CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 301/20

In the matter between:

COMMERCIAL STEVEDORING AGRICULTURAL AND ALLIED WORKERS' UNION First Applicant

WORKERS IDENTIFIED IN ANNEXURE "A" TO THE APPLICANTS' FOUNDING AFFIDAVIT Second to 174th Applicants

and

OAK VALLEY ESTATES (PTY) LIMITED First Respondent

BOLAND LABOUR (PTY) LIMITED Second Respondent

Neutral citation:	*Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7
Coram:	Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgment:	Theron J (unanimous)
Heard on:	31 August 2021
Decided on:	1 March 2022
Summary:	Right to strike — final interdict — leave to appeal is granted — interdictory relief is only competent if respondents are linked to the actual or threatened unlawful conduct — appeal is upheld in part

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. Save in respect of the 23rd applicant [Mr Magaba], paragraphs 2.1 and 2.3 of the Labour Appeal Court's order are set aside.
4. There is no order as to costs in this Court.

JUDGMENT

THERON J (Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] Can an employer faced with unlawful conduct committed during a protected strike interdict employees participating in that strike without linking each employee to the unlawful conduct? The Labour Appeal Court held that it can.[1] It said that it would be "a bridge too far", in the "fraught context of an industrial relations dispute", to impose such a requirement on employers seeking interdictory relief. The applicants in this unopposed appeal – comprising the Commercial Stevedoring Agricultural and

[1] *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) (Labour Appeal Court judgment).

Allied Workers' Union (CSAAWU) and 173 striking workers, against whom the Labour Court granted a final interdict – disagree. They contend that there must be a rational factual connection between the actual or threatened unlawful conduct and the persons against whom the interdict is sought, and that in this case, no such link has been established.

Factual background

[2] On 6 May 2019, a protected strike called by the first applicant, CSAAWU, commenced at the premises of the first respondent, Oak Valley Estates (Pty) Limited (Oak Valley). Oak Valley operates the Oak Valley Farm in Grabouw in the Western Cape. The grievances which underpinned the strike action related to the alleged racially based allocation of employee housing by Oak Valley and its refusal to recognise "seasonal"[2] workers as permanent employees.

[3] The workers who participated in the strike were either employed by Oak Valley in terms of permanent contracts of employment or had seasonal employment on Oak Valley's farm through a labour broker, Boland Labour (Pty) Limited (Boland Labour), the second respondent. Initially, some 364 workers participated in the strike. By the time CSAAWU delivered its replying affidavit in the Labour Court proceedings, which are the subject of this appeal, only the second to 174th applicants remained on strike.

[4] On 2 May 2019, prior to the commencement of the strike, the Commission for Conciliation, Mediation and Arbitration (CCMA) determined Picketing Rules in terms of section 69 of the Labour Relations Act.[3] In those Rules, the CCMA Commissioner noted that previous strike action at Oak Valley Farm had resulted in violence and

[2] The applicants contend that these workers were inappropriately labelled as "seasonal" when in reality they performed work indistinguishable from Oak Valley's permanent employees. They contend that, as a result, these workers unfairly received lower pay than Oak Valley's permanent employees.

[3] 66 of 1995.

damage to property, and that it was therefore prudent to allow gathering and picketing only in a designated area.[4] The Picketing Rules also prohibited, amongst others: 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.

[5] It is common cause that the strike triggered incidents of intimidation, damage to property, and unlawful interference with Oak Valley's business operations and that there were numerous breaches of the Picketing Rules. On 15 May 2019, the Commissioner convened a meeting following CSAAWU's request for clarification of the Picketing Rules. It appears that the complaint made by CSAAWU at this stage was that the demarcated picketing area was some 800 metres from the entrance of the Oak Valley Farm which inhibited the capacity of the striking workers to dissuade customers from supporting Oak Valley. The Commissioner encouraged the parties to engage further, but the Picketing Rules were not revised.

[6] On 17 May 2019, Oak Valley's attorneys addressed a letter to CSAAWU seeking a written undertaking that its members would comply with the Picketing Rules and would cease intimidating and threatening employees, engaging in violent and dangerous conduct, and setting alight objects on Oak Valley's premises. The letter indicated that if this undertaking was not given, Oak Valley would launch urgent proceedings in the Labour Court. Also on 17 May 2019, CSAAWU's attorneys advised Oak Valley by letter that the union denied that its members had breached the Picketing Rules and explained that "the unrest presently experienced in and around your client's premises and the surrounding areas has been at the hand of the local communities over whom [CSAAWU] has no control or authority". The letter did not provide the undertaking sought by Oak Valley. Instead, it proposed that the matter be resolved urgently by way of negotiations.

[4] This being the corner of Oak Avenue and R321 Road, Grabouw, Western Cape.

[7] On the same day, Oak Valley and Boland Labour[5] served an urgent application on the applicants, which was set down for hearing on 20 May 2019.

[8] In the subsequent urgent proceedings before the Labour Court, Oak Valley sought a rule nisi interdicting CSAAWU and each of the 364 workers who had initially participated in the strike from, amongst others, unlawfully interfering with Oak Valley's operations. These 364 workers were referred to as "the Individual Respondents". Oak Valley also cited and sought an interdict against "the Unidentifiable Respondents", who it said were "people who associate themselves with the Individual Respondents in the criminal and unlawful conduct". Oak Valley argued that although they could not be individually identified, these Unidentifiable Respondents had actively associated with the conduct of the Individual Respondents. It insisted that the interdict against the Individual Respondents would have no practical effect unless the Unidentifiable Respondents were also placed under interdict.

[9] 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.

[10] On 20 May 2019, the Labour Court granted the interim relief against CSAAWU, the Individual Respondents and the Unidentified Respondents. Thereafter, some of the striking workers returned to work. When Oak Valley again approached the Labour Court, this time for final relief, it abandoned its case against 191 of the Individual Respondents who were no longer on strike. It therefore sought relief only

[5] I refer to these parties collectively as Oak Valley, save where the context makes clear that I am referring to Oak Valley Estates (Pty) Limited alone.

against the Unidentifiable Respondents, CSAAWU, and the workers who remained on strike, namely, the second to 174th applicants in this Court.

