent can the right to strike be exercised by health care workers, and what are the limitations on the right to strike by health care workers? What impact does the exercise of such right have on the fundamental right to access to health care by patients? Can the right to strike by public health care workers and the right to access to health care by patients be balanced in order to reduce the increase of strikes and the number of patients who are effected when such strikes take place?

1.7 RESEARCH METHODOLOGY

In answering the question for this research, a literature review will be conducted which will be of paramount assistance and a comparative analysis will be made on balancing the right to strike by public health care workers and the right to access to health care by patients as a fundamental human right. It must be noted that in addressing the issues based on the research question, an analysis will be made regarding the right to strike by public health care workers and the remedies which are made available in order to curb the increase of strikes within the health care sector. Further analysis will be made on the impact such strikes have on the fundamental right to access health care. A comparative study of Australia and Canada will be made regarding the fundamental right to strike by essential services, particularly health care workers, and comparing whether in such countries health care workers have a right to strike.

1.8 LITERATURE REVIEW

It has been generally accepted that the right to strike is widely recognised as a fundamental element of stable collective bargaining. The right to strike is one of the significant means available to employees in order to protect and promote their economic and social interest as well as disputes within the work place.

The right to strike is supported and protected by different legislation in South Africa such as the Labour Relations Act(Bendix,2010) and most importantly the constitution. However, this does not mean that employees can just embark on a strike or do as they please. The right to strike has been recognised by international organisation of which South Africa is a member and is also enshrined Article 8 of the United Nations International Covenant on Economic, Social and Cultural Rights. However it must be noted that there is no express reference to the right to strike in the ILO Convention. (Bernard Gernigon, ILO principles concerning the right to strike).

Strikes by health care workers have posed a lot of ethical questions. When health care workers are employed by the government they pledge to put patients safety first and perform their duties in respect of helping patients. When health care workers go on strike this often has a negative impact on patients and their constitutional right to access health care in terms of section 27 of the constitution of South Africa. Authors such as Dr J McQuoid-Mason state that if the exercise of a strike infringes or violates any constitutional right enshrined in the constitution such as the right to life in terms of section 11 and the right to access health care in terms of section 27 of the constitution then such strike is unlawful.

The conflict between the right to strike and the right to access health care by patients remains unresolved. Dr Brenda Kubheka addressed in her article “Health Worker Strikes: Human and Employee rights in conflict” how one of the hospital’s in Johannesburg was shut down due to a strike by health care workers which led to patients being denied access into the hospital. She argued that the lives of people are at risk when health care workers go on strike. One of the most significant cases on the right to have access to health care is *Soobramoney v Minister of Health (Kwazulu-Natal)* the constitutional court addressed the right to access health care in terms of section 27 of the constitution and was the first socio-economic case that reached the constitutional court. Chaskalson Provided that the right to

medical treatment does not have to infer from the nature of the state established by the constitution or the right to life which it guarantees. Therefore, the right to life of patients is just as fundamental as the right to strike by health care workers.

As essential service workers the right to strike by health care workers is limited. However, such limitations must be reasonable and justifiable. When health care workers go on strike a minimum service agreement must be entered into. The South African Police Service v Police and Prison Civil Rights Union is one of the cases that defined essential service workers and whether they can participate in a strike action.

Furthermore most of the researcher have one thing in common their articles focus more on the right to strike and have not revealed in their research how other countries manage industrial action within public health care sectors, which is what is lacking in South Africa, as the number of strikes by nurses keeps increasing. Therefore, one of the other purposes of compiling this research is to try to establish what measures can be taken in order to reduce strikes in the public health care sector. The purpose of this research is to find solutions to the problem of how both the right to strike and the right to access to health care can be properly balanced. Canada and Australia make use of different strikes models to limit strikes within the health sector. The above mentioned countries strike models will be discussed. Authors such as J Fudge and E Tucker discuss the advantages and disadvantages of these strike models which will also be highlighted in the research.

1.9 OUTLINE OF CHAPTERS

Chapter One introduces the subject matter of this dissertation and discusses the contextual background. This is followed by a presentation of the hypothesis and objectives of the study, as well as a statement of purpose. The rationale behind the study is followed by the research question and research methodology. Finally, an outline is given of the chapters in this dissertation.

Chapter Two discusses the constitutional right to strike and international norms in this regard. A history is presented of the right to strike by health care workers, followed by a discussion of the constitutional right to strike, as well as the right to strike in terms of ILO (International Labour Organisation). The right to strike by public health care workers as opposed to the rights of patients is also discussed.

Chapter Three looks into the limitations on the fundamental right to strike from an international perspective and in terms of section 36 of the Constitution of South Africa. Limitations in terms of the Labour Relations Act 66 of 1995 are also discussed.

Chapter Four presents a comparative study of the right to strike in Australia and Canada. The first part of the chapter presents a history of the right to strike as applied in Australia and discusses the right of patients to have access to health care in that country. The second chapter presents a discussion of the constitutional right to strike in Canada and is followed by a discussion of the Canadian Labour Code. Restrictions on the right to strike by health care workers in Canada are also discussed, followed by a discussion of the right to have access to health care.

Chapter Five presents the findings, recommendations, and conclusion of the study.

CHAPTER TWO
THE CONSTITUTIONAL RIGHT TO STRIKE, AND INTERNATIONAL NORMS

2.1 INTRODUCTION

The right to strike is the most crucial aspects of collective bargaining which employees make use of in order for their interests, needs and working conditions to be heard and reacted to by employers. The South African Constitution guarantees every worker the right to strike. This chapters aims at exploring the scope of the "the right to strike" and how this right goes hand in hand with "collective bargaining". This chapter further explores the right to strike in respect of essential services and the right of essential service workers such as nurses to embark on industrial action. The effects of the exercise of such right has an impact on the right of patients to have access to health care.

This chapter will further address what the right to strike entails in terms of the International Labour Organization (ILO). The right to strike is not clear from the International Labour Organization perspective. However it is one of the most important conventions on the freedom of association and the right to organise convention in relation to strikes.

2.2 THE HISTORY OF HEALTH CARE WORKERS' RIGHT TO STRIKE

Strikes within health care facilities can be traced as far back as 12 BC, particularly in respect of the employees who understood that going on a strike is the only way to express their demands, frustration, and unhappiness in the workplace. [24] The development for capitalism made for far-reaching changes in the health sector. This affected the distribution of health services, the position of health workers and the labour process.[25] In 1913 the South African Trained Nurses Association(SANTA) was formed with the aim of promoting the interests of nurses within the health sector.[26] In 1944 a Bill was passed as Act 45 of 1944 which denied nurses the right to strike and freedom of association.[27] In 1949 there

---

[24] D Ames et al The public's attitude towards strike action by health care workers and health services in South Africa (2011) Vol4 No 2 *South African Journal of Bioethics and Law* pg58–62.
[25]Health Worker Organisation, Critical Health Number (15 May 1986) https://www.sahistory.org.za/sites/default/files/archive-files4/ChMay86.pdf (accessed on 10-05-2022).
[26]Ibid.
[27]Ibid.

was a strike in Victoria hospital led by student nurses in support of their colleague who was unfairly suspended for complaining about aspects of the hospital. It is evident that strikes within the health sector have existed for decades in South Africa. In 1958 another strike took place within the health sector when the government ordered for all nurses to have a pass-book number in order to register for nursing.[28] The Federation of South African Women organised a public protest campaign which was attended at the Baragwanath hospital. The right to strike was only affirmed in 1957. However, subsequent to that, in terms of the Nursing Act 50 of 1978 nurses were legally prohibited to strike.[29] According to section 40(2)*(a)* and *(b)* of the Nursing Act, a strike or go-slow shall include any action by which the services rendered by the persons registered or enrolled in terms of the Act are suspended or otherwise affected. In 1992 the strike clause of the Nursing Act was removed because the LRA made provision for protected strike action by employees.[30] This took place shortly after the LRA 66 of 1995 was amended.[31]

One of the major strikes that took place in South Africa was in 1985, where nurses from Baragwanath Hospital went on strike.[32] It appears that the nurses had pointed out their grievances to the matrons, who had refused to address their grievances. The nurses then further contested the letter from the chief matron which threatened to dismiss all the nurses who participated in the strike. The nurses were clearly unhappy because non-classified staff had not received a wage increase which had been granted to other employees in the hospital.[33] The Health Workers Association (HWA) played a significant role in holding a meeting with the nurses during this time as well as the General and Allied Workers Union (GAWU). Eventually all the nurses' current and long-term demands were met, including equal pay for all black nurses, and including grievances for non-classified workers.[34]

Durban also experienced industrial action several times, notably on 4 February 1985, where over 1 000 workers in Durban's big hospitals, namely King Edward VIII Hospital,

---

[28]Ibid.
[29]M Muller "Strike action by nurses in South Africa: A value clarification"(2001) Vol24, No4 *Curationis* pg58-62.
[30]Ibid.
[31]Ibid.
[32] Health Worker Organisation, Critical Health Number (15 May 1986) https://www.sahistory.org.za/sites/default/files/archive-files4/ChMay86.pdf (accessed on 10-05-2022).
[33] Ibid.
[34] Ibid.

Wentworth Hospital and RH Khan Hospital, embarked on strike action as a result of low wages and lack of union rights.[35] The nurses had been earning R200 per month and did not have any adequate pension provision. They therefore demanded to be paid R700 per month and to be granted other rights.[36]

Strikes within the health care sector are nothing new. It is evident that there have always been issues in respect of wages and basic conditions, as well as other grievances by nurses. South African nurses still go through exactly what the nurses in 1985 went through and this calls for great concern.

2.3 THE CONSTITUTIONAL RIGHT TO STRIKE

Previously, the right to strike was governed by common law, particularly under the breach of contract.[37] According to common law, this meant that the employer had every right to dismiss an employee for participating in strike action if the employee had breached his/her employment contract.[38] However, this clearly created an imbalance in the employment relationship between the employer and employee in the sense that the employees were afraid to exercise their right to strike, knowing that should such right be exercise, they could be dismissed from the workplace.

The right to strike is enshrined in terms of section 23 of the Constitution of South Africa, 1996. The constitutional right to strike is one of the most fundamental labour rights which all employees in South Africa have the right to exercise.[39] The right to strike is an essential component of the right to associate freely.[40] The right to strike is also seen as a tool used by trade unions when collective bargaining fails. The Constitution further provides that trade unions and employers' organisations, including employers, have the right to engage in collective bargaining.[41] This is further supported by national legislation enacted to

---

[35] Ibid.
[36] Ibid.
[37] J Grogan Workplace Law, South African Law Journal(30 Sep 2015) 429 https://jornals.co.za/doi/10.10520/EJC-615dd1bc5# (accessed on 15-10-2021).
[38] JF Myburgh 100 'Years of Strike Law' (2004) 25 *ILJ*962-978.
[39] Section 23 of the Constitution of the Republic of South Africa, 1996.
[40] M Budeli "Understanding the right to freedom of Association at the workplace: its component and scope" (2010) 31/1 Obiter, 27–28 https://doi.org/10.17159/obiter.v31i1.12375 (accessed on 12-10-201).
[41] KJ Selala "The right to strike and future of collective bargaining in South Africa: An exploratory analysis(2014) Vol 3 No 5, *International Journal of Social Sciences* pg115–126, http://www net/the-right-to-strike-and-the-future-of-collective-bargaining-in-south-africa.html (accessed on 15-10-2021).

regulate these processes. Section 64 of the Labour Relations Act No. 66 of 1995 gives effect to the right to strike and provides procedures for the exercise of such right and the protection for strikes in the collective bargaining context.[42]

Strike action can be considered as the most visible form of collective action during labour disputes which is usually utilised as a weapon of last resort when workers' organisations put pressure on their employer to address their demands. [43] One of the most crucial entrenchments in the Constitution in respect of the right to strike was emphasised in *Chairperson of the Constitutional Assembly ex parte in re Certification of the Constitution of the Republic*. [44] The Constitutional Court had to consider whether the proposed amendments to the then new Constitution complied with the constitutional principles enshrined in the Interim Constitution of 1993. There were two objections specifically, the new Constitution's inclusion of the right to strike and the exclusion of an employer's right to lock-out were in violation of the constitutional principles.[45] The argument was based on the standard of equality: the right to strike is equivalent to the right to lockout and should therefore be included in the Constitution.[46]

The Constitutional court in the above-mentioned matter explained the basis of the right to strike: "Collective bargaining is based on the recognition that employers enjoy greater social and economic power than individual workers." This therefore means that employees need to act in concert to provide them with sufficient power collectively to bargain with employers.[47] One of the most fundamental is the right to strike, which is unlike other human rights. It is regarded as a higher standard against which ordinary legislation is tested for its compatibility.[48] In the case of *National Union of Mineworkers v Bader Bop*,[49] O'Regan J emphasised that the right to strike is in fact a critical mechanism which allows

---

[42] Section 64 of the Labour Relations Act 66 of 1995; KJ Selala The right to strike and future of collective bargaining in South Africa: An exploratory analysis(2014) Vol 3 No 5 *International Journal of Social Sciences*,pg115–126.http://www.net/the-right-to-strike-and-the-future-of-collective-bargaining-in-south-africa html (accessed on 15-10-2021).
[43] ILO General Survey "Freedom of Association and collective bargaining" 1994 par 136.
[44] Chairperson of the Constitutional Assembly 840C-D.
[45] Chairperson of the Constitutional Assembly.
[46] KJ Selala "The right to strike and future of collective bargaining in South Africa: An exploratory analysis. *International Journal of Social Sciences"* (2014), 115–126, http://www.net/the-right-to-strike-and-the-future-of-collective-bargaining-in-south-africa.html (accessed on 19-10-2021).
[47] Ibid 841 par B-B.
[48] H Cheadle "Constitutionalizing the right to strike" in laws against strikes: *The South African experience in international and comparative perspective* (2015) p67.
[49] *National Union of Mineworkers v Bader Bop* [2003] 2 BLLR 103 (CC).

workers to declare their bargaining power within the employment relationship. [50] Furthermore, the right to strike is essential in furthering the dignity of employees as it allows the workers to assert their demands and not to be intimidated into accepting conditions of employment imposed by employers.[51] The significant of the right to strike for employees has therefore resulted in the right being commonly enshrined in the constitutions of multiple countries.[52] These countries include Canada, which is a federal state. Section 2*(d)* of the Charter of Rights and Freedom protects the right to strike. The Supreme Court of Canada declared the right to strike to be fundamental and protected by the Constitution in *Saskatchewan Federation of Labour v Saskatchewan*. [53] In most countries, the right to strike is a constitutional right. South Africa's Constitution recognises the right to strike, and the Constitutional Court has held as shown above.

Workers therefore need to act in concert to provide themselves collectively with sufficient power to bargaining effectively with employers. It is through collective bargaining and industrial action that workers can express their power. The right to strike is a significant element of collective bargaining.[54] Therefore, taking away any employee's right to strike detracts from the right to organise and bargain collectively.

The Constitution in section 23(5) states that every trade union, employers' organisation and employer has the right to participate in collective bargaining.[55] Collective bargaining is a process that assists the parties in listening to each other's needs. This process seeks to reconcile the conflicting goals. The right to collective bargaining is on the workers' side and is without practical effect in the absence of a right to strike. Without the latter right, the right to collective bargaining amounts to no more than a right to "collective begging", meaning that the workers will more likely be seen as begging their employers to hear their

---

[50] DC Subramanien and 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) Vol 22 *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4400 (accessed on 10-10-2021).
[51] Section 64 of the LRA; *National Union of Metal Workers of South Africa and Others v Bader Bop* [2002] ZACC 307B.
[52] DC Subramanien and 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) Vol 22 *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4400 (accessed on 10-10-2021).
[53] *Saskatchewan Federation of Labour v Saskatchewan, case No. 2015 CSC 4* https://compendium.itcilo.org/en/compendium-decisions/supreme-court-of-canada-saskatchewan-federation-of-labour-v-saskatchewan-30-january-2015-case-no-2015-csc-4 (accessed on 22-10-2021).
[54] Ibid.
[55] Section 23(5) of the Constitution, 1996.

demands and needs.[56] The rationale behind the term "collective bargaining" is to maintain industrial peace. As Halton Cheadle says: "It is one of the ironies of collective bargaining that its object, industrial peace, often depends on the threat of peace."[57]

Legal scholar Eric Tucker has noted that the notion has a very long history, which he tracks back as far as 1921.[58] The right to collective bargaining and collective action is significant in ensuring the autonomy of trade unions and the protection of workers employment conditions.[59]

One of the major cases related to freedom of association is *South African Defence Union v Minister of Defence*.[60] The case concerned the question as to whether it was constitutional to permit members of the armed force to join a trade union. The constitutional court held that prohibiting participation in acts of public protest violated the right to freedom of association as well as freedom of expression. The court further held that such infringement constituted an unjustifiable limitation upon the workers' rights and was unconstitutional. The discussion of this case is significant to the research particularly with regards to the limitation of the right to strike by workers who provide essential services. Health care workers right to strike may be limited but such limitation must be reasonable and justifiable.

