IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No. : J507/2007

In the matter between:-

VODACOM (PTY) LTD First Applicant

VODACOM SERVICE PROVIDER Second Applicant

and

THE COMMUNICATION WORKERS UNION First Respondent

THE INDIVIDUAL RESPONDENTS Second to Further Respondents
REFERRED TO IN ANNEXURE A"

JUDGMENT

RAMPAI, AJ

[1] The matter first came to this court by way of an urgent application on Friday 9 March 2007. It served before my brother Ngcamu AJ on Monday 12 March 2007. The relief sought was an interdict to prohibit an imminent industrial strike action. The application was launched by the applicants against the first respondent trade union and the individual respondents whose names are listed in annexure "A" – *vide* p. 4 – 9 of the paginated court record. The matter

is opposed. The answering affidavit was filed on Monday 12 March 2007.

[2] *Brevitas causa* from now on I shall refer to the applicants as the employer, the first respondent as the union and the second respondent plus the rest collectively as the employees. The respondent employees were in the employ of the applicants' employer. They were also members of the union, the first respondent.

[3] By agreement *inter partes* Ngcamu AJ granted a provisional order in the nature of the rule *nisi* returnable on Monday 19 March 2007. In the first place the trade union was interdicted from calling upon the employees to participate in any industrial strike action in respect of the labour dispute which was referred to the CCMA on 23 November 2006. In the second place the employees were interdicted from participating in any industrial strike action or taking part in any conduct in contemplation of any industrial strike action in respect of the said labour dispute. Those then were the two real pillars of the rule *nisi*.

[4] On the return day the matter was argued before me. On the one hand Mr. Brassey, counsel for the applicants, submitted

that a proper case has been made out for a final order. Therefore he urged me to confirm the rule *nisi*. On the other hand Mr. Buirski, counsel for the respondents, submitted that no proper case has been made out for the final order. Therefore he urged me to discharge the rule *nisi*. Having heard argument for and against the grant of the rule *nisi*, I reserved judgment and extended the rule *nisi*. On the return day I again extended the rule *nisi* further. Today is the further extended return day.

[5] A synopsis of the historical background seems to be necessary. On 6 October 1999 the trade union referred a labour dispute to the CCMA. The issues that gave rise to that first dispute revolved around organisational rights. The first dispute was successfully resolved. The conciliation process led to the conclusion of the collective agreement signed by the employer and the union on 1 November 1999 – *vide* annexure "MM2".

[6] Approximately three years later on 13 September 2002 to be

precise, the union referred the second dispute to the CCMA. The issues that gave rise to the second dispute revolved around a demand for more organisational rights. The dispute could not be resolved through the conciliation process. The conciliator referred the second dispute to the next forum. The arbitration proceedings were held before Com. M.J. Malefane N.O. He issued an arbitration award against the CWU – *vide* arbitration award annexure "MM3" on p. 4 of the record.

[7] The union referred the third dispute to the CCMA approximately three years later. The issues that gave rise to the third dispute revolved around a demand for more organisational rights. Once again the conciliation process failed to resolve the dispute. Once again the conciliator referred the unresolved dispute to an arbitrator. On the arbitration forum the dispute again served before Com. M.J. Malefane N.O. On 5 November 2004 the arbitrator again ruled against the CWU – *vide* arbitration award annexure "MM4" on p. 5 of the record.

[8] On 23 November 2006 just a little over two years later, the union referred the fourth dispute to the CCMA. Yet again the issues revolved around a demand for more organisational rights. The dispute remained unresolved notwithstanding the attempts made through the conciliation process. The dispute was not taken further and pursued through the arbitration process as before. The conciliation proceedings were held in Johannesburg on 8 February 2007 before Com. M. Baloyi N.O. under case number GAJB27441-06. He issued the certificate of outcome in terms of section 135 Act No. 66/1995 whereby he certified that the dispute remained unresolved. He also allowed the CWU to embark on an industrial strike action – *vide* section 135 certificate annexure "MM9" on p. 45 of the record.

[9] A month later on 6 March 2007 the union addressed a letter to the employer. It advised the employer *inter alia* that the employees would embark on an industrial strike action countrywide. The union notified the employer that its

members would resort to a variety of strike actions from 12 March 2007 in support of a demand of the union on behalf of its members for the grant of more organisational rights – *vide* annexure "MM10".

[10] The aforegoing notice of an impending industrial strike action precipitated the launching of the current proceedings. The purpose of these proceedings is to have the contemplated industrial strike action declared unlawful and therefore prohibited by means of a final interdict. It needs to be pointed out that on 12 March 2007 Ngcamu AJ granted an interim interdict on the strength of a mutual agreement between the parties. Therefore no reasons were given for making the interim order. This is often inevitable particularly given the unexpected launch and the haste in which customarily accompanies the initial motion of urgent interdicts more so in the labour court. I have of course considered the matter afresh. On 19 March 2007 the applicants sought the final confirmation of the rule *nisi*. The final relief sought was opposed by the respondents.

