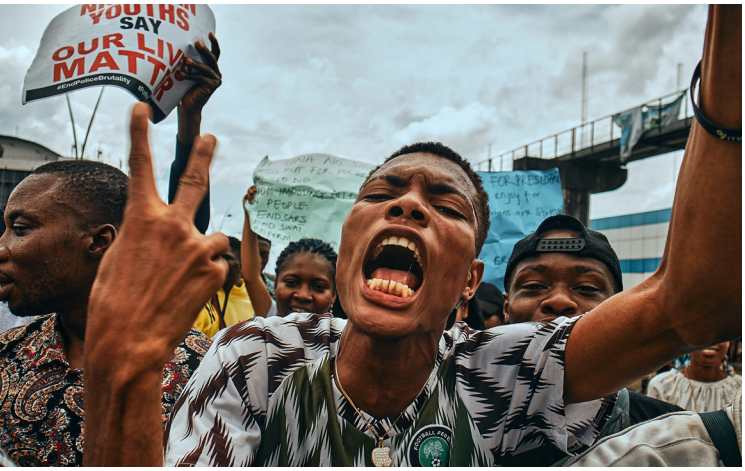
WISEUP
BITE SIZE **LAW RELATED TOPICS** FOR EVERYBODY

johanette RHEEDER incorporated
Labour, Civil, Commercial and Privacy Law Attorneys

THIS ISSUE | March 2022
Strikes and Unlawful Conduct

STRIKES AND UNLAWFUL CONDUCT – can it be separated?

Johanette Rheeder - Director: JR Attorneys Incorporated



Ukraine's invasion has had a major impact on South Africa, with experts fearing the spike in Brent crude oil prices could double the SA petrol price in the coming days. This is an alarming possibility as we are reaching strike season in South Africa, and the cost of living becoming ever more important to employees on every level. We have seen our fair share of strikes in the last months and the unfortunate violent acts that sometimes accompany the strike. Employers are lining up on the steps of the courts to interdict strikes, with violence, intimidation and damage, unfortunately being part of our collective bargaining regime in South Africa.

In *Setlogelo v Setlogelo*[1], Lord De Villiers CJ stated the requirements for final interdicts as follows:

> *"So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well known, a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."*

The requirements for an interim interdict were refined in *Webster v Mitchell*[2] where it was stated:

> *(a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable harm if the interim relief is not granted and the ultimate is eventually granted; (c) the balance of convenience should favour granting of an interim interdict; (d) the applicant has other satisfactory remedy.*

In *National Treasury v Opposition to Urban Tolling Alliance*[3] the test for granting the interim interdict was put as follows:

> *"It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."*

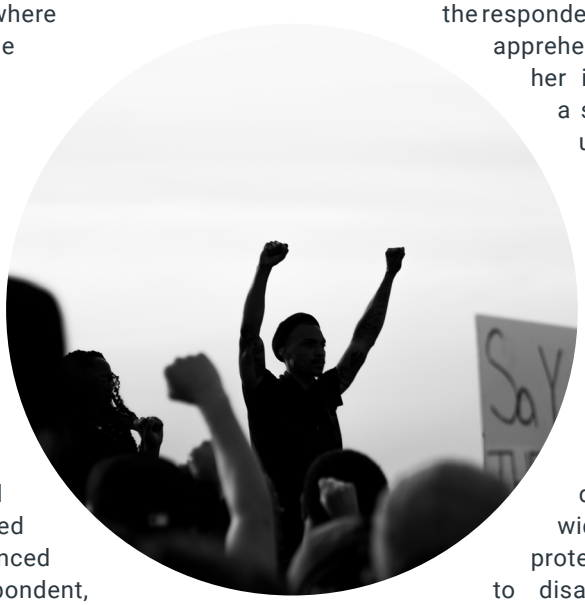
In the *City of Tshwane Metropolitan Municipality vs Afriforum and Another*[4]

> *"It was held that before an interim interdict may be granted, one of the most crucial requirements to*

1 Setlogelo v Setlogelo 1914 AD 221 at 227
2 1948(1) SA 1186 (W) at page 1186 – 1187
3 2012 (6) SA 223 (CC) at para 45
4 2016 (9) BCLR 1133 (CC) para 55

meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already".

