

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D622/2002  
REPORTABLE

In the matter between:

MONDI LIMITED - MONDI KRAFT DIVISION

Applicant

and

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD  
AND ALLIED WORKERS UNION (CEPPWAWU)

First Respondent

INDIVIDUAL EMPLOYEES AS SET OUT IN  
ANNEXURE (“A”) ATTACHED TO THE  
STATEMENT OF CASE

Second and further  
Respondents

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## JUDGMENT

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FRANCIS J

*Introduction*

1. The applicant is Mondi Kraft, a division of Mondi Limited, which carries on business as manufacturers of pulp and paper. It operates a Mill, situated at Granpham Highway, Felixton.
2. The first respondent is the Chemical, Paper, Printing, Wood and Allied Workers Union, a registered trade union (the union). The second to fifteen respondents are former employees of the applicant.

3. The applicant instituted a claim for delictual damages against the first respondent in an amount of R673 855.00 which it allegedly suffered as a result of the unlawful switching off, of its machinery on 19 and 20 July 2001. The amount claimed is for loss of production. It was contended by the applicant that the second to further respondents were at all times acting in the furtherance of the strike, acted on behalf of the union and its members and with the support and encouragement of the relevant office bearers of the union at the Mill, being the members of the shop stewards' council. It was alleged that the union is vicariously liable for the unlawful acts of the union group.
4. The union opposed the claim and denied that the second to further respondents were its members. It pleaded that the reference to the group of employees who allegedly committed misconduct as the "union group" was misleading, since whatever misconduct occurred was not supported or encouraged by the union. It was denied that the office bearers of the union either were possessed of the capacity to support or encourage unlawful action by strikers on behalf of the union and/or did act in such a manner.
5. The respondents raised three preliminary issues. The first is whether upon a proper interpretation of the provisions of section 67 of the Labour Relations Act 66 of 1995 ("the Act"), civil proceedings can be brought against a party which is not guilty of criminal misconduct and whether the safeguards provided in the Act do not apply.
6. The second preliminary issue is that the nature of the applicant's claim is one for delictual damages. There is nothing in the Act that confers jurisdiction to this Court to delictual damages if it is in the context of a protected strike.
7. The third preliminary issue is that if the group of employees were acting in furtherance of

the strike on behalf of the union and its members and with the support and encouragement of the relevant office bearers of the union at the Mill, being the members of the shop stewards council, it did not follow that the union was vicariously liable. The applicant could not go beyond what was pleaded in paragraph 16 of its statement of claim.

8. Both parties applied for the separation of liability from quantum, which order was granted.

*The evidence led*

9. The applicant called five witnesses during these proceedings. They were Wayne Allan McNair - the senior human resources officer; Richard Derrick Wass - the production manager; Daniel Pieter van Niekerk - the mechanical engineer; Anton Le Roux - the mill manager; Olaf Nagel - the human resources manager and Johan Hendrik Hoolman - a senior asset protection officer in 2001.
10. The applicant's version can be summarised as follows. The employees embarked upon a protected strike that commenced on 16 July 2001. It was a national strike about wage demands. There were non striking employees. The production at the Mill continued despite the strike. The applicant made use of skeleton staff. There were two 12 hours' shifts. Picketing and dancing took place in front of the main gate two to three times a day. The striking employees had placards and were dancing and chanting. On 19 July 2001 the applicant's management was handed a letter that had four demands. The applicant considered the four demands and responded to it in a letter dated 19 July 2001. It stated that demands were new and that it was willing to meet with them. The meeting would be held within 72 hours of cessation of the strike should they continue to wish to hold it. During the course of the morning between 10h30 and 11h00 a group of

