



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 1281/2021

In the matter between:

**MINISTER OF POLICE
APPELLANT**

FIRST

NATIONAL COMMISSIONER OF THE SAPS

SECOND APPELLANT

PROVINCIAL COMMISSIONER OF THE SAPS

THIRD APPELLANT

and

UMBHABA ESTATES (PTY) LTD & 53 OTHERS

RESPONDENTS

Neutral Citation: *Minister of Police & 2 Others v Umbhaba Estates (Pty) Ltd & 53 Others* (1281/2021) [2023] ZASCA 85 (1 June 2023)

Coram: VAN DER MERWE, MOLEMELA, NICHOLLS, MOTHLE JJA and
NHLANGULELA AJA

Heard: 28 February 2023

Delivered: 1 June 2023

Summary: Delict – whether the response by members of the South African Police Services to violence that occurred at private property during a strike action was wrongful and negligent.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Mtati J, sitting as court of first instance):

- 1 Save for the alteration of the order as set out in para 2 below, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.
- 2 Paragraph 1 of the order of the high court is altered to read as follows:
'It is declared that during the period from 5 July 2007 to 24 July 2007 the Defendants wrongfully and negligently failed to prevent striking employees from causing damage to the First Plaintiff at its Kiepersol farm and from injuring the Sixth Plaintiff'.

JUDGMENT

Molemela JA (Van der Merwe, Nicholls and Mothle JJA and Nhlangulela AJA concurring):

[1] This appeal concerns the conduct of members of the South African Police Service (the police) in response to criminal acts committed by employees during the course of industrial action that took place at the premises of a private company known as Umbhaba Estates (Pty) Ltd (Umbhaba). The latter and some of its employees had, in an action instituted at the Gauteng Division of the High Court, Pretoria (the high court) claimed damages against the Minister of Safety and Security, the responsible Minister for the South African Police Service ('the Minister of Police'), the National Commissioner of the South African Police Service ('the National Commissioner') and the Provincial Commissioner of Police Service ('the Provincial Commissioner'). They were cited in their representative capacities as the first, second and third defendants respectively. The trial proceeded before Mtati J.

Although the second paragraph of the judgment of the high court records that the merits and quantum were separated by agreement between the parties in terms of Rule 33(4) of the Uniform Rules of Court, and that the matter before the high court only proceeded in respect of the issue of liability, paragraph 5 thereof recorded that the issue of causation was also deferred for later consideration and thus did not form part of that judgment.

[2] At the stage when the summons was issued, there were 53 plaintiffs. However, at the commencement of the trial, some plaintiffs had withdrawn their claims against the defendants. Others did not participate in the proceedings because their whereabouts were unknown, as a result of which their attorneys of record withdrew for lack of instructions. Following an unsuccessful application for a postponement, the claims in respect of 48 plaintiffs were dismissed. Ultimately, the trial in the high court proceeded only in respect of Umbhaba, (which was cited as the first plaintiff) and the sixth plaintiff Ms Alida Mkhabela (Ms Mkhabela), together referred to as the respondents. The high court upheld their claims. Following an unsuccessful application for leave to appeal launched in the high court, the Minister of Police, National Commissioner, and the Provincial Commissioner (together referred to as the appellants) approached this Court seeking leave to appeal against the judgment of the high court. This appeal is with the leave of this Court.

[3] The background facts are detailed in the judgment of the high court. Umbhaba was a large agricultural enterprise operating out of three geographical locations situated at Hazyview, Hectorspruit and Kiepersol. Its core business was the growing, ripening, distribution and selling of bananas. It was one of the leading banana producers in South Africa and also produced other subtropical produce such as avocados, litchis and macadamia nuts. It was common cause that the production of subtropical fruit is labour and management intensive, and the produce perishable. The Kiepersol farm, situated in the Kiepersol area, Mpumalanga, was one of the locations where the aforesaid products were produced.

[4] On 5 July 2007 and for the remainder of the month of July there was a prolonged strike in one of Umbhaba's operations. The strike was centred at the

Kiepersol farm situated in Hazyview. Kiepersol farm was bought by Umbhaba approximately six months before the commencement of the strike and its workforce consisted of about 100 employees. However, Umbhaba's total workforce consisted of between 1500 and 2500 employees. The reason for the strike action at Kiepersol appears to have been the fact that the conditions of employment offered by Umbhaba to the employees who worked at Kiepersol were less favourable than those that had been offered by its previous owner. Umbhaba required the employees to work on Saturdays when they had previously not done so. The strike commenced on 5 July 2007 and was characterised by various acts of intimidation, assaults, malicious damage to property, vandalism, theft and looting. In addition, the particulars of claim asserted that the striking employees blockaded the farm and yard, which housed the offices, workshop, banana ripening facilities, pack-house area, storage area for vehicles and other stores on the farm and thus made it impossible for the non-striking employees to perform their day-to-day duties. Banana trees were hacked down, fresh produce was stolen and numerous orchards on the farm were set on fire.

