# Dismissing the blanket approach of interdicting strike brutality: A discussion of *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7

## 1 Introduction

This matter concerns an attempt by the employer to interdict unidentified workers in the cause of a strike that turned violent and resulted in damage to the property of the employer. The issue before the Constitutional Court was, can an employer facing unlawful conduct committed during a protected strike interdict employees participating in that strike without linking each employee to the unlawful conduct? This note will do as Theron J did in starting the judgment by discussing the facts of the case, going into detail about what the Labour Court and the Labour Appeal Court found. The note will also engage in a detailed discussion about the judgment of Theron J.

## 2 Facts

The applicants in this matter were the Commercial Stevedoring Agricultural Allied Workers' Union (CSAAWU) along with 173 striking workers (para 1). The first respondent was Oak Valley Estates (Pty) Limited (Oak Valley) (para 2). On 6 May 2019, CSAAWU called for its workers to engage in a protected strike on the premises of Oak Valley (para 2). The reason underlying the strike action was the alleged refusal by Oak Valley to transform seasonal workers into permanent workers and the alleged race-based allocation of living quarters (para 2). All the workers who engaged in the strike were connected to Oak Valley, either as seasonal workers or permanent workers (para 3). In the beginning, there were 364 workers on strike, however, by the time proceedings were instituted at the Labour Court, only 174 workers remained in the strike action (para 3). Before the strike action, the Commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA), after determining the Picketing Rules in terms of section 69 of the Labour Relations Act 66 1995(LRA), noted that there was previously a violent strike at Oak Valley which resulted in damage to property and as a result, the workers were only allowed to picket in specially designated areas (para 4). The prohibition by the rules included "preventing suppliers, clients, customers and employees of Oak Valley from entering or leaving Oak Valley's premises; committing any unlawful action such as intimidating, coercing, or threatening non-striking workers; wearing masks; and carrying dangerous weapons." (para 4). The strike action in question resulted in the violation of the Picketing Rules as there was

How to cite: Mabaso 'Dismissing the blanket approach of interdicting strike brutality: A discussion of *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7' 2024 *De Jure Law Journal* 98-111
http://dx.doi.org/10.17159/2225-7160/2024/v57a7

damage to property, intimidation, and interference with the business function of Oak Valley (para 5). At the meeting with the Commissioner on 15 May 2019, CSAAWU raised the point of the designated area being too far from the entrance which would allow the striking workers to discourage the customers from supporting Oak Valley (para 5). The Commissioner did not revise the Picketing Rules; however, the parties were told to engage each other further.

Oak Valley, through its attorneys, proceeded to request an undertaking from CSAAWU for its workers to comply with the Picketing Rules, to stop the intimidation and engaging in violent conduct (para 6). Oak Valley expressed that should the undertaking not be signed by CSAAWU, it would proceed with an urgent application at the Labour Court (para 6). CSAAWU responded without the undertaking stating that its workers did not violate the Picketing Rules, but rather, they proposed that the matter be resolved by way of negotiations between the parties (para 6). Oak Valley proceeded to institute an urgent application, as it had previously stated, which was set down for 20 May 2019 (para 7). In the Labour Court, Oak Valley sought a return date to interdict CSAAWU and each of the striking workers from disturbing its business operations (para 8). Oak Valley cited the workers individually and cited unidentifiable workers who had associated themselves with the criminal conduct of the striking workers (para 7). Oak Valley was of the view that the interdict would be of no effect unless the interdict was extended to the unidentifiable workers.

> "Oak Valley contended that the strike action triggered unlawful conduct, including the alleged intimidation of some of its non-striking workers, damage to its property, the attempted burning of patches of veld and a shed on Oak Valley Farm, the wearing of cold-weather balaclavas (in breach of the Picketing Rules), and the blocking of the entrance to the Farm. Oak Valley also alleged that the strike and protest rippled out into the local community, and was related to protest action that, at its height, briefly blocked the N2 highway at Sir Lowry's Pass." (para 9).