[11] I need not detail the main defence of the respondents. The alternative defence of the respondents, although not principally relied on appears to me to be the decisive point. It relates to the issue of the conciliation certificate of outcome in terms of section 135(5) Act No. 66/1995. Strictly speaking the certificate ought to have been issued in terms of section 64(1)(a).

[12] The effects and the consequences of the conciliator's certificate have been considered in many decided cases, for instance:

CERAMIC INDUSTRIES LTD t/a BETTA SANITARY WARE v NATIONAL CONSTRUCTION BUILDING & ALLIED WORKERS UNION & OTHERS (1) (1997) 18 ILJ 716 (LC) per Landman AJ;

FIDELITY GUARDS HOLDINGS (PTY) LTD v EPSTEIN & OTHERS (2000) 21 ILJ 2009 (LC) per Pillemer AJ;

MAGALIES WATER BOARD v LA GRANGE NO & OTHERS (2002) 23 ILJ 1055 (LC) per Jammy AJ and

SAPEKOE TEA ESTATES (PTY) LTD v COMMISSIONER MAAKE & OTHERS (2002) 23 ILJ 1603 (LC) per Tip AJ.

[13] Today is the return day of the rule *nisi*. But the onus remains

throughout on the employers, as the applicants, to show that the constitutional right to strike, which the respondents, as the workers have, has been limited and that the contemplated industrial strike action is not in compliance with the current labour legislation - **CERAMIC INDUSTRIES LTD**, *supra*.

[14] It is undisputed that the issue is about a demand for extension of organisational rights within the entire operational site of the employer countrywide. That an attempt to resolve the dispute through the conciliation process was made but failed is also a matter of common cause. On Friday 8 February 2007 the conciliating commissioner certified that the issue in dispute remained unresolved.

[15] Section 135(5) of the Labour Relations Act No. 66/1995 provides:

> **"135 Resolution of disputes through conciliation**
>
> (5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-
>
> (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;
>
> (b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and
>
> (c) the commissioner must file the original of that

certificate with the Commission."

[16] The employer(s) seeks to have the employees' industrial strike action interdicted. Section 64 recognises the right of the workers to strike. It limits the constitutional right to strike by providing that every employee has the right to strike if certain further prerequisites are met. It reads:

> **"64 Right to strike and recourse to lock-out**
>
> (1) Every employee has the right to strike and every employer has recourse to lock-out if-
>
> (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-
>
> (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-
>
> (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to

that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or..."

[17] Given the aforegoing explicit terms of section 64(1) which accords to every employee the right to strike provided certain restrictive prerequisites are satisfied, the only way in which the employees may be prohibited from embarking upon the contemplated industrial strike actions besides mutual agreement or the employees' unilateral decision, is by having section 64(1) conciliator's certificate set aside. *In casu* the party threatened by the conciliator's certificate, Vodacom (Pty) Ltd has not applied to this court to have the certificate which sanctioned the industrial strike action set aside on review – **SATAWU v COIN REACTION** (2005) 10 BCLR 1022 (LC) per at paragraphs 17 and 18.

[18] On behalf of the employer Mr. Brassey contended that the conciliator wrongly characterised the issue and irregularly

short-circuited the dispute resolution process by allowing the employees to resort to strike instead of directing them to have the dispute resolved through the arbitration process in terms of section 136 as his colleague and conciliating commissioner had done on two previous occasions in 2001 and 2004 about the second and the third dispute respectively.

[19] Assuming without deciding, that the conciliator who issued the current certificate in terms of section 64(1) acted irregularly in adopting the cause of action he adopted, the irregular or unlawful certificate remains legally protected by the evidential presumption of the legal maxim "*omnia praesumuntur rite esse acta*". Such certificate however invalid is in law accorded the official recognition and protection of a valid official act or document. It remains valid with all its imperfect attributes until it is set aside by a court of law on review – Baxter : **Administrative Law**, p. 355; **FIDELITY GUARDS HOLDINGS (PTY) LTD**, *supra*.

[20] The applicants' deponent, Mr. M.M. Mbungela, the managing executive responsible for human resources management services, averred the following at paragraph 17 of the founding affidavit:

> "17. On 8 February 2007 a conciliation meeting was held at the offices of the CCMA before Commissioner M Baloyi. The parties were unable to resolve the dispute and a Certificate of Outcome was then issued by Mr Baloyi, a copy of which is annexed marked '**MM-9**'. For reasons unbeknown to Vodacom, the Commissioner erroneously determined that the dispute can be referred to strike action."