[5] Umbhaba asserted that since the commencement of the strike, its management team had repeatedly and consistently asked the police for assistance in order to prevent the striking employees from continuing to commit unlawful acts, to ensure compliance with the court orders and to generally maintain public order. However, the appellants took no action, alternatively failed to take adequate action to prevent the unlawful actions of the striking employees. In their plea, the appellants admitted the various requests for assistance but asserted that: reasonable steps were taken by inter alia negotiating with the employees on numerous occasions; adequate action was taken to restore order as and when requested; and arrests were effected to restore order.

[6] During the hearing, an inspection *in loco* was conducted and the layout of the farm was placed on record. The farm had two gates, one on the western side of the farm, and another on the south side. The gate on the south side provided access to the main farming operations, including the administration building where meetings and training sessions were held. On the southern side of the main farm operations

there were banana plantations with a gravel path leading to the banana plantations. There was a big building that was used by farm employees for purposes of packaging the produce, with toilets situated in close proximity thereto. The buildings were cordoned off by a wall. There was a gate on the extreme south-east side of the cordoned wall, which was referred to as the main yard gate. Some of the farm employees lived in the houses situated within the premises of the farm. Some houses were occupied by striking employees, while others were occupied by those who were not participating in the strike. Access to the houses on the eastern side of the building could be obtained through the main yard gate, alternatively through the gravel path between the southern cordon wall and the banana plantations.

[7] The undisputed timeline pertaining to the events that unfolded during the strike lies at the heart of this appeal. The events were narrated by Mr Dean Plath (Mr Plath), a senior farm manager and director, who had worked for Umbhaba for 22 years. His evidence pertaining to how events unfolded was largely uncontested. Most of it was borne out by video footage and photographs that were admitted into evidence. He stated that on 29 June 2007, he received a notice of an intended strike that was scheduled to commence on 5 July 2007. After receipt of the notice, he went to the police station to report the matter. The reason why he hastened to the police station was that after Umbhaba had taken over the farm operations, they had had some resistance from some of the employees who had worked for the erstwhile owner. He therefore informed the police that he suspected that the strike would be violent.

[8] The tone was set on the first day of the strike, 5 July 2007. Mr Plath arrived at the farm at approximately 06h30. Upon his arrival, he noted that striking workers had congregated at the main entrance of Kiepersol farm. Some of them were armed with sticks. They hurled stones at several people, whipped non-striking workers with sjamboks as an intimidatory tactic to get them to join the strike, and hit one of the manager's vehicles with rods and knobkerries. With the help of other employees, Mr Plath closed the gates to prevent the striking employees from entering the buildings. He then called the police to inform them about the situation. Two police officers arrived at 07h30. The striking mob calmed down when the police arrived.

[9] The police informed Mr Plath that the union officials wanted to speak with him and his father, Mr Roy Plath, who also had business interests in Umbhaba. Mr Plath and his father agreed to talk with the union officials. One of the non-striking employees was instructed to make a video recording of that interaction and the scene in general. Mr Plath was almost hit with a brick as he and his father were approaching the union officials. During that conversation, Mr Plath complained about the violence and intimidation that was taking place. The union official remarked that that 'was alright'. The video footage was shown in court during the proceedings. In the footage, one of the union officials in question was observed trying to violently grab the camera from the person who was recording at the scene and threatening to break it. The police left soon after the discussions with the union representatives had taken place. However, the striking employees carried on with acts of criminality throughout the day. The padlocks used to lock one of the gates were vandalised by the side gate and the main gate was blockaded by the striking employees, thus preventing access into and out of the farm premises.

[10] On 6 July 2007, despite knowing that the strike was ongoing, there was no police presence at the main entrance. On that morning, a security guard employed by Umbhaba, Mr Munyai, was assaulted with a steel rod and sustained several injuries. Fewer non-striking employees were prepared to work due to the ongoing intimidation. Managers could not access the farm as all the gates were barricaded. Furthermore, rocks were thrown at them. A farm gate far from the picketing area was blockaded with the branches of burnt avocado trees. A mob of striking employees brandishing knobkerries rushed at the management team of Umbhaba and some threw stones at them. Some striking employees threw stones at and damaged one of the houses on the farm property. Others attempted to break down the gate. Orchards were vandalised, and banana trees were ripped out and destroyed. The police were called but Captain Mbambo telephonically stated that the police needed a court interdict, that Umbhaba had to deal with their own labour problem and that it was not the police's responsibility to look after Umbhaba's property. Mr Plath then phoned the station commissioner of Hazyview police station, Superintendent Nobela to inform her about the situation.