employees in civilian clothes were seen running through the Mill. They switched off the machinery and prevented the non striking employees from continuing with their work. Only one employee Mthembu was identified. Two employees chased a woman away who was working in the laboratory and asked her why she was working. One Wayne Ponnadu was taken hostage. McNair telephoned a shop steward called TV Mhlongo and enquired about Ponnadu's whereabouts. He initially did not know where he was but said that he was with them and was free to go. McNair told T V Mhlongo about the machines that were switched off and said that there would be legal consequences. T V Mhlongo replied that it was management's fault and this was their response to management who did not listen to their demands. (However during cross examination McNair was uncertain about who had said this). He went to fetch Ponnadu who was in the canteen. He found Patrick Zulu, T V Mhlongo, Ponnadu and another person. Zulu was a shop steward of the union and its chairperson. Zulu told McNair that Ponnadu was free to go and they turned towards him and said that Ponnadu had a message for the management team. They asked him if he remembered what the message was and he said he did and then left. Ponnadu looked nervous, agitated and was upset. They went to the clocking station and came across a group of employees who were outside the clocking station. Ponnadu spoke with them and said that these guys were serious. He said that if the work continued, things would become more problematic. The employees became agitated and turned to McNair and asked what guarantees the applicant could give to them about their safety. They were not prepared to continue to work until they were given guarantees that their lives and that of their families would not be endangered. McNair told them that he could ensure their safety inside the applicant's premises but not outside. They were emotional and he told them that it was better if they dispersed and management who would give them a response. Management met to arrange contingency plans. Ponnadu went to the meeting and told them what had happened. The witnesses all gave different versions about the message that Ponnadu gave. Ponnadu did not say that the message

came from the union or that he was taken hostage. Ponnadu was not prepared to give a statement and said that he feared for his life. The applicant prepared for an interdict and statements were taken. The applicant could give no such guarantees and a decision was taken not to commence with production. The Mill did not commence operations on 19 July 2001 as there was production in the lines that needed to be cleared out. The applicant was out of production for 36 hours. An interdict was not sought since the strike came to an end on 20 July 2001 and production commenced that evening. Various employees were disciplined as a result of the incident. The union did not express any remorse or failed to dissociate itself from the conduct of the employees. The running through the Mill was not discussed with Mhlongo or the union. Nobody said that it was an official message from the union.

11. The union called Thema John Buthelezi as its only witness. He testified that he is the official legal officer of the union at a national level since 2002. The union has a constitution. Shop stewards deal with it at plant level. In terms of clause 15 of the constitution, shop stewards are elected. This happens every 3 years. The locals are the first line of authority in the union. They form a shop steward council which comprises of a number of shop stewards organised by the union for that region. They form a committee in a plant. The seven shop stewards at the Mill go out of the premises to join with other shop stewards of a plant and they comprise the local shop steward's council. It is charged with co-ordination of the union activities at a local level. The shop stewards of a plant so mandated by its constituency go to the local shop steward's council to get resolutions accepted and if it is accepted it becomes the union's decision once it has been ratified. If the local council cannot entertain the resolution and it needs to be taken further it is referred to the regional shop steward council where it is then decided. If they fail to do so and act not in compliance with the objectives of the union, the resolution can be discarded. Officials who are popularly known as organisers are full time employed

personnel of the union and are paid by the union. They are paid to look after the interest of the members and are deployed to companies, sectors at regional or national level. The office bearers of the union are people who are elected in terms of its constitution like the chairperson, deputy chairperson, secretary, treasurer and additional members. On the local level it is shop stewards and in the regions, the office bearers are shop stewards and one organiser who is a full time secretary. Office bearers are shop stewards. Shop stewards are not paid by the union but by companies

12. During cross examination Buthelezi admitted that he was asked to look for certain documentation including the letter of demand sent to Gama. He did not know whether there was a response to the letter of demand since no response was found in the records. Gama was in hospital for some time. All the documentation that related to the matter was handed to the union's attorneys to hand to the applicant. He had requested the Empangeni union office to courier the file to him in Johannesburg. Gama is temporarily disabled. The union investigated the incident but did not take any steps against its members. There were disciplinary hearings set up by the applicant and the union represented its members. The matters were taken to arbitration and later on review. The union must defend its members and in doing so does not mean that it is covering up misconduct that is unbecoming. The matter was still in court and once a decision was given, would any steps be taken against the said members. The union accepted that there was an alleged allegation of misconduct on 19 July. Once there is a finding by this court, will the union take steps to ensure that they will not damage the image of the union. Any case that is referred to the union, is assessed to see if the case should go to court. If the assessment is not good, they would inform the said employee but in this case they did their homework. They spoke to the local shop stewards about this case and to the individuals. This was with T V Mhlongo and others. They wanted to know what had happened to defend them. They did not want to find out who did what on the day in question. The applicant did not