[11] In response, the applicants raised three defences: (a) the Court lacked jurisdiction regarding the alleged non-compliance with the Picketing Rules because Oak Valley did not refer a dispute regarding this alleged non-compliance in terms of either section 69(8) or 69(11) of the Labour Relations Act; (b) the interdict sought by Oak Valley was unduly broad and interfered with lawful conduct (in particular, it effectively evicted certain of the workers from their homes by restricting access to Oak Valley's property); and (c) Oak Valley had failed to link any of the unlawful conduct complained of to the respondents that it had cited (neither the 364 employees that were striking at the time nor the "unidentifiable" members of the public). The Labour Court accepted that it could not interdict the unidentifiable members of the public, but otherwise rejected the applicants' defences.

[12] In the Labour Appeal Court, the applicants were successful in relation to the first two of their defences. Thus, the only issue that is still in contention is whether paragraph 2 of the Labour Appeal Court's order ought to be set aside. It reads:

> "2. The order of the Labour Court is set aside and replaced with the following order:
>
> 2.1 The second and further respondents whose names are set out in Annexure "A1" and "B1" attached to this judgment are interdicted from participating in any unlawful or criminal acts in support or furtherance of their protected strike;
>
> 2.2 The first respondent is directed to call upon the individual respondents to desist from unlawful and/or criminal acts in support or furtherance of their protected strike.
>
> 2.3 The second to further respondents are interdicted and restrained from:
>
> (a) Intimidating, harassing, assaulting:
>
> (i) any employee of the first and/or second applicants whether such employee is employed on a temporary,

casual, fixed term, fixed purpose or permanent basis; or

(ii) any other persons involved in or connected with the conduct of the first applicant's operations or the business of the second applicant at Oak Valley Farm, Grabouw ("the farm"); and/or

(iii) any customers of, visitors to, suppliers and other business associates of the first applicant wishing to visit the farm or do business with or support the first applicant at the farm;

(b) in any way unlawfully interfering with or obstructing the normal operations of the first applicant's business at the farm and on the premises;

(c) prohibiting the individual respondents from damaging any property of the first or second applicants;

(d) prohibiting the individual respondents from setting fire or attempting to set fire to any property of the first applicant;

2.4 The first respondent is interdicted and restrained from instigating, inciting the second to further respondents in engaging, inciting or instigating in any unlawful conduct;

2.5 The first respondent is directed to call on its members, including the individual respondents to desist from unlawful conduct as set out above and comply with the agreed Picketing Rules and the terms of this order;

2.6 There is no order as to costs."[6]

[13] The Labour Appeal Court accepted the Labour Court's rejection of "the requirement of establishing a link between the individuals who were interdicted and the impugned conduct".[7] It thus upheld the final interdict on the basis that Oak Valley "was able to name certain individuals who participated in what it considered to be unlawful

[6] Labour Appeal Court judgment above n 1 at para 37.

[7] Id at paras 18 and 28.

acts together with a further group of unnamed but clearly identifiable individuals".[8] The Court reasoned that "[t]o insist in the fraught context of an industrial relations dispute that an employer can only gain relief against those employees it can specifically name from a group which was involved in unlawful activity is surely a bridge too far".[9]

[14] The applicants contend that, in this, the Labour Appeal Court erred. They say that interdictory relief is only competent if a rational factual connection can be drawn between the alleged unlawful conduct and the respondents sought to be interdicted. In this case, they say, there is "no link on the papers and the Labour Court and Labour Appeal Court did not find there was such a link". The applicants do not dispute that certain unlawful conduct took place but maintain that Oak Valley failed to establish that the conduct could be attributed to the second to 174th applicants. The applicants contend that, absent a rational factual connection between these incidents and the interdicted workers, members of the public at large "could just as easily have been responsible" for the impugned conduct. They say that this not only violates settled law on the requirements for a final interdict, but is also inimical to the rule of law, which requires that legal liability can only be imposed upon a person if a cause of action is made out against her.

Jurisdiction and leave to appeal

[15] This Court has on a number of occasions confirmed that neither its constitutional nor its extended jurisdiction will be engaged in an application for leave to appeal against the misapplication of a settled legal test.[10] It follows that the present application cannot get off the ground if the alleged error committed by the Labour Appeal Court was merely a misapplication of the settled test for final interdictory relief. In this case, however, the applicants allege much more than the misapplication of a settled legal test.

[8] Id at para 28.

[9] Id.

[10] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 49; *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 49.

They allege, instead, that the Labour Court and Labour Appeal Court got the law of interdicts wrong. We are therefore required to ascertain rather than merely apply the law. Moreover, the legal question identified requires that we determine the circumstances in which a person exercising their rights in terms of sections 17 and 23(2)(c) of the Constitution can be interdicted. Our constitutional jurisdiction is thus engaged.[11]

[16] This Court's extended jurisdiction is also engaged because we are confronted by an arguable point of law of general public importance. It is arguable, because the law reports are replete with conflicting answers to the legal question.[12] And it is of general public importance, because it bears directly on the regulation of strikes and protests, which are a commonplace occurrence in South African society. In addition, as will become apparent, the applicants have strong prospects of success. Leave to appeal is thus granted.

The requirement of a link: general principles

[17] At the outset, it is necessary to draw a distinction between *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. This case is concerned with the latter: the complaint is that the final interdict against the second to 174th applicants was not competently granted due to a failure to establish this link between each

[11] *Hotz v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC); 2017 (7) BCLR 815 (CC) (*Hotz*) at para 14.

[12] Decisions affirming the requirement of a link include *ABSA Bank Limited v South African Clothing and Textile Workers Union* 2014 JOL 31586 (KZD) (*Absa Bank v SACTWU*); *Makhado Municipality v SA Municipal Workers Union* 2006 27 ILJ 1175 (LC); 2006 JOL 17074 (LC) (*Makhado*); *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* 1999 20 ILJ 392 (LC) (*Polyoak*); *Oconbrick Manufacturing (Pty) Ltd v SA Building and Allied Workers Organization* 1998 19 ILJ 868 (LC); 1998 4 BLLR 408 (LC) (*Oconbrick); Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union* (1997) 18 ILJ 84 (D) (*Mondi Paper*); and *Ex Parte Consolidated Fine Spinners and Weavers Ltd* (1987) 8 ILJ 97 (D) (*Consolidated Fine Spinners*); and decisions rejecting the requirement of a link in certain situations include *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 2006 27 ILJ 1234 (LC); 2006 JOL 16643 (LC) (*Woolworths*) and *Great North Transport (Pty) Ltd v TGWU* 1998 6 BLLR 598 (LC) (*Great North Transport*).

applicant and the actual or threatened unlawful conduct.[13] The applicants do not fault Oak Valley for its inability to name the persons against whom it sought an interdict. With that in mind, the first question for determination is whether our law as it stands requires an applicant seeking a final interdict to establish a factual link between the respondents against whom the interdict is sought and the actual or reasonably apprehended unlawful conduct.

