

EMPLOYMENT LAW

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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A probable inference: Employers to link individual employees to unlawful conduct in a protected strike

On 1 March 2022, the Constitutional Court (CC) handed down judgment on an appeal of a Labour Appeal Court (LAC) decision pertaining to the granting of a final interdict of a protected strike in the matter of *Commercial Stevedoring Agricultural and Allied Workers' Union v Oak Valley Estates (Pty) Ltd and Another* 2022 ZACC 7.

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A probable inference: Employers to link individual employees to unlawful conduct in a protected strike

On 1 March 2022, the Constitutional Court (CC) handed down judgment on an appeal of a Labour Appeal Court (LAC) decision pertaining to the granting of a final interdict of a protected strike in the matter of *Commercial Stevedoring Agricultural and Allied Workers' Union v Oak Valley Estates (Pty) Ltd and Another* 2022 ZACC 7.

This matter relates to a protected strike called by the Commercial Stevedoring Agricultural and Allied Workers Union in May 2019. It is common cause that there were numerous incidences of intimidation, damage to property and unlawful interference in the employer's business, as well as numerous breaches of the picketing rules that had been determined by the Commission for Conciliation, Mediation and Arbitration.

These incidences necessitated the company approaching the Labour Court (LC) for an interim order, in respect of 364 of its employees and various "unidentifiable" respondents, who the company said had associated themselves with the unlawful conduct. The order was granted. On the return day, the company abandoned the relief it sought against a number of employees who were no longer on strike, but it sought a final order against the "unidentifiable"

respondents, the union and the 174 employees that were persisting with their strike action. The union raised several defences in opposition to the final order, which included, but were not limited to, the fact that the company had failed to link any of the unlawful conduct complained of to the remaining respondents. The LC accepted that it could not interdict the "unidentifiable" respondents, but rejected all the other defences.

At the LAC, the union succeeded with its defence that the LC lacked jurisdiction regarding non-compliance with the picketing rules as the company did not refer the dispute in terms of either section 69(8) or 69(11) of the LRA; and that the interdict sought by the company was overly broad. However, the LAC held that "[t]o insist in the freight 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", and confirmed the interdictory relief in an amended form.

The matter was then taken on appeal to the CC, by the union, and was unopposed by the company. The CC ruled that it had jurisdiction to hear the matter by virtue of the constitutional implications for individual rights contained in sections 17 and 23(2)(c) of the Constitution and the general public importance of the issues raised.

The legal requirements for a final interdict are plain, however, whether the applicant is required to demonstrate a link, as mentioned above, in the case of an interdict pertaining to a strike or protest action, has not been unequivocally settled by our courts.

A probable inference: Employers to link individual employees to unlawful conduct in a protected strike

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The CC has now laid down, in no uncertain terms, that to prevent undue prejudice to innocent bystanders and to promote and protect the right to protest, an employer will need to demonstrate that based on the facts of the circumstances, an inference may be drawn that it is more probable than not that each individual employee cited in the interdict, engaged in the unlawful conduct or associated with it.

The CC engaged with an array of High Court and LC decisions to reach this conclusion, with the case of *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* being the most persuasive.

The CC further confirmed that should protestors or strikers engage in widespread ongoing unlawful conduct as a cohesive group, they shall bear the onus of disassociating themselves from the unlawful conduct to escape being implicated.

**HEDDA SCHENSEMA,
TSHEPISO RASETLOLA AND
GABBY SCHAFFER**

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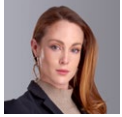


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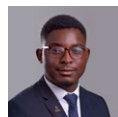
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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