## 3 Decision of the Labour Court

At the set down date, the Labour Court granted the interdict as requested by Oak Valley against CSAAWU and the unidentifiable workers, thereafter, the workers returned to work (para 10). At the return date, Oak Valley sought a final interdict against 174 of the members of CSAAWU and the unidentifiable workers as it had abandoned the application against 191 of the workers as they were no longer engaging in the strike (para 10). The applicants raised three defences against the Oak Valley interdict (para 11). First, the Labour Court lacked jurisdiction to deal with matters regarding the failure to comply with the Picketing Rules as the matter was not referred to through section 69(8) of (11) of the LRA. Secondly, the applicants contended that Oak Valley sought an interdict that was too broad, which also disturbed their lawful conduct. Lastly, the applicants contended that Oak Valley had failed to show a link between the alleged unlawful conduct and the unidentifiable workers it

had cited in the application. The Labour Court accepted that it could not blindly interdict members of the public without identification, however, it rejected the defence raised by CSAAWU and the workers.

## 4 Decision of the Labour Appeal Court

At the Labour Appeal Court, the court accepted the first two defences of CSAAWU and the workers (para 12). The LAC rejected the attempt by CSAAWU and the workers to require Oak Valley to establish a link between the individuals that were interdicted and the alleged unlawful conduct (para 13; see also *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Limited*, unreported judgment of the Labour Appeal Court, Court Case No CA11/19 (17 November 2020) para 37). The basis upon which the Labour Appeal Court upheld the final interdict was that Oak Valley succeeded in naming the individuals who were involved in the alleged unlawful conduct along with a group of unidentifiable individuals (para 13; LAC judgment para 28). According to the Labour Appeal Court, requesting the employer to specifically identify the striking workers engaging in the unlawful conduct was taking it a step too far, and it was an impractical and broad approach (para 13; LAC judgment para 37).

## 5 Decision of the Constitutional Court

In the Constitutional Court, the applicants (CSAAWU and the workers) argued that in its reasoning, the Labour Appeal Court was mistaken as the relief sought by way of an interdict is only relevant if a factual connection can be proven to exist between the alleged unlawful actions and the respondents to be interdicted (para 14). There was no dispute on the part of the applicants that unlawful conduct did in fact happen, however, they contended that Oak Valley had not established that it was connected to the 174 applicants that had remained in the strike. The applicants argued that any members of the public could have been responsible for the alleged unlawful conduct, this approach violates settled law concerning final interdicts and it violates the principle that legal liability can only be attributed to the person who was the cause of the unlawful action.

When it came to the requirement for a link between the unlawful actions and the respondents, the court noted that "At the outset, it is necessary to distinguish the identification by name of the respondents against whom an interdict is sought and the drawing of a link between those respondents and the unlawful conduct which an applicant reasonably believes will persist or occur if an interdict is not granted." (para 17). The court noted that the matter before it was concerned with establishing a link between the respondents and the alleged unlawful conduct. The question of law to be determined by the court is whether our law requires such applicants to establish a factual link, when seeking a final interdict, between the unlawful conduct complained of and the respondents. What must be established for a final interdict is settled law, there must be a right, that is harmed or reasonable apprehension and

there must be no other remedy to protect such a right from harm (para 18; see also *Setlogelo v Setlogelo* 1914 AD 221 . Interdicts in our Constitutional dispensation play a crucial role as they allow the courts to enforce the protection of a right and in essence, put an end to the breach of a legally protected right (para 19; see also *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) paras 36 and 39).

If an interdict is to be granted, then it must be shown on a balance of probabilities that if such relief is not granted, the culprit will continue to injure or there is a reasonable apprehension that they will injure the rights of the applicant (para 19; see also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 21; *Plascon-Evans Paint Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) paras 634E-635C). The Constitutional Court noted that the requirement of reasonable apprehension was dealt with in detail in *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) paras 896G-I where the court concurred with *Nestor v Minister of Police* 1984 (4) SA 230 (SWA) at 244 that

> A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However, the apprehension test is an objective one. This means that, based on the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."

