

## Business Law & Tax Review

# 'Passport to strike' denied

A certificate of outcome cannot trump the limitations contained in section 65

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**I**N AN unreported case the Labour Appeal Court last year had to determine whether a certificate of non-resolution issued by a Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner permitting industrial action overrides section 65 of the Labour Relations Act and the Labour Court's jurisdiction to interdict strike action.

Vodacom and the Communications Workers Union (CWU) entered into a collective agreement on November 1 1999 following a dispute relating to organisational rights. The agreement provided that any request by the CWU for additional organisational rights would be dealt with in terms of the provisions of the Labour Relations Act. Disputes relating to organisational rights were referred to the CCMA in 2002 and 2004 by the CWU. The CCMA arbitrated on the disputes and found in both instances that the collective agreement was binding on the CWU and Vodacom.

In 2006 the CWU again referred an organisational rights dispute to the CCMA. The matter could not be resolved at conciliation and a certificate of outcome was issued. The certificate provided that the CWU was entitled to engage in industrial action. A month later, the CWU advised Vodacom that it would engage in a national strike in support of the organisational rights dispute it had referred to the CCMA. Vodacom advised the CWU to withdraw its strike action in the light of section 65(3)(a)(i) of the Labour Relations Act which provides that no person may take strike action if that person is bound by a collective agreement that regulates the issues in dispute. The CWU refused to do so on the basis that it had a certificate from the CCMA entitling it to strike. Vodacom launched an urgent interdict in the Labour Court.

The Labour Court issued an interim order interdicting the strike. On the return day, Vodacom was ordered to

pay the costs of the entire urgent application. Judge Rampai held that the certificate of outcome, regardless of whether it was irregular or unlawful, remains valid until set aside by a court on review and was, so to speak, a "passport to strike".

On appeal to the Labour Appeal Court, Vodacom argued that section 64 of the Labour Relations Act was not determinative of the lawfulness of the strike and the Labour Court's jurisdiction. Section 64 contains the procedures to be followed to engage in industrial strike action. The procedure includes obtaining a certificate of outcome. The certificate does not in and of itself constitute a "passport to strike", particularly where there is another operative prohibition (S65).

The Labour Appeal Court held that section 65 of the act limits the right to strike and must be read together with section 64. Therefore, if a strike falls within one of the limitations contained in section 65 of the legislation, the strike is unlawful regardless of whether the provisions of section 64 have been complied with. In other words, a certificate of outcome cannot trump the limitations contained in section 65 and is not a "passport to strike".


The judgment of the Labour Appeal Court, while reconcilable, sits somewhat uncomfortably with the court's decision in *Fidelity Guards v Epstein NO & others* where the court held that once a certificate of outcome has been issued the CCMA has the power to arbitrate the dispute until the certificate is set aside on review by the Labour Court.

In the *Fidelity Guards* case, the employee referred an unfair dismissal dispute to the CCMA. At conciliation the matter remained unresolved and a certificate of outcome was issued directing that the matter be referred to arbitration. The arbitrating commissioner found that the dismissal of the employee was unfair and awarded compensation. The employer took the decision on review to the Labour Court. The employer alleged that the arbitration award should be reviewed and set aside because the employee's

referral to the CCMA had not been served and filed within 30 days of the date of his dismissal. The employee had not applied for condonation and such condonation application had therefore not been considered and ruled upon by the CCMA. Accordingly, the CCMA did not have jurisdiction to conciliate or arbitrate the dispute.

In coming to its decision, the Labour Appeal Court examined the relevant sections of the Labour Relations Act and identified the conditions that must exist under the legislation before a dispute that is unresolved may be arbitrated upon.

The court concluded that firstly there must be a referral, secondly that the referral has been served properly on the relevant parties and thirdly a certificate of outcome must be issued. The court found that where a referral is made outside the requisite 30-day period and no application for condonation is made or an application is made but no decision has been taken, the jurisdiction of the CCMA to

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arbitrate is not affected provided that the certificate of outcome has not been set aside. The employer only raised the jurisdictional issue on review at the Labour Court when it should have been raised much earlier. The Labour Appeal Court understandably took a jaundiced view of the employer's approach, with far-reaching consequences for future litigants.

The far-reaching consequences of *Fidelity Guards* may not have been fully understood nor intended. While the certificate of outcome may reflect that

there was an attempt to conciliate, this fact alone ought not to be determinative of the true legal position. The fact that a certificate was issued in the Vodacom case does not mean that the employees were, in law, entitled to strike. Arguably, a commissioner who unlawfully issues a certificate should not deprive the Labour Court of jurisdiction pending a review and setting aside of the certificate. In the Labour Court decision of *Silver Meadows Trading, Judge van Niekerk*, correctly held that the commissioner does not make a jurisdictional ruling when the dispute is incorrectly characterised on the certificate of outcome.

From a practical perspective, employers should of course always attend conciliation hearings and ensure that all jurisdictional issues are raised and argued at conciliation to avoid possibly being denied an opportunity to do so at a later stage once the certificate of outcome has been issued. Such certificates do not in and of themselves constitute a "passport to strike".