[11] Shortly thereafter, the striking mob threatened to kill the workers inside the farm premises. When management opened the south gate to enable the non-striking workers to escape, the striking workers immediately went to that gate and started hurling stones at the management of Umbhaba. Several gunshots were fired in an attempt to keep the mob away. This worked only briefly. Captain Mbambo was again contacted telephonically but no meaningful response was received. Mr Plath eventually phoned the station commissioner, superintendent Nobela. In the intervening period, some of the striking workers entered the yard and smashed the windscreen of the earth moving equipment (TLB). Other striking employees used irrigation equipment to start a bonfire at the south yard gate. The striking employees carried on hurling stones and barricading some of the gates. This prompted Mr Plath's father to fire some warning shots into the air. The crowd retreated for a few minutes and then advanced again. Mr Plath called the police several times. When the police arrived, the violence ceased. The management team of Umbhaba was able to extinguish the fire. Management pleaded with the police to maintain a presence given that the violence escalated whenever they were not present. The police stated that it was not their responsibility to get involved in labour disputes. Mr Plath explained to both Captain Mbambo and Superintendent Nobela that Umbhaba was already dealing with the labour dispute through its labour consultants and was merely asking the police to be present so as 'to keep and maintain law and order and protect the people' and also to prevent damage. The police left 20 minutes later.-

[12] When the police were called again, Captain Mbambo encouraged Mr Plath and members of Umbhaba's management to have a discussion with the striking workers, indicating that the dispute was labour-related and the police did not have capacity to deal with it. The management of Umbhaba informed him that they could not have discussions with the striking employees as they feared for their safety. Captain Mbambo proposed that Umbhaba obtain an interdict and indicated that once it had been obtained, the police would be able to act. As the weekend was approaching and Umbhaba was concerned about the safety of the non-striking employees, it employed the services of an armed security company. Since the striking employees considered both Saturday and Sunday not to be their working

days, they suspended the strike action for both Saturday and Sunday 7 and 8 July 2007.

[13] On Monday 9 July 2007 the strike resumed, with the striking employees blockading the gates and making fires close to the gates. Umbhaba management called Captain Mbambo three times on his mobile phone, but he did not show up. Umbhaba decided to approach the Labour Court for an interdict in which the trade union known as BBBWU was cited as the first respondent, one of its officials was cited as the second respondent, and several employees mentioned in an Annexure were cited as the third respondent. The order was granted on the same day and read as follows:

- '2.1. The 1st, 2nd and 3rd Respondents are interdicted from picketing at the main entrance of the Kiepersol Farm and compelled to picket a distance of 500 meters in a northerly direction (away from the R40 towards Kiepersol) from the main entrance of the Kiepersol Farm on the opposite side of the road.
- 2.2. The 1st, 2nd and 3rd Respondents are interdicted from entering the Kiepersol Farm during working hours except for purposes of using allocated toilet facilities.
- 2.3. The residing employees leaving their living area in the morning and returning in the evening may only do so through the main entrance gate. The employees must pass the southern side of the walled yard area using only the farm road between the yard and the banana orchard.
- ...
- 2.5. The 1st, 2nd and 3rd Respondents are interdicted from interfering with the Applicant's employees and its operations.
- ...
- 2.8. The 1st, 2nd and 3rd Respondents are interdicted from destroying and damaging Applicant's assets and property.'

Once the order had been issued, it was handed to Captain Mbambo, who was with Captain Khoza at that stage. They assured Mr Plath that the contents of the court order had been read out to the striking employees and indicated that the union officials had given an undertaking that the court order would be complied with.

[14] Despite that undertaking, the striking employees continued burning tyres at the gate and later started hurling stones. The police were summoned and later

arrived at the scene. Even with police present, some striking employees tried to attack the management team of Umbhaba and were hurling stones into the yard, hitting the roof and corrugated iron sheeted walls. The police called for back-up and later arrested four of the striking employees. On 10 July 2007 the striking employees were back at the main entrance of the farm in contravention of the court order issued the previous day. The striking employees threw a petrol bomb across the fence and set stacks of wooden pallets ablaze. Five striking employees were arrested. Given that the criminal acts were not abating, Umbhaba again approached the Labour Court with the intention of bringing an application for contempt of court against the striking employees, and a further order was issued in terms of which the previous orders had to be served on the Provincial and National Commissioners. The order read as follows:

'2. Member[s] of the South African Police are hereby authorised to arrest such of the individual Respondents who breach the order of Court of 9th July 2007 and to bring such arrested individuals before the Magistrates Court in the area of jurisdiction of Nelspruit in order to enable the public prosecutor to decide on the charges of criminal conduct to be preferred against such individuals.