Simply put, if there is no evidence to show a factual connection between the workers and the injury or threatened injury, then in that case, an apprehension of an injury cannot be reasonable (para 20). As a matter of law, there must be a connection between the alleged unlawful harm done and the worker who is alleged to have done it. However, in the present case, the court must decide whether a mere involvement in a strike which resulted in unlawful activity will suffice to prove the required connection. If this is allowed it will cast the net too wide as innocent participants in the picketing or even protected strike will fall under this broader umbrella (para 21). In the eyes of the Labour Appeal Court, such a wide net is justified as it is merely a starting point (LAC judgment para 29).

On the question of innocent bystanders, the Constitutional Court reasoned that they are prejudiced by casting the net too wide as they are automatically regarded as having acted or threatened to act unlawfully (para 22). Such a wide net will result in extensive litigation by the interdicted parties as they try to clear their names which have now been tainted by the broad interdict (para 22). The idea of being implicated in a contempt application, irrespective of whether it succeeds or not will disadvantage the workers in the exercise of their constitutionally protected right to protest and strike. In essence, this wide interdict will go a step further as it will end up deterring lawful strikes. This will cast a

dark cloud even on lawful strikes as workers will fear being involved in lawful strikes due to the outcome of being implicated in the contempt application which may or may not succeed. The Constitutional Court cited *Mlungwana v S* 2019 (1) BCLR 88 (CC) para 87 in pointing out that handing out interdicts with an easy hand, will have a chilling effect in deterring those who engage in lawful strikes.

The Constitutional Court then proceeded to deal with case law. The court noted that when it came to final interdicts, the important factor was the establishment of the link between the conduct that causes harm or apprehension of such and the workers (para 25). The court highlighted *Hotz* dealt with above when the Supreme Court of Appeal in that matter noted that the evidence before it suggested that the students had not disconnected themselves from the conduct of the rest of the protestors and such conduct was unlawful as it led to the destruction of the property of the University (para 25). However, the court decided that mere involvement in a protest does not suffice to have an interdict granted against the students (para 25; see also *Hotz* para 70).

The Constitutional Court noted that the applicants had relied on *Ex Parte Consolidated Fine Spinners and Weavers Ltd* (1987) 8 *ILJ* 97 (D) (*Consolidated Fine Spinners*) and *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union* (1997) 18 *ILJ* 84 (D) (*Mondi Paper*) as these cases confirmed that interdicts should not be granted against employees if the employees cannot be connected to the unlawful conduct or the reasonable apprehension thereof (para 29). Specifically, in *Consolidated Fine Spinners* the employer failed to point out the individuals who were responsible for the unlawful conduct and instead attempted to identify them as all the employees who had not returned to work. The employer conceded that since it was impossible to identify the individual workers, they chose the broader scope which in turn could have easily included any other worker who was not at work. The employer's failure to disclose the cause of action was the reason the High Court in this instance dismissed the application. The court was, however, open to the discussion of interdicting the workers as a group that had acted in an unlawful manner (para 29; see also *Consolidated Fine Spinners* paras 99A-B). The deciding factor in the court's decision was, that the workers were not present at work and as such, there was no way of establishing that they were connected to the unlawful conduct in question (see also *Consolidated Fine Spinners* paras 99B-C). In *Mondi Paper* the court stated as follows:

> The evil of intimidation of employees by striking workers and the unlawful blocking of transport to company premises can never be condoned. Juxtaposed against that evil is that of a court granting orders against 'innocent non-participants' without evidence. The latter evil seems to me to outweigh the former. It seems to me that the whole court system will lose the respect of the public at large if it grants orders against 'innocent non-participants'. (para 30; *Mondi Papers* paras 93A-B).

The Constitutional Court also cited *Oconbrick Manufacturing (Pty) Ltd v SA Building and Allied Workers Organization* 1998 19 *ILJ* 868 (LC) para 16

when the Labour Court found that interdicts must not be easily granted against a group of striking employees in instances where the individual employees who form part of the broader group commit the unlawful conduct until the specific culprits are properly identified before the court of law. The interdict is only appropriate if such a worker is properly identified (para 31).