2.4 THE RIGHT TO STRIKE IN TERMS OF THE ILO (INTERNATIONAL LABOUR ORGANIZATION)

The ILO was first established in early 1919 by the Labour Commission which was chaired by Samuel Gompers.[61] The ILO was established in different countries namely, Belgium, United states, and Japan. It was created with the aim of promoting labour rights at work to

[56] German Federal Labour Court (Bundesarbeitsgericht) Judgement 10 June 1980 (Case 1 AZR 822/79).
[57] H Cheadle "Constitutionalizing the right to strike" in laws against strikes: *The South African experience in international and comparative perspective* (2015) p67.
[58] E Tucker "Can Worker Voice Strike Back?" Law and the Decline and Uncertain Future of Strikes(2013) Research paper No58/2013 *Law and Political Economy* pg6 http://digitalcommons.osgoode.yorku.ca/clpe/300 (accessed on 19-10-2021).
[59] Ibid.
[60] *South African National Defence Union v Minister of Defence and Others* (CCT65/06)[2007] 28 ILJ 1909 (CC) (30 May 2007).
[61] G Von Potobsky, "Freedom of Association: The Impact of Convention No.87 and ILO action"(1998) Vol.137, No.2 *International Labour Review* p5. https://labordoc.ilo.org/discovery/fulldisplay/alma995164997102676/41ILO_INST:41ILO_V1 (accessed on 20-10-2021).

encourage suitable employment opportunities and to enhance social protection and strengthen dialogue on issues related to work.[62] The purpose of the ILO is to give an equal voice to employees, employers and the government.[63] The ILO will be relevant for this research for the purpose of addressing the right to strike and how this right is recognised on an international level. Furthermore, the ILO will be used to highlight how the right to strike is protected, particularly under Article 11, which provides that all necessary and appropriate measures must be taken to ensure that workers and employers may freely exercise the right to organise.[64] Even in early 1927 the ILO explicitly recognised the right to strike and that it was linked with freedom of association.[65] The ILO, which has been largely responsible for employment rights at work, has played a significant role in international labour law issues.[66]

The following discussion illustrates how international instruments guarantee the right to strike. This right is recognised by the ILO's supervisory bodies but has not yet been set out explicitly in ILO Convention 87.[67] It must be noted that despite this, the ILO Committee of Experts on the application of Conventions and Recommendations maintains that the right to strike is based on Article 3 of Convention 87, which provides that workers' and employers' organisations have the right to organise and carry out their administration and activities and to formulate their programmes.[68] Freedom of Association and Protection of the Right to Organise Convention 87 sets the legal standard protecting the principle of freedom of association which had its recognition in the constitution of the International Labour Organization in 1919.[69] According to Article 8 of Convention 87:

---

[62] Ibid.
[63] B Gernigon, A Odero, H Guido, ILO principles concerning the right to strike (1998) Vol.137 No.4, available at https://ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf (accessed on 23-10-2021).
[64] International Trade Union Confederation, Action at the ILO to Defend the right to strike, available at https://www.ituc-csi.org/IMG/htm|/newsletter_ilo.htm| (accessed on 19-10-2021).
[65] Ibid.
[66] Ibid.
[67] International Trade Union Confederation (ITUC) "The right to strike and the ILO" *The Legal Foundation*, (March 2014),available at https://www.ilo.org/actrav/WCMS_245669/lang--en/index.htm (accessed on 23-10-2021).
[68] B Gernigon, A Odero, H Guido, ILO principles concerning the right to strike (1998) Vol.137 No.4 pg 7.
[69] Note 54.

> 'In exercising the rights provided for in this Convention, workers' and employers' organizations and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.'

Furthermore, Convention 98 provides for the right to organise, and to conduct, collective bargaining. According to Article 3 of the said Convention, respect for the right to strike is ensured, and where necessary, machinery appropriate to national conditions shall be established.[70] Article 4 of Convention 98 further provides:

> 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and use of machinery for voluntary negotiation between employers and workers' organization in order to regulate the terms and conditions through collective agreements.'[71]

Convention 98 of the ILO indirectly discusses the right to strike.[72] By making references to the above-mentioned Conventions, it can be said that the right to strike indirectly exists. In addition, the majority of the large states apart from United States of America have ratified Convention 87, and the Committee of Experts has recognised the right to strike contained in the Convention.[73] The ILO Committee of Experts has provided that the right to strike is found in Articles 3,8 and 10 of the Convention.

The Constitution of South Africa gives recognition to international law and is the starting point for giving recognition to international law domestically. Section 39 of the Constitution provides that the courts and other legal bodies must consider international law and consider foreign law.

Section 233 of the Constitution provides that when interpreting legislation, the court

> … must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

---

[70] International Labour Organisation, Right to Organise and Collective Bargaining Convention (No.98) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098 (accessed on 26-10-2021).
[71] Ibid.
[72] See Article 1, para 2.
[73] Note 61.

The abovementioned section 233 gives effect to international law. Furthermore, it must be noted that where international law is in direct conflict with the Bill of Rights, the courts will not uphold the international law domestically. [74] In the *Grootboom* case, Justice Yacoob of the Constitutional Court stated: 'The relevant international law can be a guide to interpretation; but, the weight attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'[75]

In *S v Makwanyane* 1995 (3) SA 391 (CC), former Chief Justice Chaskalson of the Constitutional Court described the role of international law as:

> '*Public international law would include non-binding as well as biding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals delaying with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights in appropriate cases, reports of specialized agencies such as the International Labour Organization, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights'*.[76]

The right to strike is clearly rooted in the Convention 87 (Freedom of Association and Protection of the Right to Organise Convention) and Convention 98 (Right to Organise and Collective Bargaining Convention) of the ILO.[77] Convention 87's legislative history is undeniably clear. According to ILO preparatory report from 1948, the proposed convention relates only to freedom of association.[78] The ILO resolution on trade union rights and their relationship to civil liberties, adopted in 1970, requested the ILO governing body to

---

[74] J Dugard The Role of International Law in Interpreting the Bill of Rights, South African Journal on Human Rights, 2017 Vol 10 Issue 2 *Tandfonline* p208-215.
[75] *Government of the Republic of South Africa v Grootboom* ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).
[76] *S v Makwanyane* 1995 (3) SA 391 (CC) para 26.
[77] SB Gericke, Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law (2012) p.568 ; https://repository.up.ac.za/bitstream/handle/2263/21787/Gericke_Revisiting(2012).pdf?sequence=1;Du Toit et al (eds) Labour Law Relations: A Comprehensive Guide 5th ed, (2015) 333.
[78] Ibid.

undertake a study on the right to strike.[79] Freedom of association has been regarded as one of the most significant liberties which is the right of each South African citizen.[80] Such freedom of association is also considered of significance and relevant to trade unions in the context of industrial action. [81] The international Covenant on Economic, Social, and Cultural Rights links with Article 8, and further provides for the right of trade unions to function freely and to strike.[82]

The Constitution sets out provisions which have given recognition to the freedom of association. All members of the ILO are bound to abide by the principle of freedom of association. The examination of the ILO Constitution goes to the extent of explaining how the CFA (Committee of Freedom of Association) came to draw the link between freedom of association and the right to strike.[83]

One of the major goals of the ILO is social justice, which includes the ability of workers to participate in decision making, which could affect their working conditions and lives. This can be done by means of collective bargaining.[84] Collective bargaining can help achieve social justice by negotiating agenda's linked to equal wages and benefits of employees.[85] Furthermore, such collective bargaining can ensure that employees are treated fairly within the workplace. Collective bargaining plays an important and active role in decision making that vitally concerns its interests as important element of social life including the reproduction of wealth. [86] From a social justice perspective collective bargaining is regarded as the primary engine through which social justice is achieved by getting rid of inequality within the workplace between the employer and employee.[87] Subsequent ILO instruments which were developed by tripartite constituents contain supplementary provisions which in fact affirm the existence of a right to strike, which is protected by the ILO. The preamble to the Constitution of the International Labour Organization includes

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Article 1 paragraph 1 of Convention 98 of the ILO.
[83] Digest of Decisions, 5th ed. (Geneva: ILO, 2006) paras. 1, 2.
[84] Ibid.
[85] M Botha, Responsible unionism during collective bargaining and industrial action: Are we ready yet? (2015) Vol.48 No.2 *Scielo* pp.328-350.
[86] Ibid.
[87] Ibid.

the recognition of the principle of freedom of association as being a mechanism for improving labour conditions.

Freedom of association is one of the most fundamental prerequisites for the ILO. The international right to collective bargaining has given support to the right to strike.[88] It must be noted that the right to strike has always been one of the most fundamental international labour standards which has been governed by several international instruments, including the ILO.[89] It provides that workers should use strikes as a method of protection against all acts of discrimination in employment, which could be detrimental to freedom, particularly when a worker is fired mainly for being a member of a union.[90]

2.5 THE RIGHT TO STRIKE BY PUBLIC HEALTH CARE WORKERS VERSUS THE RIGHTS OF PATIENTS

Accordingly, every worker has a constitutional right to strike and to bargain collectively. This critical right to strike is further reiterated by South Africa's LRA.[91] Section 64 of the LRA also grants all workers in South Africa the right to go on strike.[92]

Section 72 of the LRA further provides for parties in essential services to enter into a collective agreement which regulates the minimum services to be provided by the workers in that essential service, in the event of a strike.[93] This has the effect that employees who would be prevented from striking are a percentage of those who should be required to continue providing minimum services.[94] It has to be noted that any persons who may be impacted by the designation of a service which falls under the scope of an essential service as defined by the Essential Service Committee (ESC) has the right in terms of section 71 of the LRA, which sets out the procedure in terms of which the ESC will designate a service as an essential service, to make representations to the ESC in regard to whether or not a

[88] Note 61.
[89] Article 1 para 1 of Convention 98 of the ILO.
[90] Ibid. para 2.
[91] 66 of 1995.
[92] Section 64 of the LRA.
[93] Section 72 of the LRA.
[94] S July, B Workman-Davies "The Right to Strike: Essential Services and Minimum Services Agreements" *Mondaq*(12 March 2013),available at https://www.werkmans.com/wp-content/uploads/2018/10/165_JN5563-Werksmans-Africa-Brief_The_Right_to_Strike.pdf (accessed on 26-10-2021).

service should be designated.[95] Essential service workers can legally embark on a strike action, provided, however, that certain agreements are met. [96] The agreement includes whether the service is essential in its entirety or only partially essential, the minimum number of employees required to continue working during a strike, whether the service is essential at reduced level and the type of service that must continue during the strike.[97] Industrial action by nurses in South Africa was legally prohibited with the promulgation of the Nursing Act in 1978.[98] According to section 40(2)*(a)*, *(b)* and *(c)* of the Act, no nurse may embark/participate in a strike. Participation by a nurse in a strike poses an ethical question.[99] According to the Code of Ethics for Nursing Practitioners in South Africa nurses are required to do good and to choose the best option of care under given circumstances and to act with kindness at all times.[100] Furthermore, it is crucial that nurses accept these ethical values without being in conflict with the ethical principles and values set by the profession.[101] It is therefore clear that if nurses participate in a strike this would be in conflict of the ethical principles. Therefore, when health care workers strike it does not only undermine the profession's duty to protect life and but also the right of patients. This restriction entails that all complaints and issues nurses have should be directly referred for conciliation by the Commission for Conciliation, Mediation and Arbitration (CCMA).

Reports have indicated that strikes by health care workers have led to patients being abandoned in public hospitals as well as patients being left without being treated. Strikes have a negative impact on patients throughout the provinces as well as on pregnant women who are left unattended when nurses go on strike.[102] One of the most recent strikes by nurses took place in 2019 at Dr Yusuf Dadoo Hospital in Krugersdorp, where there were striking nurses who demanded better working conditions, the reopening of the canteen and

---

[95]Ibid.
[96] Ibid.
[97]Ibid.
[98] Note 24.
[99] Ibid.
[100]Code of Ethics for Nursing Practitioners in South Africa https://www.sanc.co.za/wp-content/uploads/2021/04/Code-of-Ethics-for-Nursing-inSouth-Africa.pdf (accessed on 15-05-2022)
[101] Ibid.
[102]I Bekker and L Van der Walt, "The 2010 Mass Strike in the State Sector, South Africa: Positive Achievements but Serious Problems", *Duepublico* (2010) available at https://duepublico2.uni-due.de/servlets/MCRFileNodeServlet/duepublico_derivate_00025689/09_Walt_Bekker_Strikes.pdf (accessed on 27-10-2021).

for the management to step down.[103] This strike led to patients being denied access to the hospital premises and to resident patients not receiving any medication. This had a negative impact on the people from the local communities, who could not afford medical care from private hospitals.[104] The abovementioned hospital was criticised because the management delayed to negotiate an essential services agreement with the union in order to prevent the strike and patients from being denied their right to access to health care facilities.[105]

The South African Human Rights Commission (SAHRC) highlighted the balance between the right to access to health care and the right of health care workers to protest.[106] It must be made known that most strikes by health care workers have been influenced by wage disputes and poor working conditions. The SAHRC found that the healthcare workers acted outside their outside their right to assembly and protest and had at their disposal other avenues to their grievances. [107] It further highlighted how these actions by healthcare workers were tantamount to human rights violation as they denied a number of patients the right to access healthcare services. The report further found that the departments failure to adequately respond to the workers grievances created a fertile ground for the unrest. The protest erupted due to breakdown of communication.[108] The SAHRC concluded that in order to balance the right to access healthcare and the right to strike a joint programme of reconciliation to create a more conducive environment for communication, problem solving as well as to create guidelines for any future protest within the healthcare services so that the public will not be affected and the healthcare workers needs will be addressed.[109]

Principles governing industrial action in South Africa by health care workers have been drafted in the Constitution[110] as well as in the LRA.[111] In terms of section 65 of the LRA,

---

[103]G Gifford "Gauteng Health Urged to Halt on going Hospital Strike" *health-e-News* 6 March 2019, available at https://health-e.org.za/2019/03/06/gauteng-health-urged-to-halt-ongoing-hospital-strike/(accessed on 27-10-2021).

[104] Ibid.

[105] Ibid.

[106] K Masweneng Do Healthcare Workers Have the Right to Strike? *Sowetan Live* (5 July 2018) https://www.sowetanlive.co.za/amp/news/south-africa/2018-07-06-do-healthcare-workers-have-the-right-to-strike/ (accessed on 27-10-2021).

[107] Human Rights Commission: Hospital strike was a human rights violation https://www.sahrc.org.za/index.php/sahrc-media/news/item/2475-human-rights-commission-hospital-strike-was-a-human-rights-violation (accessed on 15-05-2022).

[108] Ibid.

[109] Ibid.

[110] Constitution of the Republic of South Africa, 1996.

[111] The Labour Relations Act 66 of 1995.

the general right to strike with regard to individuals who provide essential services is that they may not strike.[112] This clearly indicates that health care workers cannot embark on a protected strike unless such strike meets the requirements of the minimum service level agreement.[113] Health care workers fall within the scope of essential services. In terms of section 213 of the Labour Relations Act, it can be presented that the interpretation of essential services might in fact endanger the life, personal safety or even health or propose an imminent threat to life.[114] In relation to section 213 this clearly indicates that healthcare workers fall within the scope of essential services due to the services health care workers provide to the communities and citizens such as saving people's lives. Therefore, should health care workers go on strike this could result in causing harm to patients.