3. In particular members of the South African Police are authorized to arrest such of the individual Respondents who *continue* to intimidate the employees of the Applicant and/or who *continue* to damage the property of the Applicant.' (Own emphasis.)

[15] On 11 July 2007 at about 09h30 the management team of Umbhaba had a meeting with the station commissioner, Superintendent Nobela and Captain Khoza at the police station and brought the contents of the contempt order to their attention. They also laid charges against 41 individuals. The police only arrived at Kiepersol farm at 13h00. Mr Plath indicated that about 100 of the striking employees resided on the farm. Although the striking employees were still breaching the court order granted on 9 July 2007 in that they continued to barricade gates, burn tyres, and gathered at the gates in breach of the picketing distance directed by the court order. The police failed to enforce the court order and left soon after their arrival. The striking employees damaged the mobile toilets that were placed at the gates for their use and insisted on using the toilets within the premises of the farm. The striking

employees looted about four hundred kilograms of fruit, which they dropped along the road.

[16] At about 16h00, the striking employees hurled a petrol bomb into the yard, which set a tractor alight. The employees carried on with the criminal acts. A truck carrying a load of farm produce was prevented from leaving the farm. Various calls were made to the police requesting their intervention, but the police turned a blind eye and failed to effect any arrests. On 12 July 2007 about 5 petrol bombs were thrown into the farm premises but armed guards managed to extinguish the fires. On 13 July 2007, Umbhaba again approached the Labour Court, which issued the following order:

- '1. A copy of the order of this Court dated 10 July 2007 is to be served on the Commissioner of Police, Mpumalanga as well as on the National Commissioner, South African Police Services.
2. Mr Stanley Thulane Nobena, the Chairman of the 1st Respondent BBBWU who is in attendance at Court when this order [is] issued is hereby directed to inform the individual Respondents to desist from all criminal and wrongful conduct.'

[17] Despite the service of the order and further acts of violence, there were no arrests. On 16 July 2007, a mob of striking employees prevented another truck from leaving the farm with farm produce. The gate was blockaded and the management team of Umbhaba were unable to leave the farm. The police were summoned, but when they arrived, they failed to effect any arrests. They encouraged the marauding striking workers to move away instead. On 17 July 2007, the police moved the striking employees to a place further from the main gate so that they could comply with the 500m picketing distance indicated in the court order. On the same day, Umbhaba issued a notice to all the striking employees, indicating that a disciplinary hearing would be held on 18 July 2007. The union's response was that none of its members would attend a disciplinary hearing as the strike was still ongoing. On 18 July 2007, none of the striking employees showed up at Kiepersol farm. The disciplinary hearing proceeded in their absence. The union later sent a letter indicating that it would embark on a protest march the next day. The police were duly informed.

[18] On 19 July 2007, Umbhaba informed the police that the employees had gathered at a particular spot about 1km from Kipersol. Captain Mbambo and other police members arrived at the farm at 11h00. Although the striking employees had gathered at the gate, the police did not effect any arrests in relation to their non-compliance with the 500m picketing distance requirement. At 12h45, the police managed to persuade the striking employees to return to the permitted picketing spot. They however demanded that Mr Plath should go to where they were gathered so as to fetch a memorandum of their demands. He indicated that he could not do so as the crowd had thrown stones at him earlier.

[19] On 20 July 2007, the striking employees were informed that the outcome of their disciplinary hearing was a dismissal. On 24 July 2007, workers from one of Umbhaba's farms in Hazyview were ferried to Kiepersol so that they could resume farming operations there. Ms Mkhabela was one of them. At that stage, a group of people had gathered some distance from the main entrance. At about 08h45, three employees were busy painting the gate that had been damaged by fire when they were intimidated by the striking employees. These striking workers instructed the three employees to stop working and threatened to injure them if they did not stop. Mr Plath phoned Superintendent Nobela and informed her about those threats.

[20] At about 11h00 this group stormed into the farm through both gates and assaulted the employees who were busy working at the farm. Ms Mkhabela testified that she was busy packing fruit in the pack-house when she got a call of nature. She left the pack-house for the toilet. While she was there, she heard a commotion outside. She then realised that the striking employees were inside and outside the packing house chasing after the employees who were working in the packhouse. Some of them were armed with sjamboks and knobkerries. As she was exiting the toilet she was hit with a bottle on her leg and sustained an open wound. Armed with knobkerries, the striking employees surrounded her and tried to force her to join the strike. She told them that she could not do so because she was injured. At that specific time, Detective Inspector Mkhonto and two other police officers were about eight metres from her but did nothing to assist her. With Mr Plath's assistance, she was later taken for medical attention. Despite the presence of the police at that

stage, no arrests were made. Instead, the members of the police merely had a discussion with the instigators.