[21] It follows from the above averment that the employer attended the conciliation meeting and participated in the conciliation process. The employer became aware of the conciliation certificate which legalised the industrial strike action, the relief apparently sought by the union on behalf of its members. It is not the employer(s) case that the commission did not serve a copy of that certificate on them or the person who represented them in the conciliation meeting as section 135(5)(b) requires. It is patently clear and obvious that the employer(s) were aware of the

certificate from 8 February 2007. Notwithstanding such knowledge or awareness, the employer(s) sat back, relaxed and did nothing. The potentially harmful repercussions of the alleged unlawful industrial strike action permitted by means of a certificate which they considered legally defective, did nothing to get them to take urgent remedial action.

[22] Almost four weeks went by. The employer took no practical steps whatsoever to challenge the validity of the certificate. In **CERAMIC INDUSTRIES LTD** Landman AJ had this to say about the importance of section 64(1)(a) – the conciliation certificate:

> "The certificate envisaged in terms of section 64(1)(a) of the Act is an important step. It is not a mere procedural step. Conciliation is the preferred and primary means of resolving labour disputes. The issuing of a certificate has several consequences. One of them is to signal that conciliation has been attempted. It serves as a green light for a party, who otherwise has the right to strike, to proceed to the next step in the process which culminated in a strike. The certificate is not itself a licence for an industrial action."

It is clear from this passage that the party threatened by such a certificate ignores it at its own peril.

[23] The union gave the employer the requisite notice of the commencement of the proposed strike. The written notice was served on the employer 27 days after the issue of the certificate in terms of section 64(1)(a). The industrial strike action was supposed to begin about two weeks later on 12 March 2007. On that day, 32 days after the certificate was issued, the employer obtained the rule *nisi*.

[24] In **FIDELITY GUARDS HOLDINGS (PTY) LTD**, *supra* at paragraphs 10 – 12 Pillemer AJ commended as follows about the legal consequences of the conciliation certificate, which in the context of a strike, is governed by section 64(1)(a):

> "[10] The act of issuing the certificate can surely not be regarded as a nullity and ignored any more so than the issue of an arbitration award out of the 14-day time period allowed by the Act (*Free*

State Buying Association t/a Alpha Pharma v SACCAWU

& another (1998) 19 ILJ 1481 (LC)).

[11] The certificate has a whole range of consequences under various sections of the Act. **If its validity is to be challenged that challenge must itself be timeous**, ie within a reasonable time, which, given the nature of the process and the consequences of the issue of the certificate of non-resolution, **will inevitably be a short period and take place before further steps occur relying upon its issue. This is particularly so if the further steps take place with full participation and without objection.**

[12] If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, **public policy as expressed in the maxim omnia praesumuntur rite esse acta, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision** (cf *O'Reilly v Mackman* [1983] 2 AC 237 at 238 and *Harnmaker v Minister of Interior* 1965 (1) SA 372 (C) at 381)."

[25] The employer failed to challenge the validity of the certificate of outcome timeously or shall I rather say at all. The challenge has to be mounted speedily before further steps are taken on the strength of the conciliation certificate. It was never done here. There is no averment at all that the employer has initiated or intends initiating any review motion to have such certificate set aside by this court. There is hardly any suggestion that the employer intends doing so at any time in the future. The thrust of the employer's contention was that the conciliator acted in such an irregular fashion that the employer was entitled to ignore the certificate as a *pro non scripto*. I am not persuaded by the contention. I hold the firm view that the conciliation

certificate we are here concerned with needs to be given all the effects in law of a valid decision however erroneous, the affected but passive party may perceive it to be.

[26] I am in respectful agreement with Mr. Buirski's submission that the principle of defensive or collateral challenge, if you will, in terms of which a party in proceedings which are not directly designed to impeach the validity of an administrative act, is entitled to ignore an unlawful act with impunity, as elucidated in the case of **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA) at par. 32 and 34 does not assist the applicants in the instant case. This is so because they are not threatened by a public authority in these proceedings. Quote par. 35 **OUDEKRAAL**, *supra*:

> "[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the

> administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'. Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law."

[27] Through their compliance with all the prerequisites of section 64(1) the trade union and its members have thereby acquired a passport, so to speak, deemed to be valid, to engage in an industrial strike action. The right to strike cannot now be declared to be an illegal and unprotected strike on the basis of a document which the applicants did not and do not seek to have reviewed and set aside. Public policy which favours legal certainty militates against passive litigation stance and pernicious practice as displayed by the applicants. I would, therefore, discharge the rule *nisi* on the ground that it has not been shown that the proposed industrial strike action constituted an unlawful strike which

infringes the applicants' clear right.

[28] Accordingly I make the following order:

28.1 The rule *nisi* issued on 12 March 2007 is hereby discharged.

28.2 The applicants are directed to pay the costs of the respondents relating to the entire application.

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M.H. RAMPAI, AJ

On behalf of applicants:	Adv. M. Brassey SC Instructed by: Bowman Gilfillan Attorneys SANDTON
On behalf of respondents:	Adv. P. Buirski Instructed by: Cheadle Thompson Haysom BRAAMFONTEIN

HEARD : 19 March 2007

DELIVERED : 28 May 2007

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