> Ultimately, the Court found that the matter was distinguishable on the facts from *Consolidated Fine Spinners* because the respondents before it "formed a cohesive group" and it was "uncontested that the individual respondents, acting as a group and in concert, obstructed access to the applicant's premises". The Court found that [t]hese were not isolated and individual unlawful acts, but conscious acts of striking workers acting in concert. (para 32).

The Constitutional Court noted that in *Makhado Municipality v SA Municipal Workers Union* 2006 27 *ILJ* 1175 (LC) (*Makhado*) the reason behind the Labour Court's refusal to grant the interdict against the striking employees was that the employer's case was merely an unfounded and unsubstantial allegation of a threat without a particular individual worker being identified as the one who committed the unlawful conduct (para 33; see also *Makhado* para 23).

In *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* 1999 20 *ILJ* 392 (LC) (*Polyoak*) the Labour Court noted that

> Generally speaking, a person can only be restrained by interdict if the evidence demonstrates that, as a matter of probability, he or she will commit the act in question within the period encompassed by the proposed order. The conclusion is competent when the evidence shows that a person has undertaken or agreed to commit the act or that an inference to this effect can be drawn from the fact that he or she has previously done so. In the absence of evidence identifying the respondent as a prospective perpetrator or accomplice in the acts of a perpetrator, however, he or she cannot be interdicted, and it matters not that the person is one of a group of strikers containing malefactors or that his or her interests as striker happen to be promoted by the wrongdoing in question. Our law knows no concept of collective guilt.(para 34, the court notes that this line of reasoning was approved in *Makhado* para 24; see also *Polyoak* paras 395H-B).

However, Theron J pointed out that the courts have not always concurred on this line of thought as can be seen in *North Transport (Pty) Ltd v TGWU* 1998 6 BLLR 598 (LC) (*Great North Transport*) (para 37). In this matter, the Labour Court found that while the employer had failed to prove the link between the 166 workers and the unlawful conduct, it was still warranted that the court grant the interdict against the workers. This court noted that there was a series of harassments and intimidations and the workers in question were part of such conduct and there was no basis for suggesting that it be shown specifically which individual workers were involved. According to the Labour Court in this matter, this line of reasoning was in line with section 1 of the LRA which promoted labour peace and the effective resolution of labour issues.

In *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 2006 27 *ILJ* 1234 (LC) the court highlighted its sympathy towards the employers in strikes that result in violence and such instances do warrant granting interdicts against the workers whose conduct is unlawful (para 38). The court argued further that the workers must be properly identified, even if it was the names of a few specific individuals.

The Constitutional Court in this case then found that our jurisprudence requires that a factual connection between the alleged unlawful conduct and the worker must be established for the interdict to be competently granted against such a worker (par 39). The reasoning behind this is a person's right to a peaceful strike, picketing or protest cannot be limited due to the violent conduct of other people (para 40; see *also South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC) para 53). In instances where a person is engaging in a peaceful strike and they are interdicted, that is simply a violation of their constitutional right, this is not permissible under our constitutional dispensation irrespective of whether the subsequent contempt proceedings are successful or not (para 41).

The Constitutional Court noted that based on what has been discussed above, two principles are evident. The first principle is with regards to the link between the unlawful conduct and the alleged perpetrator and secondly, this does not necessarily apply if the workers are acting as a group, and both of these principles are dependent on the facts of each case (para 42).

The Constitutional Court in this case noted that Oak Valley provided ample evidence by way of video footage, pictures, and voice recordings in its attempt to prove that at least some of the workers were involved and or associated with the unlawful conduct (para 49). Oak Valley proceeded to claim that it would make this evidence available to the court, however, the evidence in question was never provided to the Labour Court nor the Labour Appeal Court. The photographs mentioned in the Labour Court judgment do not specifically detail exactly what they depict nor if the workers are identified. Oak Valley failed to file such material on its founding affidavit, it is replying affidavit that it attempted to identify a handful of specific individuals. As such, the workers on the other side argued that Oak Valley's founding affidavit was simply hearsay and did not contain reliable evidence as the deponent deposing of the affidavit simply generalised (para 51). In essence, the workers did not dispute the unlawful nature of the strike, they simply argued that Oak Valley failed to identify them individually.

