Strikes – certificates of outcome and matters of mutual interest – how far does it stretch?

By Johanette Rheeder

In order for strikes to be protected, Unions and employees must comply with the prescripts of the Labour Relations Act, 66 of 1996, and in particular with section 64 thereof. When it comes to the issuing of a certificate to strike, the courts have considered this technicality in detail and it is clear how the Constitutional right to strike cannot be curtailed by technicalities.

In *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*[1]

the Court dealt with the certificate and held that:

"It is now trite law that the significance of a certificate of outcome being issued is that it essentially marks the end of the conciliation phase of a dispute and the description of the dispute on the certificate is nothing more than indicative of what the dispute might concern. It is not a finding by the author of the certificate. Consequently, it cannot be said that the employer ought to have set aside the certificate before it could raise its argument that the dispute concerns a dispute of rights rather than one of interest. In passing, it might also be mentioned that the term 'matter of mutual interest' is often erroneously used as a synonym for a dispute of interest, whereas disputes of mutual interest may be either disputes of rights or disputes of interest."

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The question to consider is what happens when the dispute has matured beyond the 30 days period as set out in section 64(1)(a), but no certificate has been issued?

In a number of judgments, it has been consistently held by the courts that a certificate of failure to settle has no legal significance beyond simply recording that a particular dispute was referred to the CCMA, and remained unresolved following conciliation under Section 135 of the LRA. It does not serve as a determination of the dispute or the actual issue in dispute, binding on the parties, going forward.

In *SA Post Office Ltd v Moloi NO and Others*[2] the Court said:

"Although the status of the certificate of outcome was dealt with in the context of unfair dismissal cases, in my view the same principle applies in cases involving disputes of mutual interest. In this respect, I align myself with Van Niekerk J, in Bombardier Transportation (Pty) Ltd v Mtiya NO & others …"

In the case of *South African Airways (SOC) Ltd v South African Cabin Crew Association*[3], the following was decided on the question as to whether a certificate is needed to strike or not:

"The proceedings at the CCMA, and before commissioner Hilligenn, were conciliation proceedings under Section 135 of the LRA. The primary purpose of such proceedings is to attempt an amicable resolution of the dispute, and not to decide the dispute. This is evident from Section 135(5), which compels the commissioner to issue a certificate of failure to settle based on one simple reason only, being that the dispute remained unresolved. That is indeed what happened in casu. This certificate of failure to settle is of no significance in itself in deciding whether the strike is protected or unprotected. All it proves is that the dispute remains unresolved. It may be added that the respondents would not even need this certificate in order to embark upon a protected strike, as all that is needed is that 30 days must have elapsed since the dispute was referred to the CCMA, and with the dispute still remaining unresolved."

In *Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Members and Another*[4] the Court said:

"… while the appellant is entitled to an order declaring that the respondent's members are not entitled to embark upon a strike in respect of their demand for 'transport subsidy/allowance', the appellant's prayer for the setting aside of the certificate of non-resolution of the dispute is misconceived. I say this because whether the certificate of non-resolution is valid or not, in this case this did not affect the legality of the strike the employees may have been planning to embark upon. This is so because in terms of s 64(1)(a)(i) and (ii) of the Act a strike will be a protected strike even if there is no certificate of non-resolution of the dispute provided that a period of 30 days from the date of the referral of the dispute to conciliation has lapsed and all the other requirements of s 64 of the Act have been complied with[5]*."*

The certificate of failure to settle in this instance was clearly issued in the form as prescribed by Form 7.12.33 As such, it does not constitute a ruling.

In this respect, the Court in *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg & Bean Suncoast and Others*[6] said:

"When a commissioner completes form 7.12 and categorizes the dispute referred to the CCMA by ticking one of the boxes provided, the commissioner does not make a jurisdictional ruling. Nor does the ticking of any of the boxes marked "CCMA arbitration", "Labour Court" "None" or "Strike/Lockout" amount to a ruling on which of those courses of action must be pursued by a referring party."

It is therefore clear that a certificate is not required once the 30 days period has lapsed for a strike.

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[1] (2013) 34 ILJ 119 (LC) at para 15.

[2] (2012) 33 ILJ 715 (LC) at para 37.

[3] Reportable case J949/17: Labour Court

[4] (2010) 31 ILJ 2552 (LAC) at para 17.

[5] See Section 64(1)(a) which reads: '…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.

[6] (2009) 30 ILJ 2968 (LC) at para 9