[18] The requirements for a final interdict are settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.[14]

[19] In a constitutional order, interdicts occupy a place of importance. In granting an interdict a court enforces "the principle of legality that obliges courts to give effect to legally recognised rights".[15] The purpose of injunctive relief is to "put an end to conduct in breach of the applicant's rights".[16] An interdict is intended to protect an applicant from the actual or threatened unlawful conduct of the person sought to be interdicted. Thus, for an interdict to be granted, it must be shown, on a balance of probabilities (taking into account the *Plascon-Evans* rule,[17] where final relief is sought on motion), that unless restrained by an interdict, the respondent will continue committing an injury against the applicant or that it is reasonably apprehended that the respondent will cause such an injury.[18] The requirement of a "reasonable apprehension of injury" was explained by the then Appellate Division in *Nordien*:

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[13] In the circumstances, the applicants' reliance on cases which merely concern the improper identification of respondents (such as *The City of Cape Town v Yawa* 2004 JDR 0074 (C); 2004 2 All SA 281 (C) (*Yawa*)) does not take the matter much further.

[14] *Setlogelo v Setlogelo* 1914 AD 221 at 227. Injury in this sense means an unlawful infringement (actual or threatened) of the applicant's clear right.

[15] *Hotz v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA); 2016 4 All SA 723 (SCA) (*Hotz SCA*) at para 39.

[16] Id at para 36.

[17] *Plascon-Evans Paint Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) at 634E-635C.

[18] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 21.

> "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 test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."[19]

[20] Plainly, if the evidence is insufficient to establish any link between the respondent and the actual or threatened injury, the apprehension of injury cannot be reasonable. Put differently, it follows that there must be *some* link between the respondent and the alleged actual or threatened injury. But this does not provide a complete answer to the present appeal. What must also be determined is whether mere participation in a strike, protest or assembly, in which there is unlawful conduct, suffices to establish the required link.

[21] If so, inevitably, innocent participants in strike or protest action will sometimes get caught in the net of an interdict. The Labour Appeal Court was satisfied that this prejudice is mitigated by the fact that the interdict would "serve only as a starting point".[20] It explained:

> "If there was a contempt application brought on the basis of conduct in breach of the order so granted, it would have to be shown with greater precision that a specified individual had the necessary mens rea to breach the order of court. In short, a bystander who had not breached the picketing rules would have nothing to fear from an order being so granted in that his or her conduct would not have been in breach of the order. No illegal act had been perpetrated by such a person. To be in contempt, it would also have to be shown that the respondent had knowledge of the order and its contents."[21]

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[19] *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) (*Nordien*) at 896G-I citing with approval *Nestor v Minister of Police* 1984 (4) SA 230 (SWA) at 244.

[20] Labour Appeal Court judgment above n 1 at para 29.

[21] Id.

[22] This, however, fails to answer the concern regarding innocent bystanders. A person is interdicted from engaging in unlawful conduct because the applicant has a reasonable apprehension that she will act unlawfully if not placed under interdict. This reasonable apprehension is based on a finding that the respondent has either acted unlawfully or threatens to act unlawfully. The innocent bystander thus suffers prejudice regardless of whether she subsequently escapes conviction in a contempt application. This prejudice lies in the imputation that she has acted unlawfully or threatened to act unlawfully. This is a serious imputation, which is borne out by extensive litigation brought by interdicted parties seeking, in essence, to clear their name.[22]

[23] In addition, it is not far-fetched to conclude that the prospect of being implicated in a contempt application – whether or not such application is likely to succeed – will have a chilling effect on the exercise of the constitutional rights to strike and protest. If mere participation in a strike or protest carries the risk of being placed under an interdict, this might well serve to deter lawful strike and protest action. Moreover, if a participant in a strike or protest is placed under an interdict, despite having conducted herself lawfully, she might well refrain from further strike action out of the justifiable fear of being swept up in contempt proceedings in the event that other persons in the crowd act in breach of the interdict.

[24] In *Mlungwana*, this Court held that the criminalisation of the assembly of more than 15 persons without notice had a "'calamitous effect' on those caught within its net" and that the "deleterious consequences of criminalisation severely discourage – and thus limit – the exercise of [the right to protest]".[23] Notably, this Court also acknowledged that the chilling effect of criminal sanction "extends beyond those who convene assemblies without notice" and that "people may be deterred from convening a

[22] See for example *Hotz* above n 11 and *Rhodes University v Student Representative Council of Rhodes University* 2016 JDR 2239; 2017 1 All SA 617 (ECG) (*Rhodes University*), the latter of which was pursued on appeal in this Court in *Ferguson v Rhodes University* [2017] ZACC 39; 2017 JDR 1768 (CC); 2018 (1) BCLR 1 (CC).

[23] *Mlungwana v S* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) at para 87.

gathering and prospective attendees might be dissuaded lest they too be deemed to have convened the gathering without notice".[24] In short, even those who intend to strike in a lawful manner might be discouraged from so doing out of fear of being deemed to have acted unlawfully if interdictory relief is granted too readily.

[25] Accordingly, while the "so what?" argument suggested by the Labour Appeal Court has intuitive appeal, it offers no answer to the contention that the indiscriminate granting of interdicts prejudices innocent parties and, potentially, has a chilling effect on the exercise of their constitutional right to strike.

The requirement of a link: case law

[26] The cases make it clear that one of the inquiries undertaken by a court asked to grant a final interdict is a careful assessment of whether the injury committed or apprehended can be attributed to the conduct of the respondent. In *Hotz SCA*, the University of Cape Town contended that the evidence established that the student respondents "had all been active participants in the protests and had not disavowed any of the conduct of the protestors".[25] In reaching its decision to grant a final interdict against the students, the Supreme Court of Appeal[26] considered the factual allegations made against each student and the grounds advanced for why the University was entitled to an interdict against them.[27] It concluded that the evidence in respect of each student disclosed that they were engaged in or parties to unlawful conduct that included the

[24] Id at para 88.