This clearly indicates that health care workers cannot embark on a protected strike unless such industrial action meets the minimum service level agreement. [115] The minimum service level agreement is the agreement that is entered into between the parties in designated essential services.[116] If the minimum service level agreement is entered into it will have the effect that:[117]

- section 74 of the Labour Relations Act 66 of 1995, which prohibits essential services workers from striking, will no longer apply (this basically means that the employees who will be prevented from striking are that number of employees or percentage of them which is required to provide minimum services to the public).
- the minimum service level agreement may also include the type of services which must continue during the strike.

It is evident that industrial action by persons who provide essential services without the minimum agreement is non-compliant with the LRA. This also directly and negatively impacts the patients' fundamental right to have access to health care services, as provided

[112] Note 98.
[113] Ibid.
[114] Section 213 of the Labour Relations Act 66 of 1995.
[115] Note 98.
[116] S July, B Workman-Davies "The Right to Strike: Essential Services and Minimum Services Agreements" *Mondaq*(12 March 2013) https://www.werkmans.com/wp-content/uploads/2018/10/165_JN5563-Werksmans-Africa-Brief_The_Right_to_Strike.pdf (accessed on 26-10-2021).
[117] Ibid.

for in section 27 of the Constitution, and the right to dignity (section 10) as well as the right to life (section 11) of the Bill of Rights.[118]

The right to health care is a fundamental rights and the National Health Act 61 of 2003 has given recognition to section 27 of the Bill of Rights as well as the Patients' Rights Charter.[119] The Patients' Rights Charter was created to ensure the realisation of the right of access to health care services and the protection of such right.[120] The Charter is binding to all healthcare workers in South Africa. It ensures that all patients have access to basic healthcare. This Charter is used to promote and protect the rights of South Africans to effective health services.[121] However the Charter is only effective to a certain extent as patients still get denied access to healthcare when healthcare workers go on strike. The Charter further provides that everyone has the right to health care services, these include:[122]

- receiving timely emergency care at any health care facility; and
- treatment and rehabilitation that must be made known to the patient to enable the patient to understand such treatment or rehabilitation and the consequences.

According to the Industrial Annual Report(IAR) for the past few years, the increase of strikes is due to the demand of wages. The report further provides that the rise in the number of strikes in 2018 increased to 165 from 135 in 2017. According to the IAR this represents 25% increase in strikes from the previous years.[123] Every individual has the right to have access to health care, irrespective of whether they can afford it or not. It is clear that such right cannot be separated from the right to life and the right to dignity, not accessing health care timeously may result in death.[124] These strikes affect and disrespect not only the rights of patients, but also those of the health care workers. Health personnel who are not participating in the strike may stay away from the facilities for fear of their lives. This may

[118] Note 16.
[119] Section 27 of the Constitution, 1996.
[120] Patients' Charter Rights, 1999.
[121] Ibid.
[122] Ibid.
[123] Department: Employment & Labour. Strikes in 2018 reaches a high in the past five years, *Department of Labour* (5 February 2020),available at https://www.labour.gov.za/strikes-in-2018-reaches-a-high-in-the-past-five-year-%E2%80%93-department-of-employment-and-labour (accessed on 12-04-2022).
[124] *S v Makwanyane and Another 1995(3) SA 391.*

also have a negative impact on patients, as they may opt not to get medical attention because of the fear of endangering their lives, as strikes often become violent.

The right to strike by health care workers as opposed to the right of patients to have access to health care may be resolved by balancing these two rights. The Department of Health (DoH) in South Africa needs to ensure that the demands of nurses are heard. The DoH can improve its communication with its employees when it comes to addressing their issues within the workplace, such as working condition and remuneration issues and low income.[125] The fact that nurses are declared as essential services means that the DoH has to prioritise the needs and demands of health care workers so that this does not affect patients, taking into consideration that health care workers will embark on a strike should their needs not be addressed. Once the DoH puts the needs of health care workers first, this will result in less strike action within the health sector and will balance the rights of nurses and patients, as patients will not be denied access to essential health care.

It must be noted that it is very crucial to differentiate between the right to have access to health care services and the right to emergency medical treatment as the latter has only a limited meaning, as in the case of *Soobramoney v Minister of Health*. [126] In the abovementioned case, Chaskalson P stated:

> 'In our Constitution, the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees.'

If the state is construed in accordance with the appellant's contention, it will be significantly more difficult for the state to fulfil its primary responsibility under sections 27(1) and (2) to provide health care services to everyone within its available resources.[127] It would also have the effect of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for the purposes

---

[125] K Govender, G George, S Beackett, T Quinlan, "Ten ways South Africa can step up care for its healthcare workers" *The Conversation* (22 July 2020) available at https://theconversation.com/ten-ways-south-africa-can-step-up-care-for-its-healthcare-workers-14836? (accessed on 17-10-2021).
[126] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCTV 32/97) [1997] 17, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) para 19.
[127] Ibid.

such as preventative health care and medical treatment for persons suffering from an illness or bodily infirmities.[128]

The Patients' Rights Charter further provides that everyone has the right of access to health care services without discrimination, coercion, or violence. [129] The Minister of Health adopted the abovementioned charter in ensuring the intensified realisation of the right to have access to health care. The aim of the national Patients' Rights Charter is to provide all South African citizens with equal access to health services. The charter contains among other rights the following:

a) the right to access health care services at a specific health care provider for services or particular health facility for treatment; and
b) the right to a safe environment.

It is therefore at such a juncture, when health care workers embark on a strike, that the patients' right to have access to health care is violated. It is unconstitutional and unethical for nurses to obstruct access to health care for seriously ill or injured patients.[130]

The right to health is a fundamental part of human rights and of our understanding of a life in dignity.[131] The right to life relates to one's life and that no one has the right to end your life meaning that everyone has the right to live. The Constitution of South Africa provides in section 11 that everyone has the right to life.[132] This is further supported by the Article 3 of the Universal Declaration of Human Rights which provides that everyone has the inherent right to life. The right to dignity is just as significant as the right to life. Section 10 of the Constitution provides that everyone has the inherent dignity and the right to have their dignity protected.[133] Such right was first articulated in the 1946 Constitution of the World Health Organization, the preamble of which defines health as a state of complete

---

[128] Ibid.
[129] Note 108.
[130] D J McQuoid-Mason What should doctors and health care staff do when industrial action jeopardizes the lives and health of patients?(2018) Vol 108 No.8 *South African Medical Journal (SAMJ)* available at http://dx.doi.org/10.7196/samj.2018.v108i8.13479 (accessed on 28-10-2021).
[131] Office of the high commissioner for human rights/ World Health Organization The Right to Health, Fact Sheet No. 31 (2008) available at https://www.ohchr.org/documents/publications/factsheet31.pdf (accessed on 29-10-2021).

[132]Constitution of the Republic of South Africa,1996, section 11.

[133] J Van Den Berg Human Rights Day: Your right to human dignity *Phfirms* (19 March 2018) available at https://www.phfirms.co.za/va/newsResources/NewArticle.aspx?ArticleID=2352 (accessed on 17-05-2022).

physical, mental and social wellbeing and not merely the absence of disease or infirmity.[134] The Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living. [135] The right to health was further recognised by the International Covenant on Economic, Social and Cultural Rights.[136]

2.6 CHALLENGES IN RESPECT OF THE RIGHT TO STRIKE BY HEALTH CARE WORKERS

The challenges that frequently arise in relation to the right to strike are those of mandatory arbitration by the decision of the authorities as well as the imposition of penal sanctions for engaging in industrial action, particularly unlawful strikes.[137] Since the Committee on Freedom of Association established its first principles on the subject of strikes and stated that strike action is one of the most fundamental means for ensuring effective right of workers' organization to organize their activities,[138] According to the Committee, it has chosen actually to recognise the general right to strike, but it imposes much stricter terms on public servants and workers in essential services, which as a result creates challenges with the term "right to strike".[139] Previously, ambiguous interpretation of Convention 87 and Articles 3,8 and 10 created challenges in understanding the term.

A generalised right to strike was still recognised. However, after considering the arguments, it was determined that Convention 87 did not in fact provide the basis for regulating such right.[140] It is evident that the employers' tone and the opposition became more strident following their walkout in 2012. It was at this particular stage that challenges in respect of the right to strike grew, leading to the assertion that the right to strike could not derive from any provisions of the Convention because it was neither expressly mentioned in its text, nor was it the signatory's intention to include such right, and furthermore, nor could it be legitimate in interpretation, including the relevant rules of the

---

[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Note 60.
[134] International Trade Union Confederation (ITUC) "The right to strike and the ILO" *The legal Foundations,* March 2014 available at https://www.ituc-csi.org/the-right-to-strike-and-the-ilo (accessed on 30-10-2021).
[139] Ibid.
[140] Provisional Record No 19, ILC, 97th Session Geneva 19/38, 51 (2008).

Vienna Convention on the Law of Treaties.[141] The employers; group has further challenged the right of the Committee of Experts to interpret Conventions particularly in relation to the right to strike.

The fact that some workers enjoy the right strike while others do not is a huge challenge. The supervisory bodies of the ILO have brought greater precision to the term "essential services".[142] The Committee has indicated that if the legislation for any country deprives workers in essential services the right to strike then such workers actually lose means of being able to defend their interest. [143] Furthermore the Committee has provided that prohibition to strike for essential workers should be accompanied by speedy conciliation processes where the affected parties can participate throughout the proceedings. In the early 1959, the Committee had conducted a survey on Freedom of Association. In its survey it was of view that the restrictions/prohibitions on the right to strike constitutes a restriction of opportunities opened to the trade unions for furthering as well as defending their member's interests (Article 10 of Convention No. 87).[144]

One of the other challenges that arise in respect of the right to strike is the freedom to work for non-strikers. The Committee recognises the freedom to work for non-strikers (ILO, 1996d, para 586).[145] However, where some members are striking, and some are working, it often leads to violence. Therefore, when employees are unable to exercise their right to strike collectively, this often leads to tension and violence. Employees often resort to making use of violence during strikes because they feel it is one of the ways in which their interests and needs will be heard.[146] According to Ngcukaitobi, the economic and political order of the day has a critical impact on violence that takes place during strikes. [147]

---

[141] Statement by Christopher Syder, Employers' Spokesperson at the meeting with the Committee of Experts in Geneva on 1 December 2012 available at http://payamekarfarmayan.com/IMG/pdf/ 2012–12–14 G–134
[142] International Trade Union Confederation (ITUC) "The right to strike and the ILO" *The legal Foundations*, March 2014 https://www.ituc-csi.org/the-right-to-strike-and-the-ilo (accessed on 30-10-2021).
[143] Committee of Experts on the Application of Conventions and Recommendations "Report" in International Conference General Survey Concerning Labour Relations and Collective Bargaining in the Public Service (ILO Geneva 2012) https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index htm (accessed on 30-10-2021).
[144] Ibid.
[145] ILO, 1994 para 586.
[146] Ibid. 147.
[147] T Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) *ILJ* P835-836.

Ngcukaitobi further provides that the growth of unemployment, poverty and income inequality provides the reasoning behind violence during strikes.[148]

One of the biggest cases in South Africa where there was violence during a strike is the Marikana Massacre, where a large number of miners was killed. This took place on 16th of August 2021 in the North West province.[149] The event took place after an intense week of protesting whereby miners were demanding increase of wages at the Lonmin Platinum Mine.[150] The fatal breakdown of communication between the miners and the trade union aggravated a volatile situation.[151] Violence is one of the biggest issues when it comes to industrial action in South Africa. It is clear that the violence that we see taking place during strikes is a symbol of the failure of the country's collective bargaining system.[152] Poverty is what leads to an increase violence during strikes.

In *Gri-Wind Steel SA v AMCU,*[153] the employer had brought an application to hold the trade union as well as its members in contempt of court mainly for not adhering to a Labour Court order which had prevented violence. In this case, the employees had blocked the intersection, committed assault, and burnt tires on the road. However, because, in this particular case, the Labour Court did not specify what the union needed to do in order to prevent violence, the application was dismissed. The court did, however emphasise that it is against violence carried out during strikes.[154]

One of the other major challenges in relation to the right to strike is replacement labour. Replacement labour exacerbates violence during strikes, and it has been recommended that a ban be placed on replacement labour in South Africa as there is a link between the two.[155] In *Mahlangu v SATAWU Passenger Railway Agency of South Africa*, the plaintiff who had approached the court for damages against the union had been brutally attacked because she

---

[148] Ibid.
[149] 2014 South African Platinum Strike: longest wage strike in South Africa. https://www.sahistory.org.za/article/2014-south-african-platinum-strike-longest-wage-strike-south-africa (accessed on 29-10-2021).
[150] Ibid.
[151] Ibid.
[152] K Calitz "Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem?" (2016) Vol.28, No.3 *Sabinet African Journal* 436 https://hdl handle.net/10520/EJC-61519a604 (accessed on 29-10-2021).
[153] *Gri-Wind Steel SA v AMCU and Others* (C 561/17) [2017] ZALCCT 73.
[154] (2018) 39 ILJ 1045 (LC).
[155] Note 132.

was employed as a replacement worker while other workers were on strike.[156] The plaintiff was victimised and thrown off the train. The court held that SATAWU was not responsible for the damages suffered by the plaintiff.[157]

In the case of *NUMSA obo Members v Trenstar (Pty) Ltd* [2020] ZALCD, the Labour Court had to deal with the issue of replacement labour.[158] In the abovementioned case, NUMSA members had embarked on a strike against Trenstar. After the strike had lasted for a month, NUMSA served a notice of suspension on Trenstar.[159] A notice of a lock-out was served by Trenstar and they indicated that that they would make use of replacement labour during the lock-out.[160] The Labour Court held that in determining whether replacement labour may be used, it has to be established whether there is a lockout in response of a strike. If that is the case, replacement labour can be used.[161]

2.7 CONCLUSION

In conclusion, it is evident that the right to strike by nurses and within essential services is still a big challenge. Labour rights are entrenched in terms of our Constitution and the participation by nurses in strikes does pose an ethical question. The author is of view that there is a conflict of values between strike action and patient care. The conflict is contrary to the laws governing employer-employee relationship and at the same time stipulating the rights and duties of both parties.[162] When health care workers go on strike this interferes with the rights of patients to access health care thus compromising their health.[163] The South African government has to come up with ways of addressing nurses' demands as well as taking into consideration the patients' right to have access to health care should nurses embark on a strike. [164] South Africa can enforce different methods of dispute resolution that will prevent patient abandonment during strikes. In order to be able to resolve the conflict between such rights, the Department of Health has to resolve the issues

---

[156] *Mahlangu v SATAWU* (2014) 35 ILJ 1193 (GSJ).
[157] Ibid.
[158] *NUMSA obo Members v Trenstar (Pty) Ltd* (D 595–520) [2020] ZALCD.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] B Kubheka, N Maseko, Health Worker Strikes: Human and Employee Rights in Conflict, *News24* ,(10 July 2018) available at https://www news24.com/amp/citypress/voices/health-worker-strikes-human-and-employee-rights-in-conflict-20180709 (accessed on 12-05-2022).
[163] Ibid.
[164] Ibid.

and address the demands of the health care workers so that health care workers will not embark on a strike, and as a result, patients will not be denied access to health care.