Oak Valley had also made an allegation regarding five unnamed men who had entered its property and committed arson (para 53). In this allegation, Oak Valley again provided that it had evidence and, as such, would institute disciplinary proceedings against the employees involved. However, it failed to identify the individuals in its founding and replying affidavit. The photographs that were provided, only showed the scorched

earth, as such, they failed to show a link between the arson and the alleged workers. Oak Valley made further claims regarding the damage of its vehicles, again, it failed to identify the individuals responsible for such (para 54). The allegations of intimidation made by Oak Valley were the same as the above allegations, they lacked specificity (paras 55 and 56). Oak Valley failed to point out, in its founding affidavit, who made the intimidating calls. Furthermore, it failed to explain why it could not provide the names of the individuals who made the threatening calls (para 57).

The Constitutional Court found that in its founding affidavits, Oak Valley made vague allegations and made it impossible for the respondents to reply (para 62). In instances where it did manage to make specific allegations of unlawful conduct, it simply failed to provide a link between such conduct and the alleged perpetrator. In simple terms, Oak Valley failed to prove that there was a reasonable apprehension that it would be harmed if the alleged perpetrators were not placed under interdict (para 65).

## 6 Discussion

The code of good practice: collective bargaining, industrial action and picketing states that there is no constitutional or statutory duty to bargain. In simple terms, both the Constitution of the Republic of South Africa, 1996 and the LRA do not make collective bargaining mandatory, but rather, as the Code states, collective bargaining is entirely voluntary. The code of good practice also states that

> prolonged and violent strikes have a serious detrimental effect on the strikers, the families of strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and the community… the Code urges-those embarking on industrial action to recognise the constitutional rights of others.

The note submits that based on the above, it is clear that the code recognises the detrimental impact that violent strikes have on society and the parties involved, as such, it advocates for industrial actions to be peaceful and within the confines of the law. Such lawfulness is even extended by the Code onto picketing, governed by section 69 of the LRA. Thus, strikes that turn violent are no longer within the confines of the law.

When another is violating a person's legally protected right, the person whose right is being violated can apply to a court of law to obtain a suitable relief that will protect them against the person doing the harm (CB Prest Interlocutory Interdicts (1993) 2 as cited in Dhlakama *The role of the common law interdict in enforcing environmental compliance through public interest environmental litigation in South Africa* (LLM dissertation 2014 UKZN) 27). The applicant seeking relief in such instances must show that they have a right that is about to be harmed or there is a reasonable apprehension that their right will be harmed and there must

be no other remedy available that offers protection (*Hotz* para 29; see also *Setlogelo* para 227; *Van Deventer v Ivory Sun Trading* 77 (Pty) Ltd 2015 (3) SA 532 (SCA) para 26; *Red Dunes of Africa v Masingita Property Investment Holdings* [2015] ZASCA 99 para 19; *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 38). This is settled law. The courts have no discretion in refusing to grant such relief once these requirements are established by the applicant of the interdict (*Hotz* para 29; see also *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) paras 23-24; *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) para 347F-H). In this case, Oak Valley applied to court to protect its property from damage, which it alleged, was being harmed by the workers.

As can be seen from the above discussion of the case, whether or not there was harm to Oak Valley's property was not in dispute, rather, what was in dispute was the attempt by Oak Valley to interdict unidentified workers, trying to link the harm to its property to unidentified workers.

The purpose of pleadings in civil matters is to define the issues in dispute between the parties and they also serve the purpose of informing the presiding officer of the nature of the dispute. (Vettori and de Beer "The consequences of pleading a non-admission" 2014 46 *De Jure* 612). That is, pleadings are generally meant to clarify the issue in dispute, the facts of how the issue arose, as well as identify the identity of the alleged perpetrator. To establish fairness, it is not for the court to deal with an issue that was not pleaded (*Fischer v Ramahlele* 2014 4 SA 614 (SCA) para 14). That is to say, if an issue was not raised during the pleadings, the court could not be expected to rule on that issue. However, as will be shown below, there is an exception to this rule. The courts also use the pleadings to ensure that the evidence before it is admissible (Vettori and de Beer 2014 *De Jure* 613). The purpose of this process in litigation is to ensure that a party does not argue one thing in the initial stages of the litigation and end up trying another argument during the trial stage of the proceedings (*Munters (Pty) Ltd v Serote* (4004/2014) [2018] ZAGPJHC 491 para 5).