[25] *Hotz SCA* above n 15 at para 34.

[26] Whose decision, save on the issue of costs, was confirmed by this Court. See *Hotz* above n 11.

[27] See, for example, para 75 of *Hotz SCA* above n 15, where the Court concluded:

> "Given the vehemence with which the appellants expressed their complaints against the university and its management it was probable that they would have continued their protest and the actions related to it if able to do so. (The interim interdict excluded them from the campus, which precluded that.) In the absence of any undertaking from the appellants not to repeat the conduct described above, the university had a reasonable apprehension that unless an interdict was granted the students would continue with conduct of the same type in breach of its rights. Accordingly, the first two requisites for a final interdict were established."

destruction of university property.[28] By implication, it rejected the contention that mere participation in protest action, in which there is unlawful conduct, is sufficient to expose a person to interdictory relief.[29]

[27] Likewise, in *Rhodes University*, the High Court engaged in a painstaking analysis of each student's involvement in the unlawful conduct in order to determine what relief, if any, could be granted against them.[30]

[28] Is the position any different in cases where an interdict is sought against workers engaged in strike action? A conspectus of jurisprudence from the High Court and Labour Court reveals that courts have held steadfast to the requirement of a sufficient link between the respondent sought to be placed under interdict and the alleged unlawful conduct committed or apprehended, even within the context of strike action.

[29] The applicants placed considerable reliance on *Consolidated Fine Spinners* and *Mondi Paper*, both High Court decisions which confirm that an interdict ought not to be granted against a striking worker in circumstances where the worker cannot be linked to the unlawful conduct complained of. In *Consolidated Fine Spinners*, the employer was unable to identify the individual perpetrators of the alleged unlawful acts and instead sought to interdict the individual respondents on the basis that they were all employees who had not yet returned to work. The employer conceded that the respondents cited may well have included persons who were not in fact engaged in strike action or involved in any of the conduct sought to be interdicted but contended

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[28] *Hotz SCA* id at para 70.

[29] Id at para 40.

[30] *Rhodes University* above n 22 at paras 95 and 146-7. The Labour Appeal Court took the view that—

> "neither the judgment in *Hotz* nor in *Rhodes University* supports the argument raised on behalf of the appellants, namely that it was impermissible to grant an order against the various individual employees, notwithstanding that some of them may not have comported themselves illegally".

This assessment is difficult to square with the judgments in *Hotz SCA* and *Rhodes University*, which took great pains to evaluate the extent to which each of the students under interdict had engaged in unlawful conduct.

that it was practically impossible for it to identify the individual perpetrators. The High Court refused to grant the interdict on the basis that the employer had not established a cause of action against the individual respondents. Notably, the Court appeared open to counsel's suggestion that individual respondents could be interdicted on the basis of their membership of a group that had acted unlawfully.[31] Ultimately, however, it concluded on the facts before it that the employer had not laid a factual basis for inferring that the individual respondents were members of such a group, as it was clear that the only reason they were cited by the employer was that they had not returned to work. It therefore concluded that "[t]he only fact which is common to all the respondents is that they stayed away from work yesterday" and there was no proof that they were otherwise linked or that they had collectively engaged in unlawful conduct.[32]

[30] In *Mondi Paper*, the High Court held that a rule nisi against a union and certain individual employees fell to be discharged "by virtue of the failure of the applicant to identify any of the respondents and link them with the alleged acts of intimidation and sabotage".[33] Nicholson J reasoned:

> "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'."[34]

[31] The principles espoused in *Consolidated Fine Spinners* and *Mondi Paper* were endorsed in subsequent decisions of the Labour Court and High Court.[35] In *Oconbrick*, the employer asked the Labour Court to discharge a rule nisi interdict against a union

[31] *Consolidated Fine Spinners* above n 12 at 99A-B.

[32] Id at 99B-C.

[33] *Mondi Paper* above n 12 at 90H-I.

[34] Id at 93A-B.

[35] *Oconbrick* above n 12; *Absa Bank v SACTWU* above n 12; and *Makhado* above n 12.

and certain named members of the union who had embarked on a protected strike, since the relevant strike had ended, but sought an order for costs. The union resisted the prayer for costs on the basis that apart from one isolated individual, the employer had failed to identify any particular individual respondents as having engaged in unlawful conduct and the rule nisi ought therefore not to have been granted in the first place. The Labour Court accepted that the effect of the decisions in *Consolidated Fine Spinners* was that—

> "an interdict ought not to be ordered against a group of striking workers in circumstances where individuals who form part of that group make themselves guilty of conduct which is unlawful, unless and until the individual perpetrators of that conduct are identified before court. Such an interdict ought only to be granted it follows against workers so identified."[36]

[32] 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".[37] The Court found that "[t]hese were not isolated and individual unlawful acts, but conscious acts of striking workers acting in concert".[38] Pretorius AJ explained that these conclusions were based on inferences drawn from common cause facts and photographic evidence.[39]

[33] In *Makhado*, the Labour Court refused to grant a final interdict against striking workers, because the applicant's case against the striking workers "amount[ed] to a number of unsubstantiated conclusions regarding alleged threatening or intimidatory behaviour, without any particularity supplied, or perpetrator identified".[40] The Court

[36] *Oconbrick* id at para 16.

[37] Id at para 18.

[38] Id.

[39] Id at para 19.

[40] *Makhado* above n 12 at para 23.

also concluded that the workers could not be interdicted in the absence of evidence identifying them as a prospective perpetrator or accomplice in the acts of a perpetrator.[41]

[34] Perhaps the most persuasive authority for the requirement of a link is to be found in *Polyoak*, where the Labour Court emphatically held that an interdict can only be granted against a respondent when a link has been established between the respondent and the actual or threatened unlawful conduct. It held:

> "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 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."[42]

[35] Brassey AJ decried an increasingly common litigation strategy in which employers seek rule nisi interdicts against striking workers without laying a proper factual basis for that relief:

> "In support of the application, affidavits are generally filed by a member of management and by eye-witnesses to acts of misconduct. Specific acts of misconduct are normally referred to but only sometimes attributed to specific individuals. Allegations are frequently made against 'the individual respondents' as a class when it is clear from the context that the participation of every one of them is, if not inconceivable or impossible, then at least highly improbable. Hearsay evidence is commonly included for the admission of which no basis is laid in the papers, and

[41] Id at para 24.