CHAPTER THREE
THE LIMITATIONS ON THE FUNDAMENTAL RIGHT TO STRIKE (SUBSTANTIVE AND PROCEDURAL LIMITATIONS)

3.1 INTRODUCTION

From the early 1990s, a number of labour law reforms were implemented in South Africa including the establishment of the right to strike. The right to strike in essential services is subject to constraints and limitations. The South African Constitution of 1996, as well as the Labour Relations Act 66 of 1995, impose such restrictions on the right to strike. The Constitution allows for the right to strike to be limited in terms of law of general application. The limitation must be reasonable and justifiable in an open and democratic society, founded on human dignity, equality, and freedom. The discussion in this chapter seeks to delve into the debate concerning such limitations placed on the right to strike as well as the procedural and substantive limitations. The LRA limits the right to strike by providing that no person may participate in a strike if the issue in dispute is one that a party may refer to arbitration or to the Labour Court, this another way in which the Labour Relations Act limits the said right.[165]

3.2 LIMITATIONS PLACED ON THE RIGHT TO STRIKE (INTERNATIONAL PERSPECTIVE)

The ILO recognizes limitations on the right to strike. The ILO stipulates that if a strike ceases to be peaceful, limitations and prohibitions are permissible.[166] In terms of guidance on limitations on the right to strike, the jurisprudence of the ILO supervisory bodies is one of the most fundamental sources of international law. It establishes the defense to the right to strike as well as the recognition of relatively narrow grounds for restricting the right to strike.[167] One of the common restrictions imposed on the right to strike is compulsory arbitration. Compulsory arbitration is initiated by authorities or by one of the parties to the

---

[165] Section 65 of Labour Relations Act 66 of 1995.
[166] Note 56.
[167] Ibid.

dispute. [168] In countries such as Canada and South Africa, the Constitution expressly provides for the limitation clause, which is applied subject to the limitations being reasonable and justifiable[169]

In Russia, a "sweep ban" approach is used towards the restriction on strikes. Section 4 of Article 4 of the Labour Code in Russia contains a list of situations where strikes can be restricted. An example of this would be where there is a disagreement between the employer and employee about the possibility of performance and the employees threaten to embark on strike action. In such instances, the court often decides to restrict/ban the strike from taking place. Furthermore, employees who fall under essential services are restricted from participating in a strike. The norms with regard to the prohibition of strikes in Russia are also contained in their legislation relating to state civil service and municipal service. However, the ILO has endorsed a negotiated minimum service instead of total prohibition.[170]

The ILO recognises the restriction of the right to strike even in instances where it is not an essential service, for example, basic transportation of goods, postal services and similar services. The mentioned services are not essential. However, they do cause inconvenience should there be a strike. The ILO recognises the limitations of the right to strike in such instances as justifiable.[171] In the Netherlands, legislation with regard to the right to strike may be limited according to the criteria set out in Article G European Social Charter. One of the fundamental cases that dealt with the limitation of the right to strike was in *FNV v Amsta Ruling ENGLI:NL:HR:2015:1687,JAR 2015/188* case, [172] where a dispute arose concerning a health institution in Amsta. Various employees gave statements that several patients, including dementia patients, had endured anxiety which they had exhibited by shouting and banging their heads on the windows.

---

[168] Ibid.
[169] D Ahmed and E Bulmer Limitation Clauses *International IDEA* (2014) https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf(accessed on 14-10-2021).
[170] N Lyutov Strikes in Essential Services-The Russian Federation *ResearchGate* (2019) https://www.researchgate.net/publication/332869622_Regulating_Strikes_in_Essential_Services_The_Case_of_Russia (accessed on 14-10-2021).
[171] R Le Roux and T Cohen "Understanding the Limitations to Right to Strike in Essential and Public Services in the SADC Region" (2016) *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2916/v19i0a1161 (accessed on 16-10-2021).
[172] *FNV v Amsta Ruling ENGLI:NL:HR: 2015:1687, JAR 2015/188 (FNVc.s/ Amsta).*

The Supreme Court held that the right to collective bargaining is not limited by ground rules which function as an obstacle in advance of the assessment of the lawfulness of the strike. The court further held that

> '*[t]he judge must take into consideration the relevant facts when assessing whether or not the strike is lawful and that it is only possible to limit the right to collective bargaining of employees and trade unions if this is urgently necessary in order to protect the rights and liberties of others and to preserve public order and public health'.*

This case is significant for the limitation of the right to strike as it shows that all rights can be limited if the exercise of that particular right will infringe the right of others such as the right to access healthcare. Therefore in relation to the research when health case workers go on strike this violates the right of patients to access health care. In certain circumstances the damage is even greater than just workers demanding their rights and the hospital's reputation but it also has a negative effect on the patients and their wellbeing.

The limitations placed on the right to strike from the international perspective show that there is no right that is absolute and that limitations are placed for a reason in instances where the exercise of a right violates another fundamental right.

3.3 LIMITATIONS OF THE RIGHT TO STRIKE IN TERMS OF SECTION 36 OF THE CONSTITUTION OF SOUTH AFRICA

Section 36 of the Constitution provides for the limitations of the rights enshrined in the Bill of Rights which may be limited by law of general application.[173] As a result it is clear that no right is absolute and that the right to strike is not absolute and can in fact be limited in certain circumstances.[174] The limitations that have been placed by the Constitution on such right meet the goals of general interest as a whole and should not be in conflict or have interferences that has the likelihood of affecting the essence of protected rights.

---

[173] C Gungadeen, Essential Services: A restriction on an employee's constitutional right to strike *Consolidated Employers Organisation* (11 July 2019) https://ceosa.org.za/essential-services-a-restriction-on-an-employees-constitutional-right-to-strike/ (accessed on 23-10-2021).
[174] Ibid.

In the Interim Constitution of South Africa, the general limitation clause was provided for by section 33 which stated:

> *'The rights entrenched in this chapter may be limited by law of general application, provided that such limitation:*
>
> - *shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality; and*
> - *shall not negate the essential content of the right in question and further provided that any limitations to a right entrenched in sections 10, 11, 12, 14, 21, 25 or 30.'*[175]

South Africa reproduced the above clause from the Interim Constitution in the final clause provided for by section 36 of the Constitution.

Section 36 of the Constitution states that all rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all the relevant factors, which include:[176]

- the nature of the right.
- the significance of the purpose of the limitation.
- the nature and scope of the limitation.
- the relationship between the restriction and its purpose.
- less restrictive means of achieving the purpose.

In the case of *Dladla and Another v City of Johannesburg and Others*,[177] the rules of an Ekuthuleni overnight shelter house unlawfully limited the rights of the tenants, which are entrenched in sections 10, 12 and 14 of the Constitution.[178] Reference was made to section 36 of the Constitution and the court held that in order for limitation of a right to be justified, it has to be authorised first by law of general application.[179] In this case, the rights were limited by the rules on the contract that had been concluded. The city of Johannesburg

---

[175] Section 33 of the Interim Constitution 200 of 1993.
[176] Section 36 of the Constitution, 1996.
[177] *Dladla and Another v City of Johannesburg and Others* 2018 (2) BCLR 119 (CC).
[178] *Dladla and Another v City of Johannesburg and Others* 2018 (2) BCLR 119 (CC).
[179] Ibid.

failed to prove that the limitations were justified in an open and democratic society. Therefore, the court held that the rules in the contract were unconstitutional and violated the rights of the tenants.[180]

When we speak of "limitation of rights", this typically refers to circumstances in which laws enacted or actions taken after the commencement of the Constitution have an impact on the conduct and interests which are protected by constitutional rights.[181] Limitations refer to the act of restriction. When considering the limitations of rights, it is very crucial that one must look at the limitation of the right, on one hand, and the purpose of the limitation of the right, on the other.[182] The South African Constitution contains general limitation clauses, including several sections in the Bill of Rights, with provisions that qualify the aspects of the limitation clause in respect of those particular rights.[183]

It must be noted that section 36 of the Constitution's justification analysis considers the extent to which competing interests could be balanced. *In Johncom Media Investments Limited v M and Others* (CCT 08/08) 2009 ZACC 5, 2009 (4) SA 7 (CC)), section 12 of the Divorce Act 70 of 1979 was in question. This section states that no person shall in the course of such action make known in public or publish requests for information from the public or particulars of a divorce. In the above-mentioned case, while the action was pending, a newspaper which was owned by the applicant became aware of such action and thought it would be an interesting story to publish. The applicant launched a counterapplication stating that section 12 of the Divorce Act is unconstitutional.

The Constitutional Court had to decide whether section 12 violated the right to freedom of expression. A two-stage inquiry was required: the first stage of the inquiry was to determine whether the disputed legislation limits the right in the Bill of Rights; and second stage, was to determine whether such limitation can be justifiable in terms of section 36 of the Constitution.[184] The court also held that in order to determine whether a limitation is reasonable and justifiable in terms of section 36, requires a balancing of competing

---

[180] Ibid.
[181] IM Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" (2014) Vol 17 n.6 *Potchefstroom Electronic Law Journal*, para3.
[182] Ibid.
[183] Ibid.
[184] *Johncom Media Investments Limited v M (2009) 4 SA 7 (CC) 15A-C, this is in accordance with the test formulated in Coetzee v South African Government.*

interests.[185] The Constitutional Court ruled that the section 12 limitation is unconstitutional and that such limitation is not justifiable.[186]

In *S v Zuma* 1995 4 BCLR 401 (CC)[187], the court considered the balanced relation between the limitation and the purpose of the right, and the nature of the right affected as being a fundamental right.[188] It is evident that the limitation test requires the analysis of not only the scope but also the content of the particular right in question, namely, the right to strike. The meaning and the effect of essential services need to be established in determining whether the provisions relating to essential services limit the right to strike.[189]

Most of the modern constitutions from different parts of the world, such as Germany, expressly provide for the limitation of rights. According to Klatt and Meister, '*[o]nce certain behaviour is protected prima facie, the state has to justify the infringement of that particular right by applying limitations*'. This then burdens the state with the duty to give the reasons for the limitations. The significance of the limitation clause (section 36(1)*(b)*) provides the weight of interest and rights that the limitation protects.[190] The legality of limiting law is provided for by the requirement in the introduction to section 36(1), which states that that the limitation must be in terms of the law of general application.[191] The Labour Relations Act 66 of 1995 would also qualify as the law of general application because it provides guidelines to the handling of labour issues and ensures that it is applied equally without being arbitrary. It must borne in mind that the nature of the limitation will also refer to the methods which are used to limit such right.[192] Section 36(1)*(d)* of the Constitution further provides that the limitation is capable of making a contribution to the achievement for the purpose. [193] The limitation clause, particularly section 36(1)*(e)*, provides that where there are two or more ways in which the right can be suitable for

---

[185] *Johncom Media Investments Limited v M* (2009) 4 SA 7 (CC) 15E-F.
[186] Ibid.

[187] *S v Zuma* 1995 4 BCLR 401 (CC).
[188] *S v Zuma* 1995 4 BCLR 401 (CC), Para 2.
[189] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (CCT 28/01) (2002) ZACC6.
[190] Section 36 of the Constitution, 1996.
[191] Ibid.
[192] IM Rautenbach "Proportionality and the Limitation Clauses of the South African Bill of Rights" (2014) Vol 17 n.6 *Potchefstroom Electronic Law Journal*, para2.
[193] Section 36(1)*(d)* of the Constitution, 1996.

ensuring the purpose of the limitation, the limitation which infers less must be considered.[194]

3.4 LIMITATIONS IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995

The right to strike is entrenched by the Constitution of South Africa and is regulated and dictated by section 64 of the Labour Relations Act 66 of 1995. However, even though this right is contained in the Labour Relations Act, subsidiary legislation such as the Constitution. 1996, has made use of mechanisms that limit the application of the abovementioned right.[195] Irrespective of the fact that the right to strike is derived from ILO Conventions 87 and 98, the jurisprudence of its supervisory bodies is one of the most crucial sources of international law, especially when seeking guidance on the limitations of the right to strike.[196] The LRA was created to do away with the injustices within labour relations. Before the enactment of the LRA, essential services in our country were regulated and governed by different sectors and legislation such as the Industrial Relations Act, 1990 and common law.[197] The standard premise of the LRA is that strikes in essential services are prohibited and are often subject to arbitration.[198]

According to section 65(1)*(d)*(i) of the LRA no person may participate in a strike if that person is engaged in an essential service. In detail, the abovementioned section provides for a prohibition on strikes based on the following grounds:[199]

- The person is bound by a collective agreement that in fact prohibits a strike in respect of the issue that is in dispute.
- An agreement exists that requires the issue in dispute to be subject to compulsory arbitration.
- The person is engaged in essential services or maintenance services.

---

[194] Section 36(1)*(e)* of the Constitution, 1996.
[195] T Fashoyin, "Collective Bargaining and Employment Relations in Kenya" *Geneva ,International Labour Office,* (2010), available at https://www.ilo.org/wmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_158357.pdf (accessed on 9-10-2021).
[196] The Committee of Experts on the Application of Conventions and Recommendations and the Governing Body on Freedom of Association.
[197] R Le Roux and T Cohen "Understanding the Limitations to Right to Strike in Essential and Public Services in the SADC Region" *PER/ PELJ*2016(19) available at http://dx.doi.org/10.17159/1727-3781/2916/v19i0a1161 (accessed on 9-10-2021).
[198] Explanatory Memorandum on Labour Relations Amendment Bill, 2013.
[199] Section 65 of the Labour Relations Act 66 of 1995.

- There is an arbitration award or a collective agreement that regulates the dispute between the parties.

Every right is important, including the right to strike. However, because no right is absolute, some sort of limitation needs to be in place and needs to be justified and also limited.[200] Section 65(1)*(a)* of the Labour Relations Act provides that it prohibits any person bound by a collective agreement from embarking on strike action if such a collective agreement prohibits strike action. According to Basson, the main reason or logic behind this prohibition is to limit the employers and employees from partaking in strikes or possibly even lockouts. [201] In the case of *Vista University v Botha and Others*, [202] *a* collective agreement had been concluded between the parties excluding any strike action in respect of dispute of rights. In this case 25 respondents who were employed at Vista University went on strike. The court exercised its discretion to award costs in law of fairness and have come to the conclusion that no order as to costs is called for in casu. The court further declared that the strike action commenced by the respondents on 5 May 1997 is an unprotected strike and interdicted the respondents from continuing with the strike action.

Section 65(1)*(b)* further provides that a strike action will be precluded if the parties to that particular dispute have agreed that the dispute should be resolved by way of arbitration.[203] Grogan points out that that does not place any limitations on issues which may be reserved for arbitration.[204]

Section 65(1)*(c)* clearly states that employers engaged in essential services are prohibited from embarking on a strike. Strikes in essential services remain unprotected under the Labour Relations Act. Therefore, employees who take part in industrial action can be dismissed by the employer for misconduct, leading to the possibility of delictual and contractual damages.[205] The Act further provides in section 213 the definition of what

---

[200] Brad "How the law could better regulate the right to strike in South Africa Paper presented at the 27th Annual Labour Law Conference: The Changing Face of Labour Law" (August 2014) 38.
[201] AC Basson MA Christianson, A Dekker C, Garbers, PAK Le Roux, Mischke and EML Strydom et al Essential Labour Law 5ed (2009) 131.
[202] *Vista University v Botha and Others* (1997) 18 ILJ 1040 (LC).
[203] Section 65(1)(b) of the Labour Relations Act 66 of 1995.
[204] J Grogan, Collective Workplace Law,12ed, (2017) 178.
[205] N Whitear-Nel, Dismissal for Participating in an Unprotected Strike, 9 Juta's Business Law, (2001),Vol.9, no3, *Heinonline,* pg133-136.

exactly "essential services" are. It states that an essential service is one whose disruption endangers the life, personal safety or health of the entire or part of the population.[206] However, unions have previously debated over this and have argued that the designation of a sector or a service as an essential service is unconstitutional, in that it deprives workers in that particular field/industry of the right to strike.[207] It must be borne in mind that the Labour Relations Act places limitations on such rights in order to ensure that people in the community do not go without health care.[208] Furthermore, health care workers are obliged to provide quality care to patients in a safe environment and are also professionally obliged to take care of patients.[209]

The Covid-19 pandemic is one of the perfect examples of a situation that could possibly render the assumption that section 65 and section 71 limitations of nurses' right to strike in terms of the Labour Relations Act withstands the limitation test.[210] It is evident that South Africa's failure as a country to provide proper working conditions, such as providing personal protective equipment (PPE) affects both the nurses as well as the right of patients to health care.[211] In the case of *NEHAWU obo Skhosana and Others v Department of Health*: *Gauteng*[212], a group of about 60 employees, most of whom were members of the applicants, had stopped working and approached the hospital management offices in which they had demanded answers with regard to the appointment of a certain Ms Mokoena, They took issue with her being appointed on the grounds that she had falsified her personal details and had colluded with one of the officials for her appointment.[213] The applicant employees were charged and dismissed for participating in an unprotected strike as well as transgressions resulting from such strike.[214]

---

[206] Section 23 of the Labour Relations Act 66 of 1995.
[207] Note 85.
[208] M Mulaudzi, M Davhana-Maselesele "Between a Rock and a Hard Place: Ethics, Nurses Safety and the Right to Protest during Covid-19 Pandemic" *Pubmed* (2021) https://pubmed ncbi.nlm.nih.gov/34551118/ (accessed on 11-10-2021).
[209] I Dowie "Legal, Ethical and Professional Aspects of Duty of Care for Nurses" *Pubmed* (2017), https://pubmed.ncbi nim nih.gov/29250939/ (accessed on 15-10-2021).
[210] Note 184.
[211] Ibid.
[212] *NEHAWU obo Skhosana and Others v Department of Health: Gauteng* (JS903/15) [2018] ZALCJHB 201 (24 May 2018).
[213] *NEHAWU obo Skhosana and Others v Department of Health: Gauteng* (JS903/15) [2018] ZALCJHB 201 (24 May 2018).
[214] Ibid.