If the pleadings are vague and embarrassing, the respondent in an interdict application could simply strike the course of action (*Munters* para 4). In *Trope v South African Reserve Bank* 1992 3 SA 208 (T) paras 221A–E, the court noted that one of the reasons that the pleadings may be vague is due to their lack of specificity or particularity. For example, pleadings will lack specificity if the alleged perpetrator is unidentified or the issue between the parties is not clearly defined. As a result, the vagueness of the pleadings can cause some form of prejudice to the respondent (see also *McKelvey v Cowan* 1980 4 SA 525 (Z) paras 526D-E; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) paras 377, 379; *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 I SA 624 (W) para 632D; *South African National Parks v Ras* 2002 2 SA 537 (C) para 543A; *Nel v McArthur* 2003 4 SA 142 (T) paras 416F-418I).

This note concurs with Theron J that Oak Valley in this instance was given a chance to file the evidence that it suggested it had of the videos and photographs of those harming its property, but it failed to do so in its founding and replying affidavit in all courts. The result of this was that the courts were not able to establish the necessary link between the harmful conduct and the workers alleged to have done the harmful acts. The note also concurs that the failure to identify the specific individuals who Oak Valley alleged caused the harm, made it impossible for the court to link such harm to Oak Valley to those individuals Oak Valley alleges are responsible for the harm. This lack of specificity led to the Oak Valley's pleadings being vague. The note is of the view that the workers could have simply pleaded this vagueness of Oak Valley's pleadings to get the matter thrown out of court. In the alternative, the Constitutional Court could have dealt in detail with this vague pleading and decided on it even though it was not suggested by the workers. This would not be new as the court is allowed to raise an issue of law which arises during the cause of the matter if it is necessary for the decision of the case, even though it was not pleaded, this is subject to no party being prejudiced by the court's approach (*CUSA v Tao Ying Metal Industries* 2009 2 SA 204 (CC) para 68; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 39; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) paras 109-114). Thus, the matter could have ended there. To simplify, the note submits that the attempt to interdict workers who were not identified lacks particularity to the extent that it becomes vague.

Furthermore, the note concurs with Theron J that the failure to identify the individuals committing the unlawful conduct, thereby casting the net too wide, would violate the workers' rights. The right in question is the right to strike which is a constitutionally protected right under section 27 of the Constitution. This right is given life by Chapter IV of the LRA The significance of the right to strike is highlighted by the Constitutional Court in *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 4 SA 744 (CC) as it stated that the point of a strike is to allow for an effective method of collective bargaining which allows the parties to use their economic powers to fight for their needs (Subramanien and 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 *PELJ* 4). In *National Union of Mineworkers v Bader Bop* 2003 24 *ILJ* 305 (CC) the court further confirmed the importance of this right as it stated that a strike helps cement the workers' needs in the employment relationship with the employer (see also *SA Transport & Allied Workers Union v Moloto* 2012 33 *ILJ* 2549 (CC) para 29; *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 (CC) para 40).

This right to strike is also linked to allowing the workers to freely associate with their trade unions, which are often responsible for the lawful strike actions (Budeli "Understanding the right to freedom of association at the workplace: components and scope" 2010 *Obiter* 27-28). The importance of strikes is that they are often a last resort for

workers to enforce their demands onto the employer and without such a right, the workers would have no freedom of association (Manamela and Budeli "The Comparative and International Law Journal of Southern Africa" 2013 *Institute of Institute of Foreign and Comparative Law* 308). Strikes happen in the last stages of the process of collective bargaining after the employees have failed to effectively reach an agreement with the employer regarding their demands. In essence, strikes are meant to be a bargaining tool to reach common ground between the aggrieved workers and the employer of the aggrieved workers (Manamela and Budeli *Institute of Institute of Foreign and Comparative Law* 308). The note concurs with Theron J that had the court allowed the net of the interdict to be cast too wide, it would have resulted in the workers being deprived of this right to strike and in a broader sense, be deprived of freedom to associate. In simple terms, the note submits that had the application by Oak Valley to interdict unidentified workers, it would have prevented other unidentified workers, who have nothing to do with the harm caused to Oak Valley, from exercising their right to strike.

