

## **Consideration for a Policy Change to the South African Collective Bargaining Process: A Reflection on National Union of Metalworkers of South Africa v Trenstar (Pty) (2023) 44 ILJ 1189 (CC)**

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**Abstract :** At the back of the apartheid era, South Africa embarked on a democratic drive of all its institution underpinned by a social justice perspective to eradicate past injustices. These democratic values based on fundamental human rights and equality informed all rights enshrined in the Constitution of the Republic of South Africa, 1996. This means that all rights are therefore infused by social justice perspective and labour rights are no exception. Labour law is therefore regulated to the extent that it is viewed as too rigid. Hence a call for more flexibility to enhance investment and boost job creation. This view articulated by the Free Market Foundation fell on deaf ears as the opponents believe in what is termed regulated flexibility which affords greater protection to vulnerable workers while promoting business opportunities and investment. The question that this paper seeks to examine is to what extent the regulation of labour law will go to protect employees. This question is prompted by the recent Constitutional Court's judgment of National Union of Metalworkers of South Africa v Trenstar which barred the employer from employing labour replacement in response to the strike action by its employees. The question whether employers may use replacement labour and have recourse to lock-outs in response to strike action is considered in the context of the dichotomy between the Free market foundation and social justice perspectives which are at loggerheads in the South African collective bargaining process. With the current unemployment rate soaring constantly, the aftermath of the Covid 19 pandemic, the effects of the war in Ukraine and lately the financial burden of load shedding on companies to run their businesses, this paper argues for a policy shift toward deregulation or a lesser state and judiciary intervention. This initiative will relieve the burden on companies to run a viable business while at the same time protecting existing jobs.

**Keywords :** labour law, replacement labour, right to strike, free market foundation perspective, social justice perspective

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