[21] On 25 July 2007, the police attended the farm to inspect the extent of the damage that had occurred as a result of the strike. While on that inspection, they came across a striking employee who was trespassing on the farm. The police refused to arrest him, indicating that they were there to do an inspection and not to effect any arrests. What is clear from the evidence set out in the preceding paragraphs is that Umbhaba made numerous pleas for police intervention, with inadequate responses from the police. On the occasions that the police officers did visit the scene, they were there for only a few minutes and then left. Their response was not fit for purpose and thus fell short of the required standards. Notwithstanding the crimes already committed on the first day of the strike, there was no monitoring of the situation. The police therefore failed to *prevent* ongoing damage. Intimidation of non-striking employees and malicious damage to property became the order of the day. Despite three court orders being issued by the Labour Court, the arrests were few and far between. The blatant non-compliance with court orders was captured in a video footage. The same footage served to show the inadequacy of the police response.

[22] Two police officers testified on behalf of the appellants. Captain Makwakwa's evidence was that when he and his colleagues arrived at Kiepersol farm on 5 July 2007, they found about 50 striking employees singing and protesting outside the farm premises. He did not see any burning tyres. Two union officials approached him and requested that he accompany them to the locked gate as they wanted to talk with the striking employees' employer. He obliged. There was a discussion between the union officials and the employer, but they could not reach an agreement. Captain Makwakwa accompanied the two union officials back to the striking employees. The union officials had a discussion with the striking employees, after which everybody dispersed. He and his colleagues patrolled the area and since no one was injured and no property had been damaged, he and his colleagues left the farm. He did not go to Kiepersol farm again until 1 August 2007.

[23] The second witness who testified on behalf of the appellants was Brigadier Makatane, who was a police officer attached to Legal Services and stationed as Area Head: Legal Services in Nelspruit. His duties were to advise the police in relation to policies and legislation. He testified that Superintendent Nobela had called him and requested him to assist with the interpretation of the contents of the court order. He drove to Hazyview on 12 July 2007 and later accompanied Superintendent Nobela and Superintendent Mtsweni to Kiepersol farm for purposes of explaining the contents of a court order to the striking employees. Although two court orders had already been issued at that stage, he testified that he was only required to explain the one that specified that the striking employees were permitted to picket 500m north of the main entrance, ie the court order issued on 9 July 2007.

[24] He stated that on arrival at the Kiepersol farm, there were about twenty to thirty striking employees who were singing and chanting near the farm gate. He read out the court order to the striking employees in the presence of his colleagues and a farm manager. Having noted that the striking employees were not observing the stipulation to picket 500m from the main entrance, he and his colleagues measured a distance of 500m from the main entrance and informed the striking employees that it was the designated spot for their picket. Once the striking employees had moved to that spot, he left. He stated that he never visited the farm again, as he was never informed of any further acts of non-compliance. He stated that he could not recall going back to the farm on 17 July 2007. Notably, he conceded under cross-examination that the police would have been expected to monitor the striking employees daily to ensure that they remained at the designated picketing spot (ie 500m from the main entrance). The police would also have been expected to comply with court orders. These concessions reveal how reasonable police officers faced with a similar situation that had prevailed at Kiepersol farm would have reacted.

[25] The appellants contend that the high court, in reaching a conclusion that the police's conduct was wrongful and negligent, made errors of fact and law. The biggest challenge for the appellants in this appeal is that the high court's credibility findings, which were in favour of Umbhaha, have not been attacked by the appellants. It is trite that courts will not tamper lightly with the trial court's credibility

findings.¹ However, in *Minister of Safety and Security and Others v Craig and Others*,² this Court held that even though courts of appeal are slow to disturb findings of credibility made by trial courts, courts of appeal generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts and upon probabilities. Although counsel for the appellants conceded in the appeal hearing that there was no basis for interfering with the factual and credibility findings of the high court, I will nevertheless scrutinise the evidence adduced before the high court, including the video evidence, when traversing the delictual elements pertaining to the respondents' claims.

[26] The appellants' pleaded case was that they took adequate steps to prevent the violence during the strike. It was never their case that they had insufficient resources to restore order. The question is whether the elements of delict that were not deferred for later adjudication were proven. It is to that aspect that I now turn. It is of significance that the appellants did not dispute that they had a legal duty to maintain public order and could not, in any event, deny the duty upon them, given the provisions of s 205(3) of the Constitution, which provides that '[t]he objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'. Furthermore, s 13 of the South African Police Service Act 68 of 1995 (the Police Act) assigns specific duties to members of the police. It provides that:

'(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.'