go to the union to tell them what had happened and that it needed their assistance. They were given a letter of demand. They did not respond to the letter of demand which was addressed to Gama and the applicant took appropriate action. They were not given a platform to express remorse and had to respond to the applicant's claim. If the applicant had sought remorse, the union would have given it. The applicant threw up a challenge. The matter was for damages which was then given to their attorneys. At the time of the letter of demand, the matter was an internal one and there was no request from them to go to their attorneys. There was room for a discussion at that stage and when it was about damages they referred it to their attorneys. They have a relationship with the applicant and they had discussed many issues. The union's actions do not indicate that they approved what had happened. They will not agree to anything that will dent their image or that cause harm to the union. They do not accept the employees misconduct. The union will only approach its members once this court has ruled on the claim. The union's action does not suggest that it condoned the misconduct that took place. Their members know what happened on 19 July and what the Union is faced with. The union has a duty and misconduct will not be accepted. In the event of a strike such misconduct will not be accepted. Action will be taken against those members who caused it. He did not know a shop steward called Sipho Mthembu who was dismissed. The only person that he knew personally was T V Mhlongo and Gama who would know Sipho Mthembu. The employees who were dismissed and later reinstated denied that they participated in the events of the day. The matter was taken on review and 4 of the 11 dismissed employees were reinstated.

*Analysis of the evidence and arguments raised*

13. The first issue that need to be determined is whether this Court has jurisdiction to entertain a delictual claim arising out of a protected strike. The union contended that the High Court is the only court that can entertain a delictual claim. The applicant contended

that the Labour Court does have jurisdiction to entertain a delictual claim.

14. This Court derives its jurisdiction from the provisions of the Labour Relations Act and other related Statutes like the Basic Conditions of Employment Act, the Employment Equity Act, the Skills Development Act etc. This Court is the equivalent of a High Court but is a specialist Court. It has inherent powers and standing only in relation to matters under its jurisdiction. The Labour Court it is a creature of Statute and derives its jurisdiction from Statutes.

15. Section 151 of the Act provides as follows:

*“(1) The Labour Court is hereby established as a court of law and equity.  
(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.”*

16. Section 157(1) and (2) of the Act provides that:

*“(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.  
(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -  
(a) employment and from labour relations;  
(b) in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;  
(c) the application of any law for the administration of which the Minister is responsible.”*

17. Section 158 (1)(a)(iv) of the Act provides that the Labour Court may make an appropriate order, including an award of compensation in any circumstances contemplated by this



Act. This section deals with the relief that the Labour Court can grant in any case that comes before it. It does not deal with jurisdiction.

18. Section 67 deals with strikes or lock out in compliance with the Act. It provides that:

- “(2) A person does not commit a delict or a breach of contract by taking part in*
- (a) a protected strike or a protected lock-out; or*
  - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.*
- (6) Civil legal proceedings may not be instituted against any person for -*
- (a) participating in a protected strike or a protected lock-out; or*
  - (b) any conduct in contemplating or in furtherance of a protected strike or a protected lock-out.*
- (8) The provisions of subsection (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that is an offence.”*

19. Section 68 of the Act deals with strikes or lock-outs not in compliance with this Act. It provides that:

- “(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction -*
- (a) to grant an interdict or order to restrain -*
    - (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or*
    - (ii) .....*
    - (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, having regard -*
      - (i) whether -*
        - (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;*

(bb) ..... ”

20. In the matter of *Lomati Mill Barbeton v Paper Printing Wood and Allied Workers Union & others*(1997)

18 ILJ 178 (LC) Landman J said at 183 from paragraphs A - D:

*“If in the course of a protected strike the employees ‘breach’ the strike rules and this breach is ‘conduct in contemplation or furtherance’ of a protected strike it will not, in terms of 67(2) of the LRA, constitute a breach of contract. This Court will in any event be precluded from hearing any such complaint as the aggrieved party is not entitled to institute civil legal proceedings. See s 67(6) of the LRA”.*