In the above case, there was more focus on the limitations placed by the Labour Relations Act on the right to strike by essential services. A restrictive interpretation of "essential services" should be adopted to avoid impermissibly limiting the right to strike. [215] A restrictive interpretation entails interpreting the wording in the statute is in a strict sense so that the words have restrictive ambit. Furthermore, broadly interpreting such right would impermissibly limit the right to strike.[216] It must be borne in mind that in terms of section 72 of the LRA, the ESC has the power to approve or even ratify a collective agreement that provides for the maintenance in a service designated as an essential service.[217] The ESC ensures the implementation and observance of essential services, the maintenance service agreements, and the minimum service agreement. It also promotes effective dispute resolution in essential services.[218]According to Grogan, one of the main reasons as to why there is a prohibition on such right is purely to limit strike action, particularly where the effect of such strike has the possibility of in fact endangering life, health, or even the safety of the people.[219]

One of the most fundamental cases which dealt with the right to strike by essential works is *SA Police Services v Police & Prison Civil Rights Union*.[220] In this case, the question was raised as to whether prohibition of industrial action in essential services applies to all the employees in the services concerned or to only those employees who were directly performing essential services.

The Labour Court held that all members who are employed by South African Police Services are engaged in essential services, in terms of the South African Police Service Act 68 of 1995 (SAPSA).[221] The decision of the Labour Court was appealed against in the Labour Appeal Court (LAC). The LAC held that the decision of the Labour Court, which provided that only members of the South African Police Service (SAPS) employed in terms of the South African Police Service Act were prohibited from striking by the provisions of

---

[215] *(2011) 32 ILJ 1603 (CC).*
[216] Ibid.
[217] Section 72 of the Labour Relations Act 66 of 1995, https://www.gov.za/documents/labour-relations-act (accessed on 14-10-2021).
[218] L Yegani Functions and Operations of Essential Services Committee Briefing, *PMG*(13 May 2015) https://pmg.org.za/committee-meeting/20846/ (accessed on 20-10-2021).
[219] Note 179.
[220] *SA Police Service v Police & Prison Civil Rights Union* (2010) ILJ 2844 (LAC).
[221] Ibid., para 9.

sections 65 and 71(10) of the Act was not accurate. Furthermore, personnel employed by SAPS in terms of the Public Service Act (Proclamation 103 of 1994) are not prohibited from embarking on a strike. This includes prison officers.[222]

The South African Police Service then appealed against the decision of the Labour Appeal Court to the Constitutional Court. The Constitutional Court (CC) had to pay close attention to the interpretation of the term "essential services", [223] and held that a restrictive interpretation of the term should be adopted in order to avoid limiting the right to strike. The CC concluded that persons who are engaged in essential services are prohibited from striking in terms of section 65(1)*(d)*(i) of the Act. They include members of the South African Police Service and that they in fact included the personnel employed in the SAPS as well as designated members in terms of section 29 of the SAPSA.[224] The Constitutional Court therefore re-affirmed that the Labour Appeal Court could not at all be faulted in holding that not all SAPS employees were engaged in essential services and confirmed the judgment of the Labour Appeal Court.[225]

3.5 CONCLUSION

In conclusion, it is evident that although the right to strike does not entail any qualifying provisions, the LRA sets out several substantive and procedural limitation to the right to strike. It is the author's opinion that even though the Constitution and the LRA place such limitations on the right to strike by nurses as health care workers, it is clear that such limitations have been effective only to a certain extent. In a nutshell, one could conclude that nurses as health care workers do not have a constitutional right to strike, mainly because they are prohibited from embarking on a strike. Should they embark on a lawful strike according to the minimum service agreement, the "no work, no pay" principle is applicable and often replacement labour is employed. Some of these limitations are placed on such a right in order to ensure that patients are not abandoned, although clearly, irrespective of such limitations and the declaration of health care workers as "essential services", this has not stopped nurses as health care workers in South Africa from exercising the right to strike. Limitations can also be put in place where a strike becomes

[222] Ibid.
[223] Ibid., para 31.
[224] *SA Police Service v Police & Prison Civil Rights Union & Another* (2011) 32 ILJ 1603 (CC) para 30.
[225] Ibid.

violent and could possibly serve as a means of maintaining peace and creating a just society based on human dignity.

The author is further of the opinion that all limitations which are placed on the right to strike by health care workers must be justifiable. What is justifiable will depend on the circumstances of each case. It can therefore be asked whether the limitation on strikes in essential services is not a justifiable implementation of the proportionality principle. The author further concludes that there is still a loophole with regard to the limitation of rights, particularly the right to strike. The South African legislation needs to provide stricter measures in respect of the limitations of the right to strike. With regard to the controlled strikes in Canada, it was proved in the investigation by Haiven and Haiven that unlawful strikes within the health sector in Canada between 1999 and 2002 were reported only once.[226] Canada adopted the controlled strike model which is an approach to regulate strikes within essential services. This approach was adopted by the Federal Government. (This is discussed in detail in chapter four). Therefore South Africa could adopt a similar so-called "controlled strike model" in order to ensure that strikes that take place within the health sector meet all the necessary requirements, including the minimum service agreement. A controlled strike model would prevent unlawful strikes that take place without the minimum service agreement.

[226] Haiven & Haiven, 2002, 8 et seq.

CHAPTER FOUR
COMPARATIVE STUDY: AUSTRALIA AND CANADA

A. AUSTRALIA

4.1 INTRODUCTION

The Australian Government passed the Industrial Relations Reform Act in 1993. This Act was created to protect the right to strike pursuant to section 51 of the Australian Constitution. [227] The legislation was implemented as a result of findings by the ILO committees, who are in charge of insuring compliance with the ILO Conventions. The ILO committees found that Australia had breached its obligation under the ILO Convention 87 by failing to protect the so called "right to strike".[228] This chapter examines the right to strike by health care workers in Australia and the limitations placed upon this right. Furthermore, the chapter will discuss both protected and unprotected strikes in Australia. This chapter will further compare the legislation of Australia with regard to the rights of patients to have access to healthcare. The South African Constitution makes provision for both the right to strike, in section 23, and the right to have access to healthcare, in section 27. Although the right to strike by health care workers is not expressly provided for in Australia, there are, however, statutes which provide for such right such as the Fair Work Act 2009.[229]

This Chapter focuses on a comparison of the right to strike by healthcare workers in Australia and Canada. The reason for not comparing this study with other African countries such as Kenya and Swaziland is that their laws regarding the right to strike and to access health care are poorly developed. The comparison between South Africa, Australia, and Canada with regard to their health care policies will give greater insight as to how South Africa can best improve their systems.

---

[227] Australian Constitution s51.
[228] See case No 1511 (Australia) 277th Report of the Committee on Freedom of Association (Pilots Strike Case).
[229] Fair Work Act, 2009.

4.2 HISTORY OF THE RIGHT TO STRIKE

The right to strike in Australia was originally not recognised.[230] The Conciliation and Arbitration Act 1904 prohibited any strike action in Australia as well as other forms of industrial actions that took place in Australia. The abovementioned legislation imposed a penalty of an amount up to 1 000 Australian pounds for any employee who participated in a strike or even formed part of any trade union.[231] Australia is a federal government, meaning that power is shared among different entities, which limits their powers to ensure that matters are handled locally. Strike action in Australia was previously completely outlawed, with the aim of ensuring that all disputes were handled through the use of a conciliation and arbitration processes. [232] Furthermore, employers and unions were compelled to approach the Tribunal with all of their disputes. However, if the dispute remained unresolved, the Tribunal had the power to make a binding arbitration, which was known as an award.[233]

The national umpire's settling of industrial disputes without a legislated right to strike prevailed almost throughout the 20th century.[234] However, in 1993, a limited right to strike was first enshrined in the legislation of Australia, but even then, the changes which were made were not enough to confer a right to strike.[235] Instead, the Industrial Relations Reform Act 1993 provided immunity from liability resulting from legal action for employees and unions.[236] Such liability would include damages caused during strikes. When the Howard government was elected in 1996, it legislated to enhance the authority of the national tribunal to prevent industrial action that took place outside the permitted framework.

---

[230] J Bornstein "Requiem for the right to strike" *monash.edu* (21 May 2018), available at, https://joshbornstein.com.au/requiem-for-the-right-to-strike/ (accessed 20-11-2021).
[231] Ibid, pg3.
[232] S Long, Have Australia's Right to Strike Laws Gone Too Far? *ABC news web* (2017), available at https://www.abc net.au/news/2017-03-21/have-the-right-to-strike-laws-gone-too-far/8370980? (accessed on 23-11-2021).
[233] International Arbitration in Australia in 2020-State of Play, available at https://hsfnotes.com/arbitration/2020/10/21/international-arbitration-in-australia-in-2020-state-of-play/ (accessed on 23-11-2021).
[234] Ibid.
[235] J Bornstein "Requiem for the right to strike" *monash.edu* (21 May 2018), available at, https://joshbornstein.com.au/requiem-for-the-right-to-strike/ (accessed 25-11-2021).
[236] Ibid.

4.3 THE RIGHT TO STRIKE IN AUSTRALIA

Australia's legislation does not expressly make reference to the right to strike but instead refers to freedom to strike.[237] Under Australian laws, strikes can take place only when there is bargaining. However, in most cases, it is unlawful.[238] The right to initiate bargaining in Australia stems from the early 1990s, when issues relating to wages and conditions of employment were carried out through awards. The awards were the result of state and federal level of disputes settled via the process of conciliation and arbitration. It must be noted that before employees in Australia can participate in industrial action, they must:[239]

- be in the process of bargaining for an enterprise agreement.
- show that they actually want to reach an agreement.
- not be covered by a current enterprise agreement.

Unlike South Africa, Australia does not expressly grant the right to strike formally but rather mentions it in both federal and state systems which are adopted by several legislative prohibitory industrial actions.[240] Australia has implemented legislation that provides for protection as well as immunity against liability if the person participates in industrial action. This legislation is the Fair Work Act 2009. It must be noted that because of the compulsory conciliation and arbitration, Australia has little legislative pressure applied to the right to strike.[241] This is also one of the major reasons the unions and their members find it a threat to participate in strikes. According to McManus, the right to strike extends to enabling employees the right to express their dissatisfaction through industrial action with regard to economic and social policy matters which affect their interest.[242] It must be noted that action by unions and their members is legal only if it meets requirements such as not taking action before the expiry date of an industrial agreement. However, the actions

---

[237] O R Riley, J Murray *The Law of Work* (2011) Oxford University Press p527.
[238]Industrial Action, *Industrial Union*, available at, https://www.australianunions.org.au/factsheet/industrial-action/ (accessed on 28-11-2021).
[239] Ibid.
[240] B Creighton "Freedom of Association" in Plantain R: *Comparative Labour Law and Industrial Relations in Industrialized Market Economics* (2010) 763.
[241] Ibid. 814.
[242] S McManus and ACTU Secretary, "Everything we do, every campaign we run, every political advance we make, we will build our movement" *Australian council of trade unions,* available at https://www.actu.org.au/about-the-actu (accessed on 28-11-2021)

of a trade union and its members are not legal if the trade union fails to comply with the requirements, at which point, the strike action becomes unprotected.

This means that the trade unions and their members which took industrial action were not protected and were exposed to action for damages in tort and contract prior to the adoption of the abovementioned legislation and the Industrial Relations Act 1988.[243] In *Dollar Sweets Pty Ltd v Federal Confectioners Association of Australia 1986,*[244] an industrial dispute which had major ramifications took place, where an employer resorted to a common law verdict and damages in the Supreme Court of Victoria.[245] On 22 July 1985, a picket began outside the Dollar Sweets Factory, where workers were unhappy about the working hours and the wages. The court in the abovementioned case held that the picketing was unlawful and involved a great deal of harassment and obstruction. The union was therefore ordered to pay common law damages in a sum of $175 000.

In the case of *Australasian Meat Industry Employees Union v Mudginberri Station Proprietary Ltd (1986) 161 CLR 98,*[246] the Australian meat industry was in a decline which had started in the 1980s. In 1984, picket lines were made in the Northern Territory.[247] In this particular case, a dispute arose in respect of the payment system. This dispute led to the first successful use of legal action against a union. This reshaped workplace standards and industrial action in Australia as well as resulting in the creation of balanced disputes between the trade union and employers.[248]

The Industrial Relations Reform Act 1993 amended Division 4 of the Industrial Relations Act 1988 by inserting a new division which provided for immunity against civil liability for striking employees in Australia in limited circumstances. Laurine Brereton, the minister of Industrial Relations, stated that "[t]he Industrial Relations Reform Bill 1993 will give effect to Australia's international obligation in respect of the right of employees to engage in a strike action."[249]

---

[243] *See Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383.
[244] Ibid. para 5.
[245] Ibid. para 4.
[246] *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* [1986] FCA 131; 65 ALR 683.
[247] Ibid. para 4.
[248] Ibid.
[249] Commonwealth, Parliamentary Debates, House of Representatives, 28 October 1993, 2782 (Laurine Brereton, Minister of Industrial Relations).

Section 170PA of the Industrial Relations Act 1988 mentions specific international law sources which give recognition to the protection of the right to strike in Australia. These sources are:[250]

- The Freedom of Association and Protection of the Right to Organise Convention, 1948
- The Constitution of the International Labour Organisation[251]
- Article 8 of the International Covenant on Economic, Social and Cultural Rights.

It must be noted that in Australia the right to strike was not recognised until the case of *Victoria v Commonwealth*.[252] In this case, the High Court had to respond to the challenge of the validity of section 51 of the Industrial Relations Act 1988, that the provisions relating to the right to strike were a valid exercise of the power of external affairs.[253] The court in *Victoria v Commonwealth* held that the International Convention Organisation does not expressly provide for a " right to strike" and that the closest to the right to organise as well as the right to collective bargaining in relation to the right to strike is provided for in Article 4, which provides as follows:

> *'Measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers, employees and organisations, with the view to regulate the terms and conditions of employment by means of collective agreement'*.[254]

The changes which were made because of the abovementioned case indicate that the new system gives primacy to collective bargaining at the enterprise level, which permits employees and unions to bargain collectively with employers and further to take industrial action in certain circumstances. [255] Collective bargaining at enterprise level refers to collective bargaining in which working conditions and wages are negotiated at the level of the individual. Consequently, the right to strike in Australia exists only after the expiry of the term of enterprise agreement with the employer and only in circumstances where

---

[250] Section 170PA of the Industrial Relations Act, 1988.
[251] The Constitution is contained in the International Labour Organisation Act 1947(Cth) (the Schedule) adopted 26th Session ILO 10/5/1947.
[252] *Victoria v Commonwealth* (1996) 187 CLR 416.
[253] Ibid. 542–527.
[254] Ibid 542–528.
[255] Note 205.

workers want to discuss further agreements.[256] Usually the expiry date is stipulated in the enterprise agreement.

It must be noted that in order for strike action to be protected and regulated by Part 3 of the Fair Work Act 2009 (FW Act), it must comply with the following prerequisites:[257]

- The bargaining representative must have attempted good faith bargaining with the employer.
- The bargaining representative has obtained a protected industrial action ballot order in terms of the Fair Work Act 2009 and the proposed action must be approved in a subsequent ballot of relevant employees.
- Required notice of proposed industrial action has been given in terms of section 413 of the Fair Work Act 2009.
- The bargaining representative has not contravened any orders that apply to them or that relate to the industrial action (section 413(5)).