It is clear from these provisions that public policy and the Constitution placed a legal duty on the police to, among others, prevent the commission of crime and maintain public order at Kiepersol farm for the duration of the strike action, especially after the provisions of the interdict were brought to their attention.

¹ *R v Dlumayo and Another* 1948 (2) SA 677 (A) at 705 – 706; *S v De Jager and Another* 1965 (2) SA 616 (A) at 629 A-B; *Santam Bpk v Biddulph* [2004] 2 All SA 23 (SCA); 2004 (5) SA 586 para 5.

² *Minister of Safety and Security and others v Craig and Others* [2009] ZASCA 97; [2010] 1 All SA 126 (SCA); 2011 (1) SACR 469 (SCA).

[27] As regards the element of wrongfulness, the following dictum of the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*³ is apposite as it aptly summarises the approach our law takes to the wrongfulness enquiry:

‘ . . . [T]he wrongfulness enquiry focuses on—

“the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.”

Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.’

[28] In *Mashongwa v PRASA (Mashongwa)*,⁴ the Constitutional Court quoted the same dictum and expounded that the principle laid down in that judgment holds true regardless of whether one is dealing with positive conduct such as an assault or negative conduct, where there is a pre-existing duty, such as the failure to protect a vulnerable person from harm. The court said:

‘To conclude that an incident of omission, particularly in relation to public law duties, is wrongful and impute delictual liability is an exacting exercise that requires a reflection on a number of important factors. Some of them are: whether the operating statute provides for a delictual claim for damages; whether the legislation’s scheme is primarily about protecting individuals or advancing public good; whether the public power conferred is discretionary; whether the imposition of liability for damages is likely to have a “chilling effect” on the performance of government functions; whether the loss was foreseeable

An omission will be regarded as wrongful when it also “evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful”. This leads to a legal policy question that must of necessity be answered with reference to the norms and values, embedded in our Constitution, which apply to the South African society.’

It should be mentioned that in *MTO Forestry (Pty) Ltd v Swart NO*,⁵ this Court held that foreseeability of harm should no longer be taken into account in respect of the determination of wrongfulness and that its role is confined to the rubrics of negligence and causation. As I have said, causation does not arise in the appeal.

³ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2014 (12) BCLR 1397 (CC); 2015 (1) SA 1 (CC) paras 21 – 22.

⁴ *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) para 22.

⁵ *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) para 18.

[29] It is noteworthy that the appellants did not plead nor assert a lack of resources as a reason for their failure to take adequate steps. There can be no doubt that the legal convictions of the community require that an unjustified failure to fulfil the objects of the police service be regarded as wrongful. Having considered the harm-causing conduct, I am of the view that the high court's finding that '...the conduct of [SAPS] viewed against the legal and public policy considerations, constitutional norms and values was unacceptable' and accordingly wrongful, was correct. I turn now to the element of negligence.

[30] The proper approach for establishing the existence or otherwise of negligence was laid down in *Kruger v Coetzee*.⁶ This test rests on two legs, namely, reasonable foreseeability and the reasonable preventability of harm or damage.⁷ It is important to emphasise that what is required is foresight of the reasonable possibility of harm ensuing; the foresight of a mere possibility of harm does not suffice.⁸ What is or is not reasonably foreseeable in a particular case is a fact bound enquiry that entails the consideration of all the circumstances of the case.⁹ While the precise manner in which the harm occurs need not be foreseeable, the general occurrence must be reasonably foreseeable.¹⁰ Notably, in the plea filed on behalf of the appellants, it was not disputed that harm was reasonably foreseeable and in fact preventable. The case pleaded was that adequate steps were taken to restore order, and that order was in fact restored.

[31] As regards the foreseeability leg of the negligence enquiry, the video footage presented before the high court militated against the notion of a relatively calm industrial action situation which the appellants' two witnesses tried to portray. It is evident from the video footage that from the inception of the strike, the situation was volatile. The footage depicting one of the union officials trying to grab the video camera from the hand of the person who was recording what was unfolding at the

⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A); [1966] 2 All SA 490 (A).

⁷ *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) para 6.

⁸ *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) para 8.

⁹ *Pitzer v Eskom* [2012] ZASCA 44 para 24.

¹⁰ *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* [2000] 1 All SA 128 (A) para 22.

scene attests to this volatility. The photographs also depicted a large group of people armed with sticks and knobkerries.

[32] Moreover, the police who were present at the entrance of Kiepersol farm on 5 July 2007 knew that the discussion between Umbhaba's management and the union officials had not yielded any agreement regarding the way forward. Given that the striking workers were armed, it was thus reasonably foreseeable that violence could again erupt. Notwithstanding that standoff, the police opted to leave the scene and thereafter did not conduct any patrols so as to monitor the situation. Violence indeed erupted on 6 July 2007 and the police were summoned. The situation immediately improved when the police arrived at the scene. It was thus clear that the presence of the police served as a deterrent. The need for the presence of the police for maintaining public order was self-evident, but there was inadequate intervention from the police.