At 184 paragraphs D - H it was held that:

*“Any act in contemplation or in furtherance of a strike or lock-out which constitutes a criminal offence is unprotected and amenable to the jurisdiction of the civil court. Which Court has jurisdiction? One cannot say it is the Labour Court with reference to s 68 because that section deals with acts in contemplation or furtherance of an unprotected strike. Here we have to do with a protected strike and certain attendant activity which constitutes a criminal offence.*

*In my view, if a broad and purposive view is taken of the LRA and the jurisdiction conferred on this court then it is apparent that this court has jurisdiction over all strikes and lock-outs and conduct in contemplation or in furtherance of a protected strike or lock-out which constitute both a criminal offence and a delict. It may be that the Labour Court does not have exclusive jurisdiction in this regard. It is unnecessary for me to express an opinion on this but it is in my view clear that the Labour Court has jurisdiction in this matter.*

21. *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood & Allied Workers Union & Others* (1997)

18 ILJ 84 (D) the following was said at page 90 at paragraphs D - H:

*“The actions of the offending employees fall within the purview of the powers of the Labour Court. The incidents relating to the intimidation of non-striking employees at home are still examples of improper demonstration in support of a strike. They are, moreover, necessary and incidental to a resolution of that dispute. In any event the*

*notion that the Supreme Court should have jurisdiction for that limited purpose and that the other incidents which constitute improper picketing pure and simple should be referred to the Labour Court offends against the court's duty to avoid a proliferation and multiplicity of court proceedings with their attendant costs.*

*I am therefore not in agreement with Mr Winchester when he submits that the nature of the dispute arises out of an ordinary delict unconnected with the objects and remedies available in the Act. The Act does not, of course, give the Labour Court jurisdiction to every dispute involving workers near a factory. The Supreme Court might willingly give its attention to a wronged wife, who is assaulted by her husband outside the factory gates, when asking for maintenance. That would be a delictual action which did not concern the Labour Court. In casu the whole background, the presence of a trade union, the recognition agreement, the wage bargaining dispute, which was incidentally referred to the CCMA, the notice of intention to strike and dispute compliance with s 64 of the Act all clearly stamp the jurisprudential milieu as belonging to the machinery of the Act and the jurisdiction of the Labour Court. I am therefore of the view that the Supreme Court had no jurisdiction to grant the original rule. Accordingly the rule was discharged with costs”.*

22. In *Sappi Fine Papers (Pty) Ltd Adams Mill v Paper Printing Wood & Allied Workers Union & others*(1998) 19 ILJ 246 (SE) Neppen J said at page 259 at paragraphs C - F that:

*“The conclusion to which I have come is that the Labour Court has jurisdiction in respect of all matters with which it may deal in terms of the Act, and that the only instances in which the Labour Court has concurrent jurisdiction with the High Court are those referred to in s 157(2) of the Act. I am therefore in general agreement with the conclusion reached by Nicholson J in the Mondi case regarding the exclusive jurisdiction of the Labour, but I express no opinion as to whether the Labour Court has jurisdiction to grant relief in order to prevent the intimidation of a non-striking employee at his home. For purposes of this application it is unnecessary to do so. For the sake of completeness I must make it clear that the conclusion I have reached regarding the*

*exclusive jurisdiction of the Labour Court is in respect of civil matters only. The ordinary jurisdiction of the criminal courts is not affected in any way.*

*.... The relief sought by the applicant in the present case is relief which could have been granted by the Labour Court ..... As the Labour Court has jurisdiction to grant such relief, the High Court has no jurisdiction to do so, and it therefore had no jurisdiction to make the order which was made on 24 April 1997.”*