It is a well-known phenomenon that in South Africa, strikes often turn violent and such violence erupts quickly (Tenza "Is the use of video footage during industrial action a solution to the issue of liability for collective misconduct - Part 1" 2017 *Obiter* 243; *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers* 2016 37 *ILJ* 476 (LC) (UPN) para 37). Such violence that results from the strike is correctly labelled as the abuse of the right to strike and in a sense, it is considered to be collective brutality (*Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 2012 33 *ILJ* 998 (LC) para 11; see also Myburg "Interdicting Protected Strikes on Account of Violence" 2018 *ILJ* 706). In the aftermath of these violent strikes, the union and the workers often try to avoid accountability for the violent conduct (Tenza 2017 *Obiter* 244).

In light of the Constitutional Court not allowing the employers to broaden the application of the interdict to unidentified workers alleged to have caused the harm, the question then becomes, what will employers do to ensure that the workers who commit such unlawful conduct can be held accountable through establishing the link between them (the alleged unidentified perpetrators) and the unlawful conduct? The note submits that the answer lies with CCTV cameras which are the most common form of surveillance systems. Tenza notes "that these cameras record both the sound and image of an incident as and when it takes place and consequently, both the face and voice could potentially link the suspect to the unlawful act" (Tenza 2017 *Obiter* 245). The effectiveness of these cameras in the labour law sphere can be seen in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2011 32 *ILJ* 2455 (LAC) when an employee was dismissed after being captured by the CCTV camera stealing in the employer's store. The note submits that such CCTV footage will assist the employer in holding the actual perpetrators of the harmful conduct accountable

when filed at court appropriately. The note concurs with Tenza who also notes that the CCTV camera can be used as a deterrent mechanism as no employee would perform an unlawful act whilst being recorded as they will be easily identified and held into account by law enforcement officers and the courts and even though this may not be guaranteed, however, the strikes would most often proceed without violence than with violence if there are video recordings present (Tenza 2017 *Obiter* 245). If this is not done, it leads to the situation such as the above as well as in *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union* when the court refused to grant a blanket approach kind of interdict.

The note is of the view that another option for the employer to not only hold the violent perpetrators to account but also potentially obtain their interdict would be through obtaining the assistance of some of the employees who were present when the violence occurred and witnessed it themselves. This would be considered hearsay evidence. This form of evidence is considered to be that which is dependent on the extent of the witness's credibility, and it can be oral or written evidence (S 1 of the Law of Evidence Amendment Act 45 of 1988, see also *S v Ramabele* 1996 1 SACR 639 (A) at 469 as defined in Tenza 2017 *Obiter* 250). Hearsay evidence is generally not admissible in South African courts of law; however, exceptions can be made for its admissibility in court (Tenza 2017 *Obiter* 250).

The notes proposal has in fact been seen used and succeeded before. As Tenza (2017 *Obiter* 250) notes, in *Food and Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* 2010 31 *ILJ* 1654 (LC) the court did allow the admission of hearsay evidence. This was when an employee became the employer's witness, the reasoning of the court in that case was that the interest of justice allowed it. The note submits that, in this Oak Valley matter, had the employer obtained a witness to identify the unidentified workers, it would have been in the interest of justice for the court to allow such evidence, thus, leading to the granting of the interim interdict.