[42] *Polyoak* above n 12 at 395H-B. This dictum has been cited with approval in subsequent decisions, including *Makhado* above n 12 at para 24.

> allegations in support of such matters as balance of convenience and claims of urgency are quite often cursory and sometimes wholly overlooked."[43]

This description, with a few alterations, aptly describes the case made out by Oak Valley in this matter.

[36] Importantly, in *Polyoak*, Brassey AJ went on to hold that, in that case, interdictory relief was competent because "[t]he allegation [was] pertinently made that [the respondents] 'either directly or through association and instigation have rendered themselves guilty of the criminal conduct' complained of'".[44]

[37] There has, however, not been unanimity in the Labour Court on this issue. The most striking outlier in this regard is *Great North Transport*, where the Labour Court, despite expressly finding that the applicant had not linked any of the 166 individual respondents to unlawful conduct, nevertheless confirmed a rule nisi interdict against them. The Court reasoned that it had "found that there [had] been a number of incidents of harassment and intimidation and that members of the first respondent were involved in them", but that there was no acceptable basis on the papers for it "to conclude that all 166 cited members [had] been thus involved and, therefore, no basis for determining which of them may not have been involved at all."[45] To resolve this "dilemma", the Court decided to take "a robust and practical approach geared to the promotion of the object of 'labour peace' and 'the effective resolution of labour disputes' as set out in section 1 of the [Labour Relations Act]".[46] The Court confirmed the rule nisi "notwithstanding the anomaly that [the Court was] not satisfied that each of the 166 individual respondents [had] been positively demonstrated to have made himself a party to the misconduct".[47] Notably, the Labour Court did not refer to *Consolidated Fine*

[43] Id at 394E-H.

[44] Id at 397A-H.

[45] *Great North Transport* above n 12 at para 30.

[46] Id at para 32.

[47] Id at para 34.

Spinners or *Mondi Paper*, and I have found no case in which the High Court or Labour Court has endorsed this decision or adopted such a robust approach.

[38] The other outlier is *Woolworths*, where it was noted that "[t]he Labour Court has always been, and probably always will be, sympathetic to employers in a situation where violence has erupted during a strike" and would "readily grant interdicts" against such behaviour.[48] While the Court accepted, in rather vague terms, that striking employees against whom an interdict is sought must be "properly identified", the Court remarked that it would have been prepared to grant interdicts against impugned employees "if just a few names were put forward" and if it were satisfied that "at least some specific individuals . . . have been shown to behave in a certain way".[49] As in *Great North Transport*, the Labour Court did not cite authority for this approach.

Conclusion on the requirement of a link

[39] Faced with this conspectus jurisprudence, it seems that, notwithstanding the "fraught context of industrial relations", our law requires that for interdictory relief to be competently granted, a factual link between an individual respondent and the actual or threatened unlawful conduct must be shown. Of course, this Court is not bound by decisions of the High Court and Labour Court, but they nonetheless provide persuasive authority. They are also consistent with the requirement that a *reasonable* apprehension of injury must be shown in order to obtain interdictory relief. Protest or strike action cannot, without more, give rise to a reasonable apprehension of injury.

[40] In addition, the line of cases detailed, with the exception of *Great North Transport* and *Woolworths*, cohere with the jurisprudence of this Court. In *Garvas*, citing the European Court of Human Rights with approval, this Court held:

[48] *Woolworths* above n 12 at para 5.

[49] Id at para 7.

> "[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."[50]

[41] Where a person lawfully exercises their right to protest, strike or assemble, but is nonetheless placed under interdict, that person's constitutionally protected rights are impermissibly denuded. It matters not that the person might subsequently escape liability in contempt proceedings.

[42] Two important principles can be distilled from this Court's jurisprudence, and this line of cases. First, mere participation in a strike, protest, or assembly, in which there is unlawful conduct, is insufficient to link the impugned respondent to the unlawful conduct in the manner required for interdictory relief to be granted. Second, the necessary link can however be established where the protesters or strikers commit the impugned unlawful conduct as a cohesive group. Whether this is established will, of course, turn on the particular facts of the case. Where, for instance, unlawful conduct during protest action is ongoing, widespread, and manifest, individual protesters or strikers will usually have to disassociate themselves from the conduct, to escape the inference that it is reasonably apprehended that they will cause injury to the applicant. By contrast, where a protest or strike is substantially peaceful, but there are isolated and sporadic instances of unlawful conduct, only those protesters who associate with those acts of unlawfulness can permissibly be placed under interdict. In addition, where a strike is beset by unlawful conduct and large numbers of protesters or strikers deliberately conceal their identities – for instance, through the wearing of masks – a Court may be entitled to more readily conclude that an applicant has a reasonable apprehension that the participants in the strike will cause it injury.

[50] *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 53. In *Mlungwana*, above n 23 at para 55, this Court, endorsing *Garvas*, added that for so long as a person exercising her constitutional right to strike "act[s] within the parameters prescribed for the exercise of this important right they will be assured of constitutional protection".

[43] Regrettably, the law reports are replete with cases involving employers besieged by unlawful conduct catalysed by strike action.[51] Judgments of the Labour Court describe a scourge of strike related misconduct[52] that represents "a blight that has come to characterise the South African industrial relations landscape".[53] They lament that the Labour Court has been "inundated by applications by employers seeking to interdict and stop unlawful conduct, violence and intimidation in the course of protected strike action".[54] At the same time, courts have warned that interdict proceedings are susceptible to abuse by employers with ulterior motives[55] and that granting relief against striking workers too readily can undermine collective action.[56] And, as the Labour Court remarked in *Polyoak*, if interdicts are granted against striking workers indiscriminately and without due process, their value as a means of upholding the rule of law is debased.[57] Indeed, as Lord Wedderburn noted, "[w]ithout scrupulous care by the judiciary – and sometimes even with it – the interlocutory labour injunction can become a great engine of oppression against workers and their unions".[58]

[44] The requirement of a link, which has, save for a few instances, been consistently applied by our courts, appropriately balances these conflicting interests. On the one

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[51] See for example: *Dis-Chem Pharmacies Limited v Malema* 2019 40 ILJ 855 at para 13; *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union* 2012 33 ILJ 998 (LC); 2012 JOL 28755 (LC) at paras 4 and 11-3; and *National Union of Food Beverages v Universal Product Network* 2016 37 ILJ 476 (LC); 2015 JOL 34910 (LC) at para 37. In *GRI Wind Steel South Africa v Association of Mineworkers and Construction Union* (2018) 39 ILJ 1045 (LC); 2018 3 BLLR 273 (LC) (*GRI Wind Steel*) the Court lamented at para 1 that the application arose—

> "in the all too common South African context of a protected strike turning violent; striking workers committing violent and unlawful acts; and the SA Police Service standing idly by, playing an observer's role without arresting a single perpetrator."

