

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

CIVIL APPEAL NO. 1/95
INDUSTRIAL COURT CASE NO. 40/95

In the matter between:

**BOTSWANA BANK EMPLOYEES UNION
BONTLE MOTSEPE
KEOLOPILE GABORONE**

**1st Appellant
2nd Appellant
3rd Appellant**

and

BARCLAYS BANK OF BOTSWANA LTD

Respondent

**Mr. Attorney P. Matlala for the Appellants
Advocate D. Kuny SC. with Advocate B. Spilg and Mr. B.B. Tafa for the Respondent**

J U D G M E N T

CORAM:

**A.N.E. AMISSAH J.P
R.T. HON. LORD N. WYLIE J.A
J.H. STEYN J.A.
P.H. TEBBUTT J.A.
G.G. HOEXTER J.A**

TEBBUTT J.A.

On Monday 19 December 1994 the employees of the Respondent Bank who are members of the 1st Appellant Employees Union went on strike. The reason why they did so, put shortly, is that the Bank, as I shall refer to the Respondent, paid them, with their December salaries, only a 6% bonus instead of an 8% one as it had done in previous years and would not accede to their demand for the additional 2%.

Relying on the disruptive effect of the strike, coinciding as it did with the approach of the festive holidays, not only on the Bank but on the general public, the Bank sought and obtained on 22 December, 1994 from the Industrial Court of Botswana a rule nisi, returnable on 27 January, 1995, operating as a temporary interdict, directing the employees to cease their strike and to return forthwith to work but not later than 28 December 1994. The Union was also called on to show cause why the strike should not be declared illegal in terms of the Trade Disputes Act (CAP 48:02) and unlawful and unprocedural as being in breach of a Collective Labour Agreement between the Bank and the Union. The 2nd and 3rd Respondents were joined in the application in their capacities as Chairperson and General Secretary respectively of the Union.

The rule also interdicted and restrained the Union and all its members from vandalising the assets of the Bank or those of other employees or from intimidating those employees who were not on strike.

The Union anticipated the return day and brought the matter again before the Industrial Court on Friday 23 December 1994. It raised seven points in limine.

In a judgment delivered on 28 December 1994 the Learned Judge in the Industrial Court dismissed all seven points and the parties then argued the merits of the application. On 30 December 1994 the Court confirmed the rule nisi save for