If a strike action complies with the prerequisites and commences within 30 days of the declaration by the ballot, such strike action can continue for a longer period, unless there is an agreement subject to the strike.[258] In the same way as in the provisions of the LRA 66 of 1995 of South Africa (SA), Australia also requires substantive and procedural requirements to be met before the parties can resort to protected industrial action. One of the most important requirements for industrial action to be protected is contained in section 413(5) of the Fair Work Act 2009. The meaning of the abovementioned section was fully discussed in *Esso Australia Pty Ltd v The Australian Workers Union*,[259] where, during negotiations for an enterprise agreement, the Australian Workers Union engaged in industrial action.[260] The employer, Esso Australia, obtained an order under section 418 of the Fair Work Act which prevented the union from organising unprotected strikes.[261] The High Court in this case considered the history and statutory context of the provision and held that a bargaining representative could not meet the prerequisite of taking protected

[256] Ibid.
[257] Part 3 of the Fair Work Act, 2009.
[258] Note 230.
[259] *Esso Australia Pty Ltd v The Australian Workers Union* [2017] HCA 54.
[260] McManus, "Everything we do, every campaign we run, every political advance we make, we will build our movement" *Australian Council of Trade Unions* (4 November 2021), available at https://www.actu.org.au/about-the-actu (accessed on 12-12-2021).
[261] Note 234.

industrial action I, during the negotiations for an agreement, they had breached any order of the court.[262]

4.4 RIGHT OF PATIENTS TO HAVE ACCESS TO HEALTH CARE IN AUSTRALIA

The Australian health care system outlines in the Australian Charter of Healthcare Rights the right of patients and every Australian citizen to have access to health care.[263] The second edition of the Australian Charter includes seven fundamental rights to which patients are entitled, these being the right to safety, access to healthcare, privacy, respect, communication, participation and comment.[264] This Charter updated the previous Charter, which had been adopted by the Australian health ministry in 2008.[265] Australia is one of the few countries that does not have a constitutional guarantee of human rights.[266] Australia is, however, a party to as many as seven international human rights treaties, and the right to have access to health is contained in Article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 12(1) provides that every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The observation of human rights is mandatory under international law and such mandate derives from Australia's Charter of the United Nations.[267] The right to health is considered a matter of policy in Australia, which has ratified all the international human rights, including the right to health care and other health-related rights.[268] Health performance in Australia is reported on, and such performance is reviewed by the Covenant Committee on Economic, Social and Cultural Rights.[269]

---

[262] Note 213.
[263] Australian Patients Association, available at https://www.patients.org.au/ (accessed on 12-11-2021).
[264] Ibid.
[265] Patients' Right in Health Care, 09 August 2019,available at https://www.hospitalhealth.com.au/content/aged-allied-health/news/patients-rights-in-health-care-864033333 (accessed on 9-12-2021).
[266] EA Reid Health Human Rights and Australia's Foreign Policies (2004) Vol180, Issue4, *The medical Journal of Australia*, pg 6.
[267] Ibid.
[268] Ibid., para 9.
[269] Ibid., para 11.

It is clear that the right to health in Australia is not absolute, even though the country has the obligation to respect the enjoyment of the right to health.[270] What makes it clear that the right to strike is not absolute is the fact that patients can be denied access to health care without any consequences or liability by the Australian health sector. In South Africa, health is a human right and has been the core of the foundation of the health system since 1994. Being able to access health care in South Africa is essential for the patient's dignity, and human dignity is the core of the Constitution.[271] The right to health is central to the work of the United Nations and is in fact the core of the 1948 Universal Declaration of Human Rights (UDHR).[272]

Commonwealth legislation does not explicitly enshrine the right to health as envisaged by the Covenant. It is evident that the right to health has not yet been positively incorporated into domestic law of Australia. [273] However, the Australian jurisdiction has anti-discrimination laws which prevent any discrimination when a patient is accessing health care services. [274] These anti-discrimination laws include the Racial Discrimination Act 1975 which provides for equality before all the law irrespective of race and the Disability Discrimination Act. Australian jurisdictions such as Queensland, Victoria and the Australian Capital Territory (ACT) have introduced human rights legislation.[275] It must be noted that the ACT and Victoria's legislation are similar in the sense that the right to health is limited.[276] Section 9 of the Charter of Human Rights Responsibilities Act 2006 [277] provides for the right to life for every person and the right not to be arbitrarily deprived of life. [278] Such legislation does not in any way compel health care workers to provide services.[279]

---

[270] Ibid.
[271] A Background to Health Law and Human Rights in South Africa, *google scholar*(2010),available at https://section27.org.za/wp-content/uploads/2010/04/Chapter1.pdf (accessed on 29-11-2021). CB
[272] MA Gunn and FJ McDonald, "Rationing and the Right to Health: Can Patients Bring Legal Actions if They Are Denied Access to Care?"(2021) Vol214, Issue5, *The medical Journal of Australia*, para 2, available at,https://www mja.com.au/journal/2021/214/5/covid-19-rationing-and-right-health-can-patients-bring-legal-actions-if-they-are (accessed on the 23-10-2021).
[273] Ibid. para 1.
[274] Racial Discrimination Act 1975, Disability Discrimination Act 1992(Cth).
[275] Note 247 para 1.
[276] Section 9 of the Charter of Human Rights and Responsibilities Act 2006 (Vic); section 9 of the Human Rights Act 2004 s9.
[277] Charter of Human Rights Responsibilities Act 2006.
[278] Section 9 of the Human Rights and Responsibilities Act 2006(Vic).
[279] *Rogers v Swindon NHS Primary Care Trust and Another* [2006] EWCA Civ 392.

In contrast, Queensland a state in the north eastern part of Australia explicitly provides for the right to health. According to the Queensland Human Rights Act 2019:[280]

- Every person has the right to access health services without any discrimination.
- A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.[281]

Queensland's Human Rights Act 2019 is similar to section 27 of the South African Constitution 1996. Section 27 explicitly provides for the right to health care and for patients to have access to health care, as does Queensland's Human Rights Act, unlike Victoria and the Australian Capital Territory, which limit the rights of patients. In South Africa, fundamental rights such as the right to have access to health care cannot be violated unless for a just reason.[282] It is clear that, even though one of the Australian jurisdictions namely Queensland, has made provision for the right to have access to health, the rights contained in the Covenant are only partially put into effect in Australia. Unlike Australia, South Africa further provides for the right of patients to have access to health care not only in the Freedom Charter but also in the Primary Health Care Reform (PHCR), which lays down the principles of health care in South Africa. These are:

- Access to healthcare is a fundamental human right.
- The Primary Health Care Reform puts pressure on the government to invest in preventative health services that are close to communities.
- The Primary Health Care Reform teaches patients how to avoid ill health.

South Africa, unlike Australia, has put in place legislative measures to help realise the right of patients to have access to health care. Such measures include the National Health Act 61 of 2003, National Health Insurance, the Patients' Right Charter and the Charter of Public and Private Health Sectors of the Republic of South Africa. It is clear that the Australian laws in relation to freedom of association are different from the South African and Canadian laws.

---

[280] Section 37 of the Human Rights Act 2019 (Queensland).
[281] Ibid.
[282] See section 36 of the Constitution of South Africa.

B. CANADA

4.5 INTRODUCTION

Labour issues in Canada have led to controversy and challenges not only from the government, but also from the courts. The expression "Freedom of Association" has further led to the courts to question whether freedom of association means not only the Constitutional protection of the right of employees to form and join trade unions but also provides protection to strike.[283] This section seeks to examine and compare the right to strike by health care workers in Canada, and the limitations of exercising such right against the right of patients to access health care within the legislation and supporting laws of South Africa and Australia. The reasoning behind the contrast between the South African right to strike by health care workers versus the right of patients with the situation in Canada is that both these countries value human rights, which are the core of their Constitutions. The right to strike is clearly protected by the Canadian and the South African Constitution, which evidently indicates that these countries recognise and realise the importance of human rights. Most importantly, the comparison between these countries in relation to the right of patients to have access to health care shows that the legal drafters took into consideration the existence of such right by adopting several mechanisms including the legislation which gives effect to the right to have access to health care as a socioeconomic right, unlike Australia, which clearly fails to realise such right. The South African legislative mechanisms are examined in chapter 2 and the Canadian legislation will be examined in detail in this chapter. This examination will determine whether the Canadian legislation is more effective and proactive than South Africa in upholding the right to strike and the right to access health care. One of the reasons for comparing the South African right to have access to health care with that of Canada is that both these countries have explicitly committed to providing all citizens the equal right to access health care services in both the public and the private sectors as well as in the legislative and policy framework in relation to the right to have access to health care.[284]

---

[283] See *Re Service Employees, Int'l Union, Local 204 and Broadway Manor Nursing* Home (1983) 4 D.L.R. (4th) 481.

[284] E McIsaac, "Bringing human rights back into balance: The case for social and economic rights in the Charter", *Mowat Centre Website* (31 March 2017), available at https://munkschool.utoronto.ca/mowatcentre/bringing-human-rights-back-into-balance/ (accessed on 19-10-2021).

4.6 THE CONSTITUTIONAL RIGHT TO STRIKE IN CANADA

The right to strike is a social practice that is well known in Canadian history.[285] The freedom to participate in a strike is regarded as the principal means of freedom of association and collective bargaining.[286] The right to strike was recognised by 1872 and was no longer considered illegal.[287] The freedom to strike can be understood in relation to the freedom to associate and the freedom to bargain collectively. Canada provides for the recognition and protection of such rights in the Canadian Charter of Rights and Freedom. Section 2(d) of the Charter provides that everyone has the fundamental freedom of association.[288]

In Lavigne v Ontario Public Service Employees Union,[289] Mr Francis Lavigne was a teacher at an Ontario Community College. He was not a member of the Ontario Public Service Employees Union (OPSEU) and was not required to be one. Lavigne, however, opposed the use of his dues for activities unrelated to a union's core workplace.[290] The Canadian Civil Liberties Association supported the union's position, stating that Lavigne's protection was contained within his right to join or not to join the said organisation. The Supreme Court of Canada considered the following factors:[291]

- whether or not the charter was applicable;
- if so, whether the payments to the OPSEU infringed his freedom of expression in terms of section 2(b) of the Charter;
- whether the payments to OPSEU infringed his freedom of association in terms of section 2(d) of the Charter;
- whether there was any violation to the abovementioned rights.

The court held that the Canadian Charter did in fact apply and that there was a violation of the freedom of association, which was justified in terms of section 1, and that the use of

---

[285] J Fudge E Tucker, The Freedom to Strike in Canada*:* A Brief Legal History (2010) *Canadian Labour and Employment Law Journal* Volume 15, No 2, p.333-353.
[286] Ibid., 2010,para 1.
[287] A.W.R. Carrothers, *Collective Bargaining Law in Canada*, 6ed,1965, pg24.
[288] Section 2(d) of the Canadian Charter of Rights and Freedom.
[289] *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211.
[290] Ibid. para 2.
[291] Ibid. para 5.

such funds did not amount to forced expression. In conclusion, the court held that there was no violation of Lavigne's rights.

Lavigne then brought an application for a declaratory relief from the union and indicated that this violated his right to freedom of expression and freedom of association under section 2(d) of the Charter.[292]

Freedom of association has been interpreted by the Canadian courts to mean that the workers have the right to pursue work goals or even demands through collective bargaining. [293] The Supreme Court of Canada held in its decision in *Saskatchewan Federation of Labour v Saskatchewan*,[294] that employees have the opportunity to withdraw their services, which is an integral component of the freedom of association, and that this crucial role of collective bargaining is the reason why the right to strike would be constitutionally protected by section 2(d).[295]

Article 4 of the Canadian Constitution further sets out the objectives of the freedom of association and unions as follows:[296]

- to sign and organise and sign to membership and represent the employees;
- to regulate labour relations between the members and their employers, to include the scope of negotiation, collective bargaining, and the enforcement of collective agreements as well as the health and safety of employees;
- to defend the right to strike.

One of the major strikes took place in Ontario in June in 1986, when doctors walked out to strike in protest against the province's imminent ban on extra billing.[297] In 1984, the federal government had passed the Canada Health Act, which required the provinces to meet certain requirements in order to receive transfer payments for health care and one principle that was abolished was for extra billing.[298] During this particular strike, the emergency

[292] Ibid.
[293] F Daza, *The Right to Strike: The Charter and Challenges*, 24 May 2021 para 7.
[294] *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245.
[295] Note 268.
[296] Article 4 of the Canadian Constitution Act, 1982.
[297] H Butt, J Duffin "Educating future physicians for Ontario and the Physicians strike of 1986: The roots of Canadian competency-based medical education" 190(7) para 1 (20 February 2018).
[298] Ibid.

wards were closed and surgery appointments were cancelled, leading to maltreatment of patients.[299]

4.7 CANADIAN LABOUR CODE

The Canadian Labour Code (CLC) of 1985, which was amended in 2021 is one of the very few private sector collective bargaining statutes that pertains to essential services strikes. The CLC provides as follows:[300]

> "In the event of a strike or a lock-out not prohibited, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent that is necessary to prevent an immediate and serious danger to the safety or health of the public."

The abovementioned labour code further provides that within fifteen days after the notice to bargain has been given to the employer, including the union, giving notice of the services to be rendered during the strike, the employees may embark on a strike provided that the services are rendered and the strike does not lead to immediate danger to the safety of the public.[301] However, if the union and the employer are not able to honour an essential services agreement, their issues may then be referred to the Labour Board as a last resort. Depending on the circumstances of each case, the Minister may intervene.

4.8 RESTRICTIONS ON THE RIGHT TO STRIKE BY HEALTH CARE WORKERS IN CANADA

In the Canadian Charter of Rights and Freedoms, section 1 provides for a reasonable limitation clause, which allows the Canadian government to limit certain rights of the individual provided that such limitation is subject to and prescribed by law, and can be justified in a free and democratic society.[302] One of the most significant cases where the limitation of rights in Canada was brought into question was in *R v Oakes*,[303] where the

---

[299] Ibid., para 4.
[300] Note 201.
[301] E Tucker and J Fudge, "Regulating Strikes in Essential Services": Canada, Legal Studies Research Paper *osgoode* (2019),available at https://didgitalcommons.osgoode.yorku.ca/scholarly_works/2706 (accessed on 7-11-2021).
[302] R Pati "Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective"' (2005),Vol23, No223, *Berkeley Journal of International Law*, pg223–280.
[303] *R v Oakes* [1986] 1 SC R 103, at pp. 38–40.

court adopted what is now known as the *Oakes* test, which assesses whether the limitation of the right guaranteed by the Charter is in fact justified.[304]

In the abovementioned case, the court observed whether the law infringing a right does so for a legitimate purpose. The purpose would include the inherent dignity of the human, equality, and society. The court further provided that the limitations imposed should not be arbitrary or based on irrational founding or considerations. It is therefore evident that the restrictions on the right of employees in essential services to strike should start with considering Canada's new Constitution and labour rights as well as the right to participate in strikes, to join a union and to collective bargaining.[305] In the past, Canada rarely placed any limitations on the right to strike by health care workers or workers in essential services. However, in order to maintain limitations on disruptions to essential services, a system also known as the "No Strike Model" was put in place to deny workers the freedom to strike.[306] The Royal Canadian Mounted Police (RCMP) were previously excluded from collective labour rights mainly because they provided police services at federal level and from 1918 till 1974 they would get dismissed if they participated in a strike action, this changed after the recent Constitutional challenge in 2015.[307] In the *Saskatchewan Federation of labour v Saskatchewan,* [308] case, the judge stated that restrictions went far beyond what was necessary to maintain essential services.[309]

It must be noted that in Canada there are very few workers who are deprived of the right to bargain. However, clerical and secretarial employees have no right to strike or bargain.[310] Health care workers in Canada also face the limitation of rights. At Ontario Hospital in Canada, employees are subject to the "No Strike Model". The No strike model forms part of the regulatory models for essential services in Canada. No strike model prohibits strikes and purports to provide a principled way to settle collective bargaining disputes.[311] One of

---

[304] Ibid.
[305] E Tucker and J Fudge, "Regulating Strikes in Essential Services": Canada, Legal Studies Research Paper *osgoode* (2019), available at https://didgitalcommons.osgoode.yorku.ca/scholarly_works/2706 (accessed on 7-11-2021).
[306] Ibid.
[307] Ibid.
[308] Note 269.
[309] Ibid.
[310] Note 276.
[311] B Adell Regulating Strikes in (More or Less) Essential Services After The Collective Bargaining Trilogy, *Centre for law in the contemporary workplace(CLCW)*, (2013),available at https://clcw.queenslaw.ca/sites/clcw/files/CLCW%20Papers/Worplace%20Law%20and%the%20Charter/(2013)%

the advantages of this strike model is that it provides protection for essential services and there is no cumbersome designated procedure.[312] This model of strike is generally effective in ensuring that essential services are maintained without any interruption. The disadvantage of this model is that government can try to rig the arbitration process to save money or facilitate restructuring.[313] In 1965 a strike took place in a public hospital and the Canadian Government enacted the Hospital Labour Disputes Arbitration Act (HLDDA), which provides that if there is a dispute between the parties, it must be submitted to arbitration. Irrespective of the limitations which are placed by the Canadian Government, about 10 000 health care workers went on strike.[314] In this incident, the leader of the union had refused to order the workers back to work. The union had been threatened with mass prosecution. Seventeen union leaders were subsequently charged with contempt.[315]

Furthermore, the CLC provides that "during strikes the employer, the employees and trade union in the collective bargaining must at all times provide services irrespective of the strike that might take place".[316] This is clearly to ensure that there is no immediate and serious danger to the safety or health of the public. The Canadian Constitution further places limitations on the right to strike and particularly on essential services by providing there is a "No strike and a Controlled strike" rule.[317]

It is evident that statutory restrictions placed on the right to strike by employees in essential services must take into account Canada's labour rights, which include the right to form part of a union and to bargain collectively.[318] However, in Canada essential service workers can be prosecuted in certain circumstances if they embark on a strike for breach of contract, particularly where participation in such strike can lead to endangering human life or cause

---

20Adell%20Regulating%20Strikes%20in%20Essential%20(and20Other)%20Services%20after%20%the%20New%20Trilogy.pdf (accessed on 2-11-2021).