[52] *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union* (2018) 39 ILJ 609 (LC); 2019 JOL 43092 (LC) (*KPMM Road*) at paras 5-6; and *GRI Wind Steel* id at para 1.

[53] *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union* (2011) 32 ILJ 1722 (LC); 2011 JOL 26805 (LC) at para 9.

[54] *KPMM Road* above n 52 at para 5.

[55] *Midlands Pine Products (Pty) Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union* (2002) 23 ILJ 2276 (LC); 2002 12 BLLR 1200 (LC) at paras 17 and 25.

[56] See *Plascon Evans Paints (Natal) Ltd v Chemical Workers Industrial Union* (1987) 8 ILJ 605 (D) at 695.

[57] *Polyoak* above n 12 at 394A-B.

[58] Wedderburn *The Worker and the Law* 3 ed (Sweet & Maxwell Ltd, London 1986) at 686.

hand, it ensures that interdicts are not granted indiscriminately. On the other, it affords employers the required measure of protection. The requirement does not entail that an employer must lead direct evidence establishing conclusively that the interdicted employee was responsible for specific unlawful conduct. The employer could discharge its onus by putting up facts from which an inference can be drawn that it is more probable than not that the employee herself engaged in unlawful conduct or associated herself with it.

[45] As the High Court noted in *Mondi Paper*, "the production of proper proof either directly or by circumstantial evidence is not beyond the ingenuities of employers, given the modern technology that is available" to them.[59] Likewise, in *Durban University of Technology,* the High Court remarked that—

> "with the modern methods of access control, CCTV cameras, etc, there is ample opportunity for the applicant's security services to be able to identify those persons who were on the campus when the violence occurred, and steps could be taken to identify them".[60]

Does the evidence establish the required link?

[46] Where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such an order.[61] Of course, "[i]t may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting [that version] merely on the papers".[62]

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[59] *Mondi Paper* above n 12 at para 93B-C.

[60] *Durban University of Technology v Zulu* 2016 JDR 1284 (KZP) at para 27.

[61] *Plascon-Evans* above n 17 at 634E-635C.

[62] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1*;* 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA) at para 26.

[47] There are instances, like here, where this Court is required to determine factual disputes in order to appropriately dispose of the case before it.[63] In an appeal to this Court emanating from an action, the court of first instance enjoys an advantage in respect of its determination of the facts[64] as it hears oral evidence and is best placed to assess the demeanour of witnesses.[65] For this reason, in action proceedings, save in narrowly specified circumstances, we defer to the factual findings of the lower court.[66] By contrast, in motion proceedings decided on the papers, the lower courts enjoy no such advantage and we owe no deference to the lower court's factual findings. As this Court held in *Railway Commuters*:

> "Where an applicant seeks constitutional relief, and there is a dispute of fact on the papers before the Court, the identification of the facts upon which the constitutional matter should be adjudicated constitutes an issue connected with a decision on a constitutional matter which falls within this Court's jurisdiction. *In such circumstances, this Court is not bound by the facts as determined by the Supreme Court of Appeal in its application of the rule as stated in Plascon-Evans*."[67] (Emphasis added.)

To the extent that the Labour Court and Labour Appeal Court made factual findings about the connection of the respondents to the alleged unlawful conduct, we are accordingly not bound by those findings.

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[63] For an example of another such case, see *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC).

[64] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

[65] Id.

[66] Id; see also *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39.

[67] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Railway Commuters*) at para 53.

The case against the second to 174th applicants

[48] When Oak Valley initially brought its application for urgent relief, it made a case against CSAAWU, the Individual Respondents (then comprising 364 striking workers, including the second to 174th applicants) and the Unidentifiable Respondents (who were members of the public). By the time Oak Valley filed its replying affidavit, it had abandoned its case against 191 of the Identifiable Respondents. In this Court, we are asked to determine only whether a final interdict ought to have been granted against CSAAWU and the second to 174th applicants.

[49] In both its founding and replying affidavits, Oak Valley referred to video footage, photographs, and audio recordings which it claimed would provide proof that at least some of the Individual Respondents were involved in or associated with the unlawful conduct. Oak Valley indicated that it would make this evidence available to the Court but there is nothing in the Labour Court or Labour Appeal Court judgments, or in the applicants' founding affidavit in this Court, which suggests that Oak Valley made any video footage or audio recordings available to either court. In its judgment, the Labour Court refers to photographs made available by Oak Valley, but does not say what those photographs depicted and, crucially, whether Oak Valley had identified the persons in the photographs. And, despite allegedly having these incriminating materials at the ready when it filed its founding affidavit, it was only in its replying affidavit that Oak Valley eventually identified specific persons who had been captured in a handful of photographs. As for Oak Valley's claim that it had made video footage available to the applicants' attorneys, the correspondence evidencing this is not before this Court and cannot be verified.

[50] In summary, Oak Valley's case on the facts amounted to the following. At the outset, it made the general allegation in its founding affidavit that the Individual Respondents (who included the second to 174th applicants in this Court and many others) had been "involved in the unlawful conduct and criminal acts referred to hereafter more fully to varying degrees". The conduct of the Individual Respondents allegedly consisted of: preventing access to and from Oak Valley's property; causing

damage to its property and the property of other persons on Oak Valley's premises; intimidating and assaulting Oak Valley's employees; obstructing the N2 highway at Grabouw; and engaging in other unlawful acts and criminal conduct during the strike. These allegations appear to have been amplified later in the founding affidavit but are then made against "the Respondents" (comprising both the Individual and Unidentifiable Respondents). As indicated, Oak Valley made allegations in relation to specific individuals in its replying affidavit.