[33] There was a brief reprieve during the weekend, but the violence resumed on Monday 9 July 2007, culminating in Umbhaba seeking an interdict. On the days that followed, violence continued unabated, with little intervention from the police. It was not explained why the police did not patrol the area at least intermittently so as to monitor any acts of violence. Unquestionably, that is the bare minimum that reasonable police officers would have done.

[34] Once the interdict was issued and brought to their attention, reasonable police officers with public order policing experience similar to that of the police officers who made an attendance at Kiepersol farm would have realised that the strike at Kiepersol farm had become violent and would have heeded the court order that enjoined the striking workers to picket 500m from the main entrance. In compliance with the same court order, they would have ensured that the workers who entered the farm were those who intended using its ablution facilities; instead, a large crowd armed with sticks was allowed to congregate at the main entrance of the farm. Police officers in the position of those who made an attendance at the Kiepersol farm during the strike would have reasonably foreseen that a gathering of armed striking workers

at the main entrance of Kiepersol farm was likely to lead to acts of violence and cause harm to persons and property.

[35] To prevent harm from eventuating, reasonable police officers in the position of those who were contacted by Umbhaba in relation to the strike would have patrolled the area regularly to ensure that the striking employees were restricted to a spot 500m from the main entrance and would have heightened monitoring once the contempt order was issued. On their own version, the police did not do so; they only made an appearance after numerous calls had been made to them, requesting their intervention. The numerous calls made by the management of Umbhaba pleading for the police's intervention in the days that followed are borne out by the itemised billing invoice issued by the cellular phone service provider to Umbhaba. The police were called 12 times on 9 July 2007, 13 times on 10 July 2007, 11 times on 11 July 2007, nine times on 12 July 2007, twice on 14 July 2007, four times on 16 July 2007, twice on 18 July 2007, seven times on 19 July 2007, twice on 20 July 2007, four times on 23 July 2007 and three times on 24 July 2007.

[36] Furthermore, as correctly observed by the high court, it was not disputed that the station commissioner was notified about the impending strike a day before its commencement. This gave the police sufficient opportunity to plan its intervention ahead of the strike. Neither the station commissioner nor Captain Mbambo testified on behalf of the appellants to shed more light on why swifter action was not taken by the police to prevent the damage that was caused to Umbhaba's property throughout the duration of the strike.¹¹ As their failure to take the witness stand was not explained, it can be accepted that they did not have a reasonable explanation to offer. The two witnesses who testified were not helpful to the appellants' case, as they could not explain why police officers were not dispatched to Kiepersol farm to monitor the situation, maintain public order and to prevent the escalation of violence and destruction of property that ensued. Both of them alluded to the importance of monitoring a strike.

¹¹ *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

[37] It is clear from the appellant's own version that the response of the police was inadequate. Had the police patrolled and monitored the situation after the issuance of the court order of 9 July 2007, they would have observed that the striking employees were not complying with the requirement to picket 500m from the main entrance. It has already been shown that harm was reasonably foreseeable. There can be no doubt that police intervention would have prevented further damage. Due to their inadequate response, Umbhaha had to go back to the Labour Court to obtain a contempt order. Despite the issuance of the contempt order on 10 July 2007, the police were still reluctant to effect arrests on those who were not complying with the order and who were identified as the instigators in the striking mob. Their arrest would undoubtedly have had a deterrent effect and prevented further damage to property from ensuing. The court orders were not enforced. Access to the main entrance remained blocked, fires were made and Umbhaha's property was damaged.

[38] As regards Ms Mkhabela, she was steadfast in her testimony that the police were already present on the premises of the farm when the commotion at the packhouse started. It must be borne in mind that the police were summoned and were informed about the intimidation of non-striking employees more than an hour before the commotion started. The police attended the scene but made no arrests despite intimidation having been reported. Those involved in storming the packhouse should have been arrested immediately. Swift police action would have stopped the perpetrators in their tracks before Ms Mkhabela sustained her injury. The fact that the acts of criminality were being committed within the premises of private property did not excuse the police inaction. The appellants' contention that the police cannot be expected to perform duties of security guards are misplaced.