23. In *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W), the High Court was called upon to decide whether it has jurisdiction to adjudicate the plaintiff's claims or whether the claims fell to be adjudicated by the Labour Court. The question had been raised by way of an exception to the plaintiff's particulars of claim. The plaintiff's claim against the defendant was for the recovery of damages alleged to have been sustained by it when its premises were vandalised by members of the defendant in the course of a demonstration. The demonstration was alleged to have occurred during July 1998 while the defendant, a trade union which represents employees of the plaintiff, was engaged in negotiations with the plaintiff with regard to terms and conditions of employment. The defendant had allegedly invited its members to participate in the protest action and organized buses to ferry members to the plaintiff's premises and then to have caused such members to demonstrate at the plaintiff's premises in order to express their rejection of the wage offer made by the plaintiff and to exert pressure upon the plaintiff to accede to the defendant's demands. The protest action was alleged to have been organized and implemented by the defendant contrary to the provisions of the Act. The plaintiff was alleged to have suffered damages in the sum of R6 189 521.00. The question for determination was whether the claims under consideration were matters that were to be determined by the Labour Court in terms of the Act or any other law, for if they were, then the jurisdiction of the High Court was excluded by section 157(1). The court found that reliance was also sought to be placed on ss 67 and 68 which deal with strikes and section 69 which deals with picketing. The court found that the facts alleged in the particulars of claim did not support the contention that the conduct of the defendant's members constituted a strike, nor that it constituted a picket in support of a strike or in opposition to a lock-out. For that reason alone, the court found that those sections had no application.

24. In *Walters v Transitional Local Council of Port Elizabeth & another* (2000) 21 ILJ 2723 (LC) Landman J without referring to his earlier judgment in *Lomati Mill Barbeton* to Du Toit et al Labour Relations Law (3 ed) at 614 where it is stated that the Labour Court has no jurisdiction to determine delictual claims. He thought that the author was correct but did not deem it necessary to decide this issue.
25. Civil claims in protected strikes are not permissible unless the act in contemplation or in furtherance of a strike or a lock-out is an offence. This Court has jurisdiction to hear a claim in a strike that does not comply with the provisions of the Act. An employer may in a protected strike recover the monetary value of the payment of kind made at the request of the employee by way of civil proceedings instituted in the Labour Court. It can interdict any unlawful acts committed in a protected strike. It is clear from the provisions of section 68 of the Act that the Labour Court has exclusive jurisdiction to order payment of just and equitable compensation for any loss attributable to the strike. This is a statutory claim that an employer has in terms of section 68 of the Act.
26. I fail to understand why the Labour Court is permitted to hear delictual claims in unprotected strikes but where the strike is protected and the act complained of is an offence, it does not have the requisite jurisdiction. The Labour Court is a superior court of similar status as the High Court. In terms of section 77(3) of the Basic Conditions of Employment Act, it has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
27. I am of the view that if the Legislature had deemed it necessary to oust the jurisdiction of the Labour Court in delictual claims in a protected strike it would have done so in clear terms.
- If a broad and purposive view is taken of the Act and the jurisdiction conferred on this

Court then it is apparent that this Court has jurisdiction over all strikes and lock-outs and conduct in contemplation or in furtherance of a protected strike or lock-out which constitute both a criminal offence and a delict.

28. The conclusion that I arrive at is that the Labour Court does have jurisdiction to adjudicate delictual claims arising out labour disputes as envisaged in section 67 of the Act.
29. The next issue is whether liability in delict has been established on the admissible evidence. The applicant's claim lies in delict under the *lex aquilia*. applicant is relying on the doctrine of vicarious liability. It must prove a wrongful act, i.e. one accompanied by *culpa* or *dolus* committed by someone other than the first respondent but for which the respondent is legally liable, which caused the applicant to suffer a loss that is foreseeable. Furthermore the applicant must show that the act upon which it relies for its claim for damages is an offence. The applicant must prove that the first respondent is a *socius criminis* or is guilty on the doctrine of common purpose. It cannot be held liable if its alleged act of authorising its agent was not criminal. All the elements that give rise to liability must pass muster under section 67(8) before the protection under section 67(6) is lost. The intention is to enable any person who suffered loss as a result of conduct that constituted a criminal offence to claim damages from the criminal himself or herself and since there cannot be vicariously liability for a crime the entity that would otherwise be vicariously liable continues to enjoy immunity unless the criminal act was authorised in which even the person would himself be guilty of a crime and in any event directly liable.
30. It is common cause that a protected strike commenced on 16 July 2001 to 20 July 2001. Some of the union members participated in the strike and were not working. The Mill continued to operate on a skeleton staff. The striking employees were allocated an area where they could picket. On 19 July 2001 the management of the applicant was called to the gates and were handed a list of demands. The applicant responded to the said