[51] The applicants contended that Oak Valley "had not connected any of the respondents with the conduct they [sought to be] interdicted" and they denied that the Individual Respondents had or were engaged in unlawful conduct. They noted that the contents of the respondents' affidavit "consist[ed] mainly of unsubstantiated hearsay evidence which is not true", that the deponent had "liberally generalised" and "failed to disclose what allegations in the affidavit had come from sources who wish to remain anonymous". The applicants do not deny that the unlawful conduct complained of occurred. Instead, they contend that Oak Valley had failed to identify which of the Individual Respondents (and, more specifically, which of the second to 174th applicants in this Court) were guilty of unlawful conduct.

[52] A careful analysis of the allegations of unlawful conduct made by Oak Valley bears this out. Because the order granted by the Labour Appeal Court, which is the subject of this appeal, does not cover breaches of the Picketing Rules or the conduct of members of the public in the Grabouw area more generally, I do not deal with the allegations Oak Valley has made in relation to those issues.

Arson allegedly committed by five unnamed men

[53] It was alleged that five unnamed men entered Oak Valley's farm and attempted to set fire to the veld at two separate places. Oak Valley averred that there was video footage and intimated that it would institute disciplinary proceedings against the employees involved, but inexplicably did not name these individuals in either its

founding affidavit or replying affidavit. While Oak Valley does annex photographs depicting evidence of "arson by unidentifiable strikers", the photographs show only scorched earth. This evidence fell woefully short of establishing the required link.

Damage to Oak Valley vehicles

[54] Oak Valley alleged that during the evening of 5 May 2019, one of its delivery trucks was "stoned, causing a window of the truck to shatter". Oak Valley did not provide the name of any person or ascertainable group of persons that were linked to the incident. There is, however, a more specific allegation that on 9 May 2019, a delivery truck driven by Mr Japie Nel, one of Oak Valley's employees, was "pummelled with rocks while driving on the N2 highway". In the applicants' answering affidavit, Mr Karel Swart, CSAAWU's National Organising Secretary, said that he had "no knowledge" of these events and that Oak Valley had provided "insufficient particularity for the named respondents to respond" to the allegation. Oak Valley's counter, in its replying affidavit, was that on 28 May 2019, before the applicants filed their signed affidavit, its attorneys sent the applicants' attorneys a voice recording via WhatsApp in which Mr Nel identified Zamekile Nomganga (41st applicant in this Court) as one of the persons who had thrown stones at the vehicle. This allegation was made in reply and in the absence of a confirmatory affidavit by Mr Nel or a transcript of the recording. Oak Valley indicated that the voice recording would be made available to the Court, but, as indicated above, there is nothing in the record to suggest that this was done. While in urgent proceedings, the rule that an applicant cannot make out its case in reply may sometimes be relaxed,[68] the allegations concerning Zamekile Nomganga in any event amounted to inadmissible hearsay evidence. Accordingly, Oak Valley failed to link the second to 174th applicants to the damage of its vehicles.

[68] *Polyoak* above n 12 at 395D.

Intimidation

[55] Oak Valley alleged several incidents of unlawful intimidation of its employees. It alleged that on 5 May 2019, one of its managers received calls from a farm worker advising that workers living on the Oak Valley Farm were receiving intimidating telephone calls and text messages threatening them not to work on 6 May 2019. It also alleged that on the day the strike commenced, Oak Valley's employees were again threatened to not attend work, that access to Oak Valley's premises was impeded and that employees attempting to attend work were prevented from so doing. Further acts of intimidation were alleged to have occurred on 10 May 2019. Oak Valley said that, on this day, temporary workers it had enlisted to harvest fruit were unable to report for work, because they "had been threatened with physical harm if they were to work at [Oak Valley]". It also said that one of its employees, Mr Pieter Fielies, was "forced to return home as some of the respondents threatened to damage his car if he went to work". Oak Valley further alleged that on 14 May 2019, the "[r]espondents intimidated [Oak Valley's] employees who wanted to work" and Oak Valley's security manager, Mr Johann le Roux, advised Oak Valley's manager, Mr Gerco Engelbrecht, that the "[r]espondents were intending to throw rocks at Johann le Roux's vehicle and set it alight". Finally, in a confirmatory affidavit, Mr le Roux stated that a member of a group of striking workers threatened "today you will burn", while other members of the group made gestures indicating that he would be executed.

[56] The common thread in these allegations is a total absence of specificity. In particular, Oak Valley failed to explain who had made the alleged threats, via telephone call, text message or otherwise, and failed to annex the text messages to its founding affidavit. No confirmatory affidavit was produced to confirm the allegations concerning Mr Fielies, and these allegations therefore amounted to inadmissible hearsay. As for Mr le Roux, it is inexplicable why he was unable to identify at least some of the implicated striking workers. While certain of these workers were alleged to be wearing balaclavas, Mr le Roux did not say that this was the case for all of the workers, or even those who made the threats. The allegations concerning these acts of intimidation therefore fell short of linking the applicants to the unlawful conduct.

[57] In reply, and in the face of the applicants' strenuous denial of the allegations of intimidation, Oak Valley alleged, and Mr Engelbrecht confirmed by way of a confirmatory affidavit, that he was "informed by workers who wished to work that they were not able to do so because their lives had been threatened and they were told their houses would be burnt down". It said that it could not disclose the names of the employees who had provided this information because it needed to preserve their confidentiality. It failed to explain, however, why it could not disclose the names of the persons who had allegedly made the threats and there is, in any event, no explanation why Oak Valley did not take steps to introduce the details of these allegations as evidence, in a manner that could have protected the confidentiality of the employees. Oak Valley also failed to explain whether the threats were communicated by one person or a group of persons, and whether the threats were communicated in person or via text message or phone call.