[312] Ibid.

[313] Ibid.

[314] E Tucker Regulating Strikes in Essential Services: Canada, *Osgoode Digital Common* (2019),available at https://didgitalcommons.osgoode.yorku.ca/scholarly_works/2706 (accessed on 2-11-2021).

[315] Ibid.

[316] E Tucker Regulating Strikes in Essential Services: Canada, *Osgoode Digital Common*, (2019), available at https://didgitalcommons.osgoode.yorku.ca/scholarly_works/2706 (accessed on 3-11-2021).

[317] Note 276.

[318] Nikita Lyutov "Regulating Strikes in Essential Services: Canada, *Social Science Research Network(SSRN)* (07 November 2018), available at https://papers.ssrn.com/so|3/papers.cfm?abstract_id=3277648 (accessed on 18-11-2021).

serious bodily injury.[319] Previously unions had not constitutionally challenged the "No-Strike model" until the *Saskatchewan Federation of Labour v Saskatchewan* case.[320]

In *Saskatchewan Federation of Labour v Saskatchewan*, [321] the court accepted that maintaining essential services is such an objective. However, before such an argument can succeed, the court has to be convinced that the services the government is protecting are sufficiently essential so that their protection is a pressing and substantial objective.[322] In the abovementioned case, the court gave a clear definition of "essential services in international law" and further provided that the ILO supervisory bodies have justified strike limitations on the grounds of essential service. These apply as follows:[323]

- in the public sector, only for public servants exercising authority in the name of the State;
- in essential services in the strict sense of the term (that is, services whose interruption would endanger the life, personal safety, or health of the entire or part of the population); and
- in the event of an acute national emergency and for a limited period.

It must be noted that the Supreme Canadian Court found that the definition of "essential service" is overly broad as the categories of workers whose right to strike is restricted because they provide essential services is subject to the discretion of the employer.[324] It must be borne in mind that since the decision in the abovementioned case there have been judgments passed by lower courts in Canada which have dealt with the query as to whether the government can justify the infringement of the right to strike by essential service workers.[325]

The controlled strike in Canada is the most common approach in regulating strikes in respect of essential services. The controlled strike model is a regulatory model for essential

---

[319] *Johnston et al v Mackey et al* (1937) 67 CCC 196 (NSSC), where the court held that a strike involving wilful breach of contract, where the probable consequence of the strike would have resulted in serious property damage in violation of the Code, was tortious.
[320] Note 269.
[321] Ibid., para 6.
[322] Ibid., para. 93.
[323] Ibid., para 87.
[324] Ibid., para.87.
[325] Note 290.

service.[326] This model of strike combines power-based and principle-based element and has become popular across Canada.[327] One of the advantages of the controlled strike model is that it provides adequate maintenance of essential services during a strike and has fairly high likelihood of negotiated settlement. The disadvantages of this model is that unions see it as inevitably reducing their bargaining power.[328] This approach was created by the federal government when it invented the statutory collective bargaining scheme for the Federal Public Service in the Public Service Staff Relations Act (PSSRA) in 1967. This Act provided the unions with the option to decide between the "no-strike model", leading to binding arbitration, and the controlled strike model. [329] The Canadian jurisdiction integrated the controlled strike model in their private sector collective bargaining statutes. One of the main justifications for such restrictions is because the private sectors provide work in the field of health and safety.[330]

space

4.9THE RIGHT OF PATIENTS TO HAVE ACCESS TO HEALTHCARE

The right of patients to have access to healthcare in Canada is one of the most fundamental human rights, just as it is in South Africa. The right to have access to health care in South was evaluated in detail in chapter two. The said chapter also examined how the Bill of Rights has been applied in the context of the right to have access to health. The comparison between these countries is important as it highlights how the freedom of association and the patients' rights differ in each country. As seen above, the Canadian and South African laws in relation to the right by patients to have access to health care is very similar.

One of the reasons for comparing the South African right to have access to health care with that of Canada is because both these countries have explicitly committed to providing all citizens with an equal right to access health care services in both the public and the private

---

[326]B Adell Regulating Strikes in (More or Less) Essential Services After The Collective Bargaining Trilogy, *Centre for law in the contemporary workplace(CLCW)*, (2013),available at https://clcw.queenslaw.ca/sites/clcw/files/CLCW%20Papers/Worplace%20Law%20and%the%20Charter/(2013)%20Adell%20Regulating%20Strikes%20in%20Essential%20(and20Other)%20Services%20after%20%the%20New%20Trilogy.pdf (accessed on 8-11-2021).

[327] Ibid.

[328] Ibid.

[329] Ibid.

[330] Ibid.

sectors. The legislative and policy framework in relation to the right to have access to health care is also similar in both countries.[331]

Canada has put in place a number of constitutional measures regulating the right to have access to healthcare services. These include the following.

4.9.1 The Canadian Charter of Rights and Freedom 1982

The Canadian Charter of Rights and Freedom of 1982 is a Bill of Rights which forms part of Canada's Constitutional Act of 1982.[332] This Act regulates and guarantees citizens in Canada the right to access health care services. The Charter was proclaimed in 1982 and it was during this time that human rights were codified in Canada in the same manner in which the Bill of Rights is incorporated into the South African Constitution of 1996. The Charter was created to unify Canadians around a set of principles that embody such rights.

The Canadian Charter was preceded by the Bill of Rights, which was enacted in 1960. The Charter inspired many to improve their protection of human dignity in Canada. The movement for human rights and freedom entrenched the principles in the Universal Declaration of Human Rights. Furthermore, the Charter ensured that such human rights were respected and that the role of judges in enforcing the rights was clear. The Charter received a great deal of support, from the majority of the Canadian electorate.

4.9.2 The Protection of Socio-economic Rights under the Charter of Rights and Freedom

In contrast to South Africa, the Canadian Charter does not have a provision that expressly provides for the protection of socioeconomic rights. Section 27 of the South African Constitution provides for the right and protection of access to health care. The determination of the right to have access to health care embodied in section 9(4) of the Constitution indicates that section 27(1)*(a)* can also be applied horizontally, meaning that if such section is interpreted with reference to section 27(1)*(a)*, citizens have the right to access health care, and the denial of such right amounts to violation of the right to access

[331] Note 259.
[332] Ibid.

health care. In South Africa, the government has the primary responsibility to fulfil the right to have access to health care. This is further supported by section 7(2) of the Constitution, which provides that the state is obliged to respect, protect, promote and fulfil all rights in the Bill of Rights.[333]

The Canadian Charter, on the other hand, may not expressly protect the said rights, but the right to life and the equality provision in terms of sections 7 and 15 of the Charter clearly indicate that Canada recognises such socioeconomic rights. In terms of section 7 of the Charter of Rights and Freedom, the case of *Gosselin v Quebec Attorney General*, [334] contains one of the most important judgments of the Supreme Court Justice, where it was found that the right enshrined in section 7 places a positive obligation on the government to provide those who are in need of social assistance sufficient to cover their basic needs.[335] Section 15 of the Charter of Rights and Freedom provides that

> "[e]very individual is equal before the law and has the right to equal protection and equal benefits of the law without any discrimination based on race, religion, colour and age." [336] (Italics Removed)

Some scholarly writers such as Jackman M have stated that "[t]he right to have access to health care is linked with the element of equal protection and equal benefit of the law".[337] The author provides that the link between these right is significant as it indicates that every citizen should have access to health facilities and should never be denied access to health care.

According to Elizabeth Mclsaac, the Charter may not explicitly name economic and social rights, but it does not mean that they are excluded.[338] Elizabeth Mclsaac further provides that

> "[t]he Canadian Health Act, 1984 defines national principles to ensure that they are fulfilled. The law's requirement that provinces should provide free and universal

---

[333] Section 7 of the Constitution Act, 1996.
[334] *Gosselin v Quebec (AG)* [2002] 4 SCR, 429.
[335] Ibid. paras 82–83.
[336] Section 15(1) of the Charter of Rights and Freedoms
[337] M Jackman "The right to participate in health care and health resources allocation decisions under Section 7 of the Canadian Charter" *Health Law Review* 3 (1995/96),available at https://papers.ssrn.com/so|3/papers.cfm?abstract_id=2315823 (accessed on 16-11-2021).
[338] Note 300.

> access to publicly insured health care in order to receive federal funding, expresses the principle of the right to health care and a mechanism to realize this right."[339]

For the past three decades of the existence of the Canada Health Act 1984, access to health care has become embedded in the systems for providing health care as well as Canada's notion. One of the most important cases that dealt with the right to health care and the right to life *is Chaoulli v Quebec (Attorney General).*[340] The self-represented doctor by the name of Jacques and his patient, Mr George Zeliotis, objected to the waiting times they endured in the health care system in Quebec. They further challenged the legislation which prohibited private health care insurance for services which were covered by public health care insurance. The Quebec Superior Court dismissed the application based on the fact that the deprivation of the right to life, liberty and security of the person under the meaning of section 7 of the Canadian Charter of Rights and Freedom may be justified in certain circumstances. [341] The court further held that the legislative prohibition was justified because it was in accordance with the principles of fundamental justice and didn't did not conflict with the values provided for in the Canadian Charter of Rights and Freedom.[342] Justice Deschamps found that there was a rational nexus between the government's objective of preserving the integrity of an accessible public health insurance scheme for people in Quebec and that the complete prohibition on private insurance went further than necessary. Justice Deschamps concluded that less dramatic measures could have been taken instead of prohibiting private health insurance.[343]

The abovementioned case has been considered as the most significant decision in relation to the right to have access to health care and is relied upon by most patients in Canada.

In *Nell Toussaint v Canada (Attorney General)*, [344] a Grenadian woman who was undocumented challenged the rejection of her application for medical coverage under the Interim Federal Health Program (IFHP), which was a programme designed for immigrants. The applicant claimed that the exclusion for access to health care violated her rights in

---

[339] Ibid., para 16.
[340] *Chauolli v Quebec (Attorney General)* [2005] SCC 35.
[341] *Chaoulli v Quebec (Attorney General)* [2000] JQ No 479 (CSQ) para 263.
[342] Ibid.
[343] Ibid., para 26–33, para 97.
[344] *Nell Toussaint v Attorney General of Canada* [2010] FC 810.

terms of section 7 of the Charter.[345] The court held that the exclusion was due to her immigration status and that such exclusion was not in contradiction of the section 7 of the Charter.[346]

4.10 CONCLUSION

In conclusion, the right to strike is regulated by different laws for Australia, Canada, and South Africa. From critically analysing this chapter, one could state that the strike laws of Canada regulating the right to strike have worked perfectly in reducing industrial action in the country. Canada adopted "controlled strikes", which assisted the Canadian government and reduced the high number of industrial action suits. With regard to the controlled strikes in Canada, it has been proved from the research by Haiven and Haiven that unlawful strikes within the health sector in Canada between 1999 and 2002 were reported only once.[347] Therefore, South Africa could adopt the same so-called "controlled strike model" rather than the "no-strike model" in order to ensure that strikes that take place within the health sector meet all the requirements, including the requirements of the minimum service agreement. The controlled strike model would prevent unlawful strikes that take place without regard to the minimum service agreement. Strikes within the health sector are common in South Africa ins comparison with Australia and Canada.

However, in contrast to Australia, the South African Constitution guarantees the right to strike as a fundamental right and following the legislation of Australia, which does not protect the right to strike, would be in contrary to the provisions of the South African Constitution. Australians have little protection in relation to industrial action, they are forced to go to arbitration as it is made compulsory and may not participate in a strike. This means that most workers do not participate in strikes because of the fear of liability and especially because most strikes that do take place are considered to be unlawful. However, even though Australia does not protect the right to strike, the government has control over the requirements for such a right. For instance, before workers embark on a strike, they are compelled to approach the Tribunal.

---

[345] Ibid., para 20, para 63.
[346] Ibid., para 94.
[347] Note 201.

In South Africa, we still face the challenge of employees partaking in unlawful strikes. The author is of the opinion that even though most authors such as Crepon criticise the controlled strikes,[348] it is evident that legislation has worked in curbing strikes within the health sector in Canada and Australia. Crepon criticises the controlled strike model and provides that this strike model process is cumbersome and has potential of increased public impatience and unions may be tempted to use disruptive tactics. One may state that despite the criticism about the amount of control the Canadian and the Australian governments have over the right to strike, the control measures have accounted for less reported strikes for the past few years. [349] The author further concludes that if South Africa could benchmark from the abovementioned countries with regard to the right to strike, we would probably see different and more favourable results. South Africa already places limitations on the exercise of many rights in the country therefore, having a strict approach to the right to strike would reduce industrial action within the health sector.

The right of patients to have access to health care remains an issue, particularly when health care workers go on strike. The author is of the opinion that the Canadian and South African legislation fully provides protection for such a right for patients. These legislative mechanisms indicate that the drafters of these countries considered and realised the rights of patients as compared to Australia, which does not explicitly grant Austrian citizens such a right. It is the author's opinion that Australia needs more awareness of human rights such as the right to access health care. In this way, the legislators would be able to contribute positively to Australia's policies in order to achieve greater equality in accessing health care, because it is clear that an Australian citizen denied access to health care would have very little legal recourse.

---

[348] Note 56.

[349]

CHAPTER FIVE
FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 FINDINGS

In chapter one of this dissertation, a background to the study was considered in conjunction with the current state of the right to strike by public health care workers in South Africa weighed against the right of patients to have access to health care. Chapter one highlighted the different literature and legislation that provide guidance for the right to strike by health care workers. Including the Constitution of the Republic of South Africa Act, 1996.

The important discovery from the first chapter is the amount of literature that is available about the right to strike by public health care workers. There is a lot of literature on the right to strike and the right to access health care to enable me to compile the research. However, it has been discovered that there is an imbalance between the fundamental right to strike by public health care workers and the fundamental right of patients to access health care. When health care workers go on strike it affects patients as they don't receive proper services and in some circumstances get denied access to health care by striking employees and this as a result causes a conflict between these two fundamental right. Furthermore, chapter one revealed that irrespective of all the legislative mechanisms adopted by the government, there still seem to be gaps in respect of the extent to which public health care workers can exercise the right to strike and the limitations that are placed upon the exercise of such right.