demands on the same day in writing. At about 10h30 on 19 July 2001 the Mill stopped operating and there were reports that this came about as a result of persons who were not on duty entering the premises and activating the emergency stop buttons on the machines and chasing the non striking employees from the Mill. There was also a report that Ponnadu, a union member had been abducted from the plant and taken to the hostel. Ponnadu did not testify to support the allegation that he was abducted. The only direct evidence that the emergency stop buttons had been activated was the fact that the Mill came to a stand still. This was ascertained after the events. McNair also saw some people running in civilian clothes i.e. persons who ought not to have been in the plant as did van Niekerk who also saw someone being chased and who was shouted at as to why she was still working.

31. McNair, the human resources manager, had the cellphone number of one of the shop stewards, TV Mhlongo and telephoned him. Mhlongo was at the hostel and after initially being unsure about whether Ponnadu was there and a short while later said that he was free to leave if he chose. Ponnadu then left the hostel and met McNair on his way to the hostel. Something was said by one of the persons who was with Ponnadu about giving a message and McNair could not remember who it was. Ponnadu appeared to be nervous when he joined McNair. TV Mhlongo was not a respondent and no claim is made against him. What he is alleged to have said is accordingly inadmissible hearsay to prove the truth of what was said or to draw any inference in that regard. Ponnadu was called to a meeting with management and passed on a message the terms of which were not clear. Each witness who testified about it gave significantly different details, but the import was that the “guys are serious” and similar conduct or worse could be expected if the demands were not met. He did not say who had sent the message, but it appeared to be from some of the striking workers, “the guys”.

32. Homan testified that investigations were carried out and although the intention was to try to secure evidence that the local shop stewards' leadership played a role in the events of the day this could not be shown. This was a fundamental concession. There were disciplinary hearings as a result of which 15 people were dismissed and after a hearing at the CCMA, 4 were reinstated. The remaining 11 are challenging their dismissals on review to the Labour Court. The one person who admitted to pulling out wires of a conveyer belt on the day in question was not disciplined because "no corroborating evidence could be found" according to Homan. He was not a party to the litigation and there is no evidence that he is a member of the union. He is not a shop steward. The only person identified was a painter who is also not a party to the litigation and there was no evidence that he was a union member.
33. A letter of demand was sent to the local organizer and no response was received. It did not call for one and placed no reliance on vicarious liability. The union is governed by a constitution and the role of shop stewards defined therein. A shop stewards' committee in a plant has no authority to represent the union unless specifically mandated and it can obtain this mandate from the shop stewards' council or failing that if the council is unable to make a decision to refer it to the region or national. There is no evidence of any authority from the union in respect of the conduct of those persons who switched off machinery on 19 July 2001.
34. The contradictions as to what the message was and the lack of clarity as to who it was that wanted these sentiments conveyed to Ponnadu could only have been clarified by Ponnadu himself. He was not called to testify. No inference can be drawn from this evidence that the union was in any way responsible for the conduct or that it was connected to Ponnadu and his message.



35. The evidence of the reports made by the operators or the statements taken are not admissible as to the truth of their contents and no evidence was led as to the detail of what actually occurred. Witnesses were not subpoenaed who could have given evidence and no attempt was made to call them. They did not testify that they were unwilling to testify and what was given second hand by Homan did not necessarily reflect the current attitude.
36. The applicant had to establish the identities of those who were responsible for shutting down the Mill and to prove *culpa or dolus* their part. While there may well not have been an intention to cause delictual harm, as opposed to an intention to further the aims of the strike by stopping production, there was plainly *culpa* in the form of negligence on the part of the persons responsible and, if they could be identified, a delictual claim against them would probably have succeeded. The evidence established that persons in civilian clothing ran through the Mill and some switched off emergency buttons on the machines. Only one of these persons was identified and he is not a party to the present action and what he did, apart from running from the Mill and not stop when his name was called, is unknown. This is not enough to prove who was responsible. I cannot establish on the evidence who the responsible people were. I cannot say on the evidence who the people were and while it may be more probable than not that they were striking workers and may have included persons who were members of the union there was simply no admissible evidence to this effect. Even then at best for the applicant the culprits were unknown union members, but that is speculation premised on the hearsay statements of Homan sought to proceed and not based upon admissible evidence.
37. To saddle a party with vicarious liability the relationship between the actual culprit and the person sought to be held liable must be established to see if it falls within the class that the law regards and imposing liability upon an innocent party. I am not dealing with an employer and employee since it is common cause that the persons who committed the delict were not employees of the union. The only other possible basis is that of agency.