[58] Oak Valley referred, in its replying affidavit, to video footage which revealed strikers attempting to dissuade Oak Valley employees from working. However, as indicated above, there is nothing in the judgments of the Labour Court or Labour Appeal Court suggesting that this footage was indeed made available and that Oak Valley identified any of the second to 174th applicants in the footage. In its replying affidavit, Oak Valley complained that the applicants had not taken the opportunity "to scrutinise the video material which [was made] available on which certain of the individuals in question [could] be identified". This is a baffling complaint: if the persons in the footage were indeed striking workers, why did Oak Valley staff not view the footage and identify them? And if the second to 174th applicants were involved in unlawful intimidation, the employees and workers who had been intimidated would have been intimidated by co-workers known to them and Oak Valley.

Photographic evidence

[59] It appears that only a handful of photographs were made available to the Labour Court as annexures to Oak Valley's founding affidavit. A news article which included photographs was also annexed to Oak Valley's replying affidavit. Oak Valley alleged that the photographs depict picketing outside of the area designated in the Picketing Rules; the wearing of balaclavas and masks; "interference" with Oak Valley security at the entrance of the Farm; protest action in front of the police station; and damage to one of Oak Valley's delivery trucks which occurred on Ou Kaapse Weg, approximately four kilometres from the picketing area. Leaving aside the photographs which merely depict breaches of the Picketing Rules, as opposed to unlawful conduct relevant for present purposes, all that the photographs reveal is that Oak Valley's vehicle was damaged (the applicants have at no stage denied this) and that there was an unauthorised fire on its property. For this reason alone, Oak Valley's eventual attempt to link specific individuals to the photographs, made in reply, and which in any event was incomprehensible, took its case no further.

Allegation regarding Mr Nikelo Magaba

[60] In Oak Valley's founding affidavit reference is made to a 15 May 2019 news report during which Mr Nikelo Magaba (23rd applicant) "stated that if the demands of the respondents were not met, they would force their way on to the premises" and "kill". The applicants did not squarely address the allegation against Mr Magaba in their answering affidavit and did not present an affidavit from Mr Magaba.

The case against CSAAWU

[61] Oak Valley alleged in its founding affidavit in the Labour Court that on 13 May 2019, Mr Swart was arrested on charges of public violence. Oak Valley said that this was "clear proof of [CSAAWU's] active role in supporting the strikers . . . not only in their strike but also in their unlawful and criminal acts in furtherance of the strike". It also annexed an email from Mr Swart in which he advised Oak Valley that "the emotion and the frustration [was] running very high" and the strike would "spill

over in the community". Mr Swart's response was that he had met with workers in an open field about a kilometre from the Siyanyanzela Informal Settlement to provide feedback on CSAAWU's request that the municipality intervene in the strike. He said that, thereafter, he was followed and arrested by the police who said that he had "incited violence by inciting the workers not to go to work" and that he was subsequently charged with intimidation.

Conclusion on the case made out against CSAAWU and the second to 174th applicants

[62] The allegations made by Oak Valley in its founding affidavit were so vague that it was simply not possible for the applicants to respond to them and offer substantiated denials. While Oak Valley may have made allegations of specific instances of unlawful conduct, it did not allege that any person or sub-group within the striking workers was responsible for this conduct, had associated with it or even failed adequately to dissociate with it. In effect, the allegations made by Oak Valley amounted to: (a) certain unlawful conduct took place and (b) the Individual Respondents together with unidentifiable members of the public were responsible.

[63] The allegations against Mr Magaba stand on a different footing. His incendiary remarks created the reasonable apprehension that he would cause harm to Oak Valley, and linked him to the ongoing unlawful conduct. The applicants failed to squarely address Mr Magaba's alleged conduct in their answering affidavit. These allegations therefore stand uncontroverted and the interdict against him should be confirmed.

[64] Likewise, Mr Swart's arrest for intimidation linked both him and CSAAWU to the ongoing unlawful conduct or, at a minimum, to the threatened unlawful conduct. Mr Swart was both a CSAAWU leader and its mouthpiece during the strikes. He also admitted to being present at the picketing site on several occasions. His arrest occurred in the midst of ongoing common cause acts of unlawfulness on Oak Valley's property, and numerous instances of alleged intimidation of its employees. In that context, Oak Valley's fear that Mr Swart and CSAAWU would intimidate its workers, or

encourage unlawful activity, could hardly be faulted as unreasonable. Of course, we do not know the veracity of the charges against Mr Swart. But to require Oak Valley to establish this would indeed be "a bridge too far".

[65] Accordingly, save for CSAAWU and the 23rd applicant, Oak Valley failed to draw the required link between the applicants and the unlawful conduct. It therefore failed to show that it had a reasonable apprehension that it would suffer injury at the hands of these applicants if they were not placed under interdict.

[66] In these circumstances, while I understand that Oak Valley was exposed to unlawful conduct, and have sympathy in this regard, it has made exactly the sort of tenuous case which Brassey AJ said in *Polyoak* ought not to sustain a final interdict. Save in respect of Mr Magaba and CSAAWU, the ineluctable conclusion is that the appeal must succeed.

Costs

[67] The Labour Court made no order as to costs given the ongoing relationship between the parties, and I see no reason to interfere with this order. That order was also confirmed by the Labour Appeal Court but, surprisingly, in respect of the application before that Court, Oak Valley was mulcted with costs because CSAAWU succeeded in its appeal of the Labour Court's order as to the Picketing Rules. No explanation was given for this order, but it seems that the Labour Appeal Court applied the rule that costs follow the result. This part of the Labour Appeal Court's order has not been appealed and we are therefore not at large to interfere with it. I thus note only that, as this Court has held on various occasions, costs do not usually follow the result in labour matters.[69] In this Court, Oak Valley has not opposed the application, and there is therefore no compelling reason why it should be mulcted in costs.

[69] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd* [2021] ZACC 26 at para 42; *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited* [2018] ZACC 44; 2019 (3) SA 362 (CC); 2019 (3) BCLR 412 (CC) at para 60; and *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (39) ILJ 523 (CC); 2018 (6) BCLR 686 (CC) at para 24.

Conclusion

[68] The appeal substantially succeeds, except in respect of the orders granted against CSAAWU and Mr Magaba.

Order

[69] In the result, the following order is made.

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. Save in respect of the 23rd applicant [Mr Magaba], paragraphs 2.1 and 2.3 of the Labour Appeal Court's order are set aside.
4. There is no order as to costs in this Court.

For the Applicants:	S Wilson and I De Vos, instructed by the Socio-Economic Rights Institute