

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**DATE: 02/06/2009**

**CASE NO: JA16/08**

**In the matter between**

**VODACOM (PTY) LIMITED**

**Applicant**

**and**

**CWU**

**Respondent**

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**J U D G M E N T**

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**DAVIS JA:**

[1] This is an appeal against the judgment an order of Rampai AJ, delivered on 28 May 2007. The appellants approached this Court with leave of the Court *a quo*.

[2] The facts can be summarised thus: On 1 November 1999, the first appellant concluded a collective agreement with the first respondent following a dispute concerning organisational rights. The agreement remains in force. The key term thereof provided the first respondent with certain rights of access as set out in Clause 4 thereof:

"The union accepts that the above is a once-off agreement and that any request for other organisation

rights will be dealt with according to the provisions of the Act. The union furthermore accepts that (1) the workplace will be regarded as Vodacom (Pty) Limited (the whole company); and the 30% membership based on the above definition of the workplace will be regarded as the absolute minimum threshold to grant any other organisational rights to the union in terms of the Act."

In terms of paragraph 5 of the agreement the parties accepted that should the need arise they would be open to renegotiate the terms and conditions of the agreement, including the clause to which I have made reference.

[3] In 2002 and 2004 the first respondent demanded additional organisational rights for its members who were employed by first appellant. These disputes ended in arbitration, the first arbitration award accepted the binding nature of the collective agreement and found that if first respondent sought new organisational rights outside the agreement, the procedures as set out in Section 21 of the Labour Relations Act 66 of 1995 ('the LRA') should be followed.

[4] In a second arbitration award, the arbitrator accepted the binding nature of the collective agreement and held that the appellant could not be ordered, in terms of Section 24 of the LRA, to negotiate additional organisational rights.

- [5] On 23 November 2006 the first respondent again referred a dispute to the CCMA. The nature of this dispute was recorded as an organisational rights dispute. In the referral form, the facts of the dispute were summarised thus:

"The company Vodacom is refusing to accord the union the collective bargaining powers. The union have sufficient members to be granted to the organisational rights by Vodacom."

- [6] On 8 February 2007 a conciliation meeting was held at the offices of the CCMA. The parties were unable to resolve the dispute. A certificate of outcome was then issued. The commissioner stated that if the dispute remained unresolved it could be referred to as a "strike/lockout". On 7 March 2007 first respondent addressed a letter to the first appellant advising the company that first respondent will embark on a national industrial strike in support of the organisational rights dispute referred to the CCMA. On receipt of the strike notice, appellant's attorneys sent a fax to the first respondent in which it referred to the dispute which had been referred to the CCMA and the certificate of outcome, stating that the dispute remained unresolved and that strike action could be taken. In that letter, it was pointed out by appellant's attorneys that section 65(3) (a)(i) of the LRA provided that no person may take part in a strike if that person is bound by a collective agreement that regulates the issue in dispute. When first respondent declined to provide an undertaking to withdraw its strike notice, and to take no further strike action, an

application for an interdict was brought on 8 March 2007.

- [7] On 12 March 2007 a *rule nisi* interdicting the strike was issued by Ngcamu AJ. On the return day, that is 19 March 2007, the matter was heard by the court *a quo*. Judgment was delivered on 28 May 2007. The Court discharged the *rule nisi* and directed the appellants to pay the costs of the respondent relating to the entire application. In essence the judgment of the court *a quo* was predicated on the following from the judgment:

"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 vitae esse acta*. Such certificate however, invalid is in law accorded official recognition and protection of a valid official act or documented remains valid with all its imperfect attributes until it is set aside by a court of review [indistinct] on review."

Rampai AJ then continues:

"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 can 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 (sic) and 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 constitutes an unlawful strike which infringes the applicant's clear right."

[8] In short, the judgment of the court *a quo* is predicated on the recent jurisprudences pawned by the Supreme Court of Appeal's judgment in *Oudekraal Estates (Pty) Limited v City of Cape Town and others* 2004 (6) SA 222 (SCA) at 32 to 34, namely the principle of the collateral challenge. In other words the judgment adopted the approach that, until such time as a decision by an administrator is set aside, even if it is illegal, it remains in force until such time as a court declares it to be so illegal.

[9] Mr Redding who appeared on behalf of appellants pointed out that Section 64 is not the section to which one must turn in order to resolve this dispute. It is correct that section 64 of LRA sets out the procedures which are required to be adopted by an employee when that employee exercises its constitutional right to strike, or an employer has recourse to a lockout. In terms of that provision, a strike cannot take place until such time as the dispute has followed the procedures set out in Section 64(3),

and, as in this particular case, a certificate has been issued by the relevant commissioner to the effect that the dispute cannot be resolved. That however, simply provides, to use the term adopted by Rampai AJ, a 'passport to strike' in circumstances where there is no other prohibition insofar as the right to strike is concerned.

- [10] Section 65 sets out limitations on the right to strike or recourse to lockout which have to be read together with section 64. In short no matter that there has been compliance with section 64, the LRA limits a right to strike, such that if the strike reaches one of the limitations in terms of section 65, it is an unlawful strike, notwithstanding compliance with procedures under section 64. To express it differently, the certificate cannot trump the limitations of section 65. What can trump such a limitation is a constitutional challenge, in effect to contend that the limitations contained in the LRA breach the right to strike, as enshrined in the constitution, and constitutes an unjustifiable limitation on that constitutional right. That of course was never the dispute in this case, nor was the point ever argued. Therefore it is not before us. What is before us is the clear provision of section 65(1) which provides that no person may take part in a strike or lockout or in any conduct in contemplation of or furtherance of a strike or lockout if (a) that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute.

[11] In this particular case, it is common cause that there was a collective agreement which applied. Accordingly whatever certificate may have been produced and may have been shown to the employer, the certificate cannot override the clearly stated limitation upon the right to strike as contained in section 65(1)(a). In short a certificate can in no way trump the clear provisions of the limitation. For this reason, the court *a quo* erred in its approach to the law. It should not have held that the certificate issued in terms of section 64 provided an unqualified and unlimited 'passport' to the employees to strike, no matter the provisions of Section 65(1)(a), as I have outlined them.

[12] For this reason, I would uphold the appeal and alter the judgment of the court *a quo* to read thus:

"The *rule nisi* issued on 12 March 2007 is hereby confirmed. The respondents are directed to pay the costs of the applicants relating to the entire application."

Finally as this appeal was not opposed, I would not make an order of costs insofar as the appeal is concerned.

**LEEUEW JA:** I agree.

**JAPPIE JA:** I agree.

COURT: It is so ordered.