The test is much more restricted and while it is notionally possible that a shop steward's committee may in peculiar circumstances be authorised to act as agent for the union and render the union vicariously liable that is most unusual and not in circumstances such as the present where there is no evidence whatsoever that any organ of the union supported the conduct in question let alone authorised it. It had to be alleged and proved that the union as principal authorised, instigated or ratified the commission of the delict. No such allegation was made and the evidence went no ways towards establishing the requisite elements. What is more a principal is not vicariously liable for unauthorised acts of his agent even if the act was ancillary to carrying out the mandate.

38. The case made on the pleadings would not support vicarious liability, i.e. that the actions were done with the support and encouragement of members of the shop steward's council, it has to go further than that and establish agency and authority. There was no evidence to support even the inadequate explanation as pleaded. There is no evidence that the shop steward's council was involved in any way, nor the shop steward's committee.
39. The case of *Heatons Transport (St Helens) Ltd v Transport and General Workers Union*[1972] 3 All ER 101 (HL), relied upon by the applicant turned on its own special facts. The decision goes no further to find that an agent acting on behalf of the principal and within his authority will render the principal liable. It was found on the facts and under the relevant legislation that the shop stewards of that union had implied authority to take industrial action including blacking at their place of work in furtherance of the policy of retaining container work for dock workers to the exclusion of others. In taking such action they were thus acting within their authority and this rendered the union liable for the unfair labour practice that occurred under the special legislation that applied in the UK creating such liability. The court said expressly that liability for tortious acts lay outside the scope of the appeal. On the present facts it cannot be said that the unknown persons who were probable members of the union had implied authority of the union to run riot

through the applicant's factory, stop machines and chase out workers. There was no evidence that the misconduct was in any way done under an authority implied or otherwise or that employees could themselves decide the form of their industrial action took. The case simply does not apply to the present facts.

40. Did the applicant prove that what was done constitutes a crime? The evidence shows that the machines were stopped and management was told that the emergency stop had been activated and there was evidence to support this. The evidence does not go far enough to prove the commission of a crime in stopping the machines or to establish the requisites to prove the crime of intimidation as the cause for the delay in getting the factory operational again. Unless I know precisely what was done and by whom it cannot be said that the provisions of any of the acts relied upon by the applicant have been contravened. It is not enough to say that there is a reasonable suspicion that an offence may have been committed. The legislation requires proof that the act relied upon is an offence, i.e. that it has to be one beyond all reasonable doubt. I do not even know what happened other than in broad outline. We know there are safety features. Emergency stopping is designed to be safe. No one came to any harm. The crime under OHSA require willfulness or recklessness. I do not know how careful or not the persons were in the process of stopping the machines. The intimidation relied upon is based largely on inadmissible hearsay evidence, other than in respect of one woman who was apparently being chased from the factory. Nothing links the union with the commission of any of the alleged offences.
41. The applicant has failed to discharge the onus upon it to prove that the first respondent is liable to compensate it for any damages it may prove it suffered as a result of the shutdown of the Mill on 19 July 2001.

42. There is no reason why costs should not follow the results.

43. In the circumstances I make the following order:

43.1 The point *in limine* raised by the first respondent is dismissed with costs;

43.2 The claim is dismissed with costs

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : AIJ CHADWICK WITH OM OOSTHUIZEN OF  
SHEPSTONE & WYLE ATTORNEYS

FOR THE RESPONDENTS : SHANTA REDDY ATTORNEYS

DATE OF JUDGMENT : 24 JUNE 2005