In chapter two the nature, scope, and content of the Constitutional right to strike was examined as well as the international norms relating to the right to strike. This chapter found that the Constitution protects the right to strike by health care workers in South Africa. The chapter further established that even though the Constitution of South Africa, 1996 protects the said right to strike, there is still conflict of interest when it comes to patients needing access to health care while health care workers are on strike. This entails that there is an conflict between the fundamental right to strike and the right of patients to access health care. The chapter found that South Africa has experienced an increase in the number of strikes within the health sector from 2007 till 2010. It was established in chapter two that the increase in the number of strikes in South Africa is due to poor working conditions and low wages, lack of training and patients' safety. One of the major reasons

health care workers end up embarking on strikes is because their demands are not addressed by their employer. Which is the government in this regard. The chapter further uncovered and clarified the contradiction between the Constitutional right to strike and Section 70 of the Labour Relations Act indicating that essential workers cannot participate in a protected or unprotected strike.

Chapter three examined the limitations placed on the right to strike by public health care workers in South Africa as well as the international perspective of limitations on the right to strike. This chapter found that there is no absolute right and that all rights in South Africa are subject to limitation in terms of section 36 of the Constitution Act, including the right to strike in certain circumstances. The chapter further established that the Labour Relations Act limits the right to strike as well as the right of health care workers as essential service workers to embark on a strike. The chapter discovered that these limitations are placed to ensure that patients have access to healthcare despite the strike by other workers. If the exercise of one's rights violates another right guaranteed in the Constitution, such conduct is unconstitutional. This is one of the reasons that limitations are placed on the rights. This chapter further discovered that irrespective of the limitations in terms of the Constitution and the LRA, public healthcare workers still participated in strikes in 2007, 2010 and 2018.

Chapter four of the research compared the laws of Australia and Canada in contrast to the South African laws with regard to regulating the right to strike and the right of patients to have access to health care. This chapter found that the right to strike in Australia is not expressly mentioned in any of the Australian legislation. However, Australia has ratified many conventions dealing with the right to strike. So it is bound to provide workers the right to strike. It was established that due to the compulsory conciliation and arbitration, Australia has no legislative pressure applicable to the right to strike and as a result, trade unions barely participate in strikes or even organise strikes. Furthermore, Australia does not comply with the International Labour Organisation (ILO) because the country believes that disputes should be handled through arbitration processes. Therefore, embarking on a strike was outlawed. The chapter discovered that Australia is still criticised today for its failure to protect the right to strike and the right of patients to have access to health care.

Unlike South Africa and Canada, Australia does not protect nor expressly protect the right of patients to have access to healthcare. However, the chapter examined the legislative mechanisms that partly highlights the patients right to access healthcare. The second

edition of the Australian Charter of Rights and Freedom contains the seven fundamental rights which includes the right of patients to access healthcare. However, this chapter found that Australia does not guarantee the right to healthcare in its Constitution. It became evident from this chapter that the right to access health is not absolute in Australia. South Africa and Canada have similar legislative mechanisms in respect of both the right to strike and the right of patients to have access to health care.

One of the most interesting factors found in this chapter is that South Africa and Canada have a lot in common in the manner in which these two fundamental rights are regulated. Canada and South Africa guarantee the right to strike in their Constitutions, which means the right to participate in a strike is recognised provided that all the substantive and procedural requirements are met. The right to strike is limited in both these countries. Canada provides for the limitation clause section 1 of the Charter of Rights and Freedoms and those certain rights can be limited provided that such limitation is subject to and prescribed by law in a way such as can be justified in a free and democratic society. It has been submitted in this chapter that there are many similarities between the Canadian Charter of Rights and the Bill of Rights. In fact, many provisions in the Constitution were drawn from the Canadian Constitution when constitutional law of the Republic was still at its infancy stage during the period 1993 and 1994. It was examined in this chapter that South Africa on the other hand also limits rights in section 36 of the Constitution of the Republic of South Africa Act, 1996. This Chapter further established that the right of patients to access health care is guaranteed by both the South African and the Canadian Constitution. This right is seen as a fundamental right in both these countries. Both Canada and South Africa adopted legislative mechanisms that protect the right of patients to access health care. Furthermore, several case laws have highlighted the right to access health care.

Overall, the findings clearly indicate that when the healthcare workers' demands are not addressed within the health sector, it leads to industrial action which leads to patients being denied access to healthcare because of the strike. In the exercise of their fundamental right to strike, healthcare workers violate the fundamental right to access to health care.

5.2 RECOMMENDATIONS

The purpose and scale of this study examined and explored the effect of public health care workers' involvement in strike action. It is evident that the bargaining process within the health sector needs to improve. The process needs to attend to the health care workers' needs in order to reduce the number of strikes in the health sector.

The employment conditions affect the nature and concern of the nature of the relationship between the employer and the employee. Therefore, it is highly recommended that the working conditions of health care workers are met. This can be implemented by the government and the management within the health sector by conducting a survey within public hospitals on how working conditions can best be improved for employees while not disadvantaging patients. Investigation in public hospitals can be conducted by someone sent by the Department of Health to check on the working conditions of employees and that of employees.

Governments must engage with unions to determine which services are essential and how many employees are supposed to carry out the services. Furthermore, the government must ensure that workers who are not allowed to strike are given access to meaningful mechanisms for resolving disputes, such as arbitration.

One of the challenges revolves around staff shortage. It is recommended that the government needs to train and employ more health care workers to prevent shortage of staff and overworking of employees.

Improvement of communication between the employees, management and trade unions is recommended. In order for the bargaining process to be effective there must be good communication skills. These skills would include active listening which is a very important skill when it comes to communication.

5.2.1 GENERAL RECOMMENDATIONS

According to the study it is crucial to conduct a critical analysis of the effectiveness of the bargaining process within the health sector as this may curb the number of strikes that take place.

A controlled-strike model which may be effective in reducing strikes within the health sector should be adopted in South Africa. This can be done by amending existing

legislation. The controlled-strike model is the predominant approach in limiting essential service strikes in Canada. The controlled-strike model has proved to be effective in maintaining essential services during a strike. The controlled-strike model is the system that was established by the Public Service Essential Services Act (PSESA) for workers in essential services in the public sector. This type of system allows the public sector employers and unions to negotiate rules regarding work stoppages so that essential services continue to be provided to the public.

The above-mentioned recommendations will assist in balancing the fundamental right to strike and the right of patients to access healthcare. This will also ensure that healthcare workers needs/demands are addressed without compromising nor violating the right to access health care enshrined in section 27 of the Constitution.

5.3 CONCLUSION

As highlighted in this study, the right to strike is a fundamental right protected in section 23(2)*(c)* of the Constitution. Such right is guaranteed to every citizen in South Africa, which includes health care workers. The right to strike is further highlighted by the Labour Relations Act, which guarantees the right to strike to every citizen. Although this right is expressly provided for in South Africa's legislative mechanisms, it is clearly exercised provided that substantive and procedural requirements are complied with in terms of sections 64(1) and 65(1) of the LRA 66 of 1995.

The study concludes that regardless of the limitations placed by section 36 of the Constitution and section 70 of the LRA 66 of 1995 upon the exercise of the right to strike by healthcare workers, some workers seem still to have participated in unprotected and protected strikes. This evidently indicates that South Africa still needs to have stricter measures with regard to limiting the right of health care workers to participate in strikes. Perhaps the controlled-strike model as provided in the above recommendations could assist in limiting the right to strike by health care workers.

On the other hand, one would say that a contradiction has been observed when looking at the standards laid down, recommendations by the ILO, and the provisions of section 65 of the LRA 66 of 1995. Healthcare workers are said to be prohibited from participating in protected and unprotected strikes, yet the Constitution as well as the LRA guarantees this right. In a nutshell, health care workers cannot strike. Strikes within the health sector have

continued to pose difficult question with regard to the ethics and putting the patients first as well as acting in the interest of the patient. The extent to which healthcare workers can exercise the right to strike has been analysed to be exercised provided that the minimum service agreement has been entered into with a certain percent of workers remaining to provide services to the public.

Balancing the right to strike by public health care workers against the right of patients has been a challenge. The study revealed that the imbalance between the above mentioned rights is not yet fully resolved. When healthcare workers embark on a strike neglecting patients, that results in the imbalance of the right to strike by health care workers versus the right of patients to get well. The author concludes that the bargaining process within the health sector needs to prioritise the needs and demands of healthcare workers. Strikes are often the last resort after the failure of the bargaining process. The author further concludes that by prioritising the demands of healthcare workers, it will assist in reducing the increase of strikes within the health sector. This will also result in the balance of the two rights as patients won't be denied access to healthcare.

BIBLIOGRAPHY

Books

Basson AC, Christianson MA, Dekker A, Garbers C Le Roux PAK, Mischke and EML Strydom et al Essential Labour Law 5ed (2009).

Carrothers A.W.R, Collective Bargaining Law in Canada, 6ed,1965, pg24.

Currie, I & De Waal, J *The Bill of Rights* Handbook 6 ed Cape Town: Juta, (2008).

Cheadle H "Constitutionalizing the right to strike" in laws against strikes: *The South African experience in international and comparative perspective* (2015).

Du Toit et al (eds) Labour Law Relations: A Comprehensive Guide 5th ed, (2015).

Fudge, J and Tucker, E *History of the Restrictions on the Freedom of Association of RCMP Members*. 2001 and 2010, 100 et seqq.

Fudge, J and Tucker, E *The Freedom to Strike in Canada: A Brief Legal History*.

Grogan, J *Dismissal* 3ed Cape Town: Juta (2017).

Grogan, J *Workplace Law* 10e Cape Town: Juta (2009).

Riley OR , Murray J, *The Law of Work* , 2ed,(2011) Oxford University Press p527.

Journals

Bellace JR, "The ILO and the right to strike" (2014) Vol153, No1 *Wiley Online Library* p.29-31,

Bornstein, J '*Requiem for the Right to Strike*' para 3 (21 May 2018).

Butt, H and Duffin, J 'Educating Future Physicians for Ontario and the Physicians Strike of 1986: The Roots of Canadian competency-based Medical Education'. *Canadian Medical Association Journal* 190(7) *CMAJ* 20:190: E196-198. (2018 28 February) doi: 10.1503/cmaj.171043

Creighton B 'Freedom of Association' in Plantain R *Comparative Labour Law and Industrial Relations in Industrialized Market Economics* (2010). Creighton et al (2010).

Dalton, R and Groom, R 'The right to strike in Australia' http://dx.doi.org/10.17159/17159/1727-3781/2019/v2210a4400

Daza, F 'The Right to Strike: The Charter and Challenges' (24 May 2021).

Dhai, A 'The Public's Attitude towards Strike Action by Healthcare Workers and Health Services in South Africa' *African Journals Online (AJOL)* 4(2) (2011).

Dhai, A and Mahomed, S 'The NEHAWU Strikes: South Africa's Healthcare Battlefield' *South African Medical Journal (SAMJ)* 108(8): 632 (August 2018).

Dowie, I 'Legal, Ethical and Professional Aspects of Duty of Care for Nurses' 2017.

Gericke SB, Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law (2012)

Guidio, H *'ILO Principles Concerning the Right to Strike' International Labour Organisation* 137(4) (1998).

Gungadeen, C 'Essential Services: A Restriction on an Employee's Constitutional Right to Strike'. (11 July 2019).

Gunn, MA and McDonald FJ 'Rationing and the Right to Health: Can Patients Bring Legal Actions If They Are Denied Access to Care?' (28 July 2020.)

Jackman M 'The right to participate in health care and health resources allocation decisions under Section 7 of the Canadian Charter' *Health Law Review* 3 (1995/96).

July, S & Workman-Davies, B 'The Right to Strike: Essential Services and Minimum Service Agreements' in *Werksmans-Africa-Brief* (March 2013).

Kubheka, Dr B and Maseko, N 'Health Worker Strikes: Human and Employee Rights in Conflict' *City Press* (10 July 2018).

Long S, Have Australia's Right to Strike Laws Gone Too Far? *ABC news web* (2017).

Lyutov, N '*Regulating Strikes in Essential Services*' (05 May 2019).

Mclsaac, E '*Bringing Human Rights Back Into Balance: The Case for Social and Economic Rights in the Charter'* (31 May 2017).

McQuoid-Mason Dr J 'What Should Doctors and Healthcare Staff Do When Industrial Action Jeopardises the Lives and Health of Patients?' *South African Medical Journal* (*SAMJ*) 108n (8 August 2018).

Mulaudzi, F, Mulaudzi, M, Anokwuru, R and Davhana-Maselesele, M 'Between a Rock and a Hard Place: Ethics, Nurses' Safety and the Right to Protest during the Covid-19 Pandemic' *International Nursing Review* 68(3):270–278 (22 September 2021). DOI:10.1111/inr.12703

Pati, R. 'Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective' *Berkeley Journal of International Law* 23/1 (2005).

Reid, EA. 'Health, Human Rights and Australia's Foreign Policies' *Medical Journal of Australia (MJA)* 180(4) 163–165 (16 February 2004).

Sidley, P. 'Strike cripples health services in South Africa' *British Medical Journal (BMJ)* 334 (7606): 1240–1241 (16 June 2007).

Slaughter B, South Africa: COSATU calls off public service strike, *World Socialist Web Site* 14 July 2007

Subramanien, DC and Joseph JL 'The Right to Strike Under the Labour Relations Act 66 of 1995 (LRA) and the Possible Factors for Consideration That Would Promote the Objectives of the LRA' *PER/PELJ* 2019(22). DOI http://dx.doi.org/10.17159/1727- 3781/2019/v22i0a4400

Yegani, L 'Functions and Operations of Essential Services Committee Briefing' *Parliamentary Monitoring Group (PMG)* (13 May 2015).

Case Law: South Africa

Dladla and Another v City of Johannesburg and Others 2018 (2) BCLR 119 (CC).

National Union of Metalworkers v Bader Bop (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182

S v Makwanyane 1995 (3) SA 391 (CC)

SA Police Service v Police & Prison Civil Rights Union & Another (2011) 32 ILJ 1603 (CC).

Soobramoney v Minister of Health KZN (CCT32/97) [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 27 November 1997.

Case Law: Australia

Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd [1986] FCA 131; 65 ALR 683

Lavigne v Ontario Public Service Employees Union [1991] 2 SCR 211.

Victoria v Commonwealth.

Case Law: Canada

Chaoulli v Quebec (Attorney General) [2000] para 26-33, para 97

Gosselin v Quebec (AG) [2002] 4 SCR, 429.

Johnston et al v Mackey et al, (1937) 67 CCC 196 (NSSC).

Nell Toussaint v Attorney General of Canada [2010] FC 810.

Saskatchewan Federation of Labour v Saskatchewan [2015] 1 SCR 245.

Case Law: United Kingdom

R v Oakes [1986] 1 SC R 103.

Rogers v Swindon NHS Primary Care Trust and Another [2006] EWCA Civ 392.

Legislation: South Africa

Constitution of the Republic of South Africa, 1996

Interim Constitution of 1993

Labour Relations Act 66 of 1995

National Health Act 61 of 2003

Legislation: Canada

Canadian Constitution Act, 1982.

Industrial Relations Act, 1988.

Canadian Labour Code, 1993

Charter on Rights and Freedom

Fair Work Act 2009

Internet Sources

https://about.healthdirect.gov.au

https://ceosa.org.za

https://cliffedekkerhofmeyr.com

https://perjournal.co.za

www.australianconstitutioncentre.org.au

www.australianunions.org.au

www.google.com

www.jstor.org

www.labourandemploymentlaw.com

www.labourguide.co.za

www.saflii.org

www.scholar.com

www.worklaw.co.za

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Zinzi Mvelase (220106677)
School Of Law
Howard College

Dear Miss Zinzi Mvelase,

Original application number: 00013085
Project title: A Critical Analysis Balancing the Right to Strike by public Health Care Workers against other Fundamental human rights
Amended title: Balancing the right to strike by public health care workers against the right of patients: Lessons from abroad.

Exemption from Ethics Review

In response to your **amendment** application received on 27 July 2022 , your school has indicated that the amendment has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law