Again, strike action was marbled with violence and intimidation and went through the mill of the labour court and labour appeal court to interdict the strike, in an attempt to bring an end to the unlawful conduct in the Oak Valley case before the Constitutional Court. On 1 March 2022 the Constitutional Court dealt with the requirements for interdictory relief against a group of respondents in circumstances where an applicant fails to link each of the various respondents to the alleged actual or threatened unlawful conduct(violence damage and intimidation,), in the matter of *Commercial Stevendoring Agricultural and Allied Workers Union and others v Oak Valley Estates (Pty ltd and Another CCT 301/20* [5] .



Facts of the case:

On 6 May 2019, a protected strike called by the Commercial Stevedoring Agricultural and Allied Workers' Union (CSAAWU), commenced at the premises of the first respondent, Oak Valley Estates (Pty) Limited (Oak Valley). 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 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 which had been determined by the CCMA.

In the Labour Appeal Court, the LAC held 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*". It accordingly confirmed the interdictory relief against the applicants in amended form. In their unopposed appeal to the Constitutional Court, the applicants contended that a respondent cannot be competently placed under interdict if she is not linked to the actual or threatened unlawful conduct and that, in this case, no such link had been established.

In a unanimous judgment CC held that the High Court and Labour Court had, with few exceptions, consistently adhered to the requirement that interdictory relief can only be competently granted if a respondent can be ***rationally linked*** to the unlawful conduct. This requirement flows from the fact an applicant for a final interdict must show a ***reasonable apprehension of injury***. Without such a link between the unlawful conduct and the respondent, the applicant cannot reasonably apprehend that the respondent will cause her injury. The mere participation in a strike or protest in which there is unlawful conduct is insufficient to adequately link a respondent to that conduct.

The CC considered the following:

(1) Where the strikers or protesters committed the unlawful conduct as a cohesive group. The Court explained that where 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 they acted in concert with those who engaged in acts of unlawfulness.

(2) The second instance can be where a protest or strike is substantially peaceful, but there are isolated and sporadic instances of unlawful conduct, only those protesters who associate with the acts of unlawfulness can permissibly be placed under interdict. The Court held that this requirement, which is the extant common law position, appropriately balances the competing rights and interests of employers and employees.

On the facts, the employer simply had not been adequately linked to the alleged acts of unlawfulness, all the respondent employees. Oak Valley inexplicably failed to identify which of the employees were responsible for or associated with the unlawful conduct, in circumstances where it indicated that it knew the identities of certain of the perpetrators.

[5] https://www.concourt.org.za/index.php/judgement/458-commercial-stevedoring-agricultural-and-allied-workers-union-and-others-v-oak-valley-estates-pty-limited-and-another-cct-301-20

Where one employee had been specifically named in Oak Valley's founding affidavit as having threatened violence against Oak Valley, and this allegation was not challenged by her, the Court held that this sufficed to draw the required link between the 23rd applicant and the unlawful conduct.

Likewise, CSAAWU's National Organising Secretary had been arrested for alleged intimidation during the course of the strike. Since he was a CSAAWU leader and its mouthpiece during the strikes, and his arrest occurred in the midst of common cause acts of unlawfulness, the Court held that Oak Valley's apprehension that CSAAWU would cause it harm could not be faulted as unreasonable.

Accordingly, save in respect of CSAAWU and the 23rd applicant, the appeal was upheld, and the order of the Labour Appeal Court set aside.

It appears from the CC that the "leap from participation to unlawful conduct" cannot be made as a leap of "faith" and the employer will have to provide sufficient evidence to link the striker or protestors to the conduct to show a ***reasonable apprehension of harm***.

Employers faced with strike action, especially where unlawful acts are committed, must collect evidence of the conduct through video recordings or photographs and meticulous recording of events. Affidavits should be collected as much as possible, once witnesses are identified. Unions should be involved on a continuous basis and evidence must be recorded. Warnings, consultations and continuous attempts to prevent the conduct should be employed.

www.jrattorneys.co.za