[39] According to Ms Mkhabela, the police were facing in her direction when a bottle was thrown at her. From her version, it is clear that the armed crowd that was chasing after the employees who had been working in the pack-house, were committing criminal offences, yet the three police officers who were already at the scene failed to intervene. Ms Mkhabela's evidence about the failure of the police to intervene is borne out by the video recording. Given that one of these police officers

who failed to respond was named (Detective Inspector Mkhonto), it would have been expected of the appellants to call him and his colleagues as witnesses for purposes of refuting Ms Mkhabela's evidence. This was not done. Since the reason for not calling them was not disclosed, it can be accepted that this was because their version would not refute Ms Mkhabela's evidence and the video footage. Had these three police officers intervened timeously, Ms Mkhabela would, in all probability, not have been injured. Put differently, their timeous intervention would have prevented the harm from ensuing.

[40] In *Mashongwa*, the Constitutional Court stated as follows:

'The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the State must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on the available resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.'¹²

Given that in this matter a lack of resources was neither pleaded nor asserted as the reason for the police's inadequate response, it simply cannot be assumed that it would have been difficult, for one reason or the other, to dispatch the police to the farm.

[41] As correctly pointed out by the high court, the circumstances of this case are distinguishable to those in *Blue Mountain Productions CC and Another v Minister of Police*,¹³ where there was a widespread labour arrest in the Witzenburg Valley, with protestors damaging property, looting and torching orchards. In this matter, the violence was confined to Kiepersol farm; no other farm belonging to Umbhaha, or any other farm, was affected. The police members therefore did not face the same challenges of inadequate resources as those faced by their colleagues in

¹² *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) para 41.

¹³ *Blue Mountain Productions CC and Another v Minister of Police (Blue Mountain Productions)* [2020] 4 All SA 401 (WCC).

Witzenburg.¹⁴ They were indifferent as they either ignored pleas for help or arrived at the scene but left soon thereafter. It bears emphasising that the police had a constitutional duty to intervene, even before the first court order was obtained. That the police continued to drag their feet despite the issuance of three court orders related to the same incident is most deplorable. Based on the totality of evidence adduced, the high court's conclusion that the attitude of the police in managing the strike was merely reactionary and exhibited a 'don't care' attitude cannot be faulted.

[42] It is clear that the steps taken by the police from 5 July 2007 up to 24 July 2007 fell far short of the steps that reasonable police officers would have taken to comply with the court orders that were issued by the Labour Court, and in general compliance with the constitutional imperatives set out in s 203 of the Constitution. By the time the police took decisive action on 17 July 2023, the proverbial horses had already bolted, as extensive damage had already been caused to Umbhaha's property. Both the foreseeability and preventability legs of the negligence test set out in *Kruger v Coetzee* have been satisfied. It follows that negligence in respect of Umbhaha was established.

[43] As already mentioned, the parties opted to defer the causation element for later adjudication. The high court was alive to that aspect and alluded to that in its judgment. That being the case, the high court did not assess whether there was any causal link between the negligence and the damage that allegedly ensued. Nevertheless, the order made by the high court is ambiguous and imprecise in this regard and should be clarified in the interest of the parties.

[44] As regards costs, it is common cause that due to practicalities, the parties could not present video evidence in court. Consequently, both parties agreed to conduct the trial at the offices of attorneys Adams & Adams, where the video conference facilities would cost nothing. The appellants are aggrieved by the costs

¹⁴ In *Blue Mountain Productions* (see para 35 – 36), the SAPS's argued that the local police station was small and had to service a vast area. SAPS argued that: the protest action was a well-orchestrated campaign led by several trade unions; many areas were affected by the protests; two police stations were attacked and burnt down in the area; the protestors were transported to different locations in order to protest; women and children had to be evacuated at short notice; and the police prioritised issues of 'life and limb' as compared to issues of protecting private property.

order in relation to the costs of the stenographer. Of significance is that these costs were included in the draft order that was presented to the high court by agreement between the parties. No objections were raised against that order. Before us it was agreed that the costs in question were minimal. It is trite that the granting of a costs order by a trial court involves the exercise of a discretion. There is nothing to suggest that the high court did not exercise its discretion judicially. There is therefore no reason to tamper with its costs order.

[45] Having considered all the circumstances of this case, the following order is granted:

- 1 Save for the alteration of the order as set out in para 2 below, the appeal is dismissed with costs, including costs occasioned by the employment of two counsel.
- 2 Paragraph 1 of the order of the high court is altered to read as follows:
'It is declared that during the period from 5 July 2007 to 24 July 2007 the Defendants wrongfully and negligently failed to prevent striking employees from causing damage to the First Plaintiff at its Kiepersol farm and from injuring the Sixth Plaintiff'.

M B MOLEMELA
JUDGE OF APPEAL

Appearances

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State Attorney, Bloemfontein

For respondent: S G Maritz with I Mwanawina
Instructed by: Adams & Adams, Pretoria
Honey Attorneys, Bloemfontein.