One may wonder, what happens if the prospective witness employee refuses to be the employer's witness? The note's proposal becomes more viable when one considers that dismissal for derivate misconduct is permissible in South Africa. The note is of the view that if the employees who were present during the strike violence did not come forward to identify the violent perpetrators, then Oak Valley could have issued a notice that those employees would be dismissed for derivative misconduct. Derivative misconducts are considered to be where there has been harm to the employer and the employer cannot identify the perpetrator, the employee who is aware of the identity of the perpetrator is then called upon to disclose it and in the event of non-disclosure, the employee is dismissed (*Food and Allied Workers Union v Amalgamated Beverage Industries Ltd* 1994 15 *ILJ* 1057 (LAC) (hereinafter *FAWU v* ABI), *Chauke v Lee Service Centre t/a Leeson Motors* 1998 19 *ILJ* 1441 (LAC), *RSA*

*Geological Services v Grogan* 2008 29 ILJ 406 (LC)). However, this is not a unilateral duty nor is it a fast-sweeping threat to the employee for non-disclosure. The employer in turn must ensure the protection and safety of the employee, as can be seen in the groundbreaking decision in *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* 2019 40 ILJ 1957 (CC) (Sibiya, CalvinoII and Desan Iyer "Judicial scrutiny of derivative misconduct in South African employment law: a careful approach to the duty to speak" 2023 *Obiter* 107). The test for derivative misconduct is "the employee knew or could have acquired knowledge of the wrongdoing; …the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge."

The note submits that Oak Valley simply could have put up a notice during the strike that any worker with knowledge of who the unidentifiable workers were must come forward, that they (Oak Valley) would provide sufficient protection to such workers who came forward and any failure to come forward would be a dismissible misconduct. Once workers have come forward, Oak Valley would argue that it is in the interest of justice for the hearsay evidence of those employees who came forward to be admitted as evidence, thus, identifying the unidentified workers and obtaining the necessary interdict.

It seems South African courts have made attempts to prevent possible violence during strikes. For example, in *Picardi Hotels Ltd v Food & General Workers Union* 1999 20 ILJ 1915 (LC) para 25, the court stated that while workers are allowed to hold written material such as placards during a strike, such writings must not be a criminal offence and there must not be any weapons such as firearms (Manamela and Budeli *CILSA* 324).

Over the past few years, our courts seem to also now try to remove the protection of a strike when it turns violent. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* para 13 the court stated that through the mandate given to it by both the Constitution and the LRA, it will always protect the right to strike, however, this right is eclipsed by those who engage in violent acts to meet their own ends (see also *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA* 2001 32 *ILJ* 2939 (LAC) para 52). The court also explained that "[w]hen the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status." The Labour Court in *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Netw ork (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers* 2016 37 *ILJ* 476 (LC) para 32 cites Professor Rycroft that when assessing potentially removing protection to a strike, one must ask whether the misconduct has been to such as extent that the strike is

no longer about collective bargaining (Rycroft "What can be done about strike-related violence?" 2014 *IJCLLIR* 199 -216). Rycroft proposes that what must be weighed in answering this question is looking at the violence caused and the unions' attempt or lack thereof, to prevent such violence (*National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd* para 32; see also Rycroft 2014 IJCLLIR 199 -216). The note is of the view that although this may not have solved the issue of the unidentified perpetrators who caused harm to its property, perhaps Oak Valley could have considered making an application for the strike to be declared unprotected as there was violence, violence which does not advance the interests of collective bargaining.

## 7 Conclusion

This note engaged in a detailed discussion of the decision of the Constitutional Court regarding the blanket approach to interdicts. The note concurred with Theron J in not allowing the employer to pled vaguely due to the lack of specificity which resulted from the failure to identify the workers responsible for the unlawful conduct and by default the failure to establish a link between the workers and the conduct. The note also concurred with the court in not allowing the employer to simply interdict unidentified workers as this would have unwanted and drastic consequences. One such consequence as discussed above would be the violation of the right to strike which is guaranteed by our Constitution. The implication of the case as discussed above is, that employers must identify specific workers who are responsible for the unlawful conduct, one such mechanism is the use of CCTV cameras whose evidence must then be appropriately filed in court.

Fanelesibonge Mabaso
*LLB, LLM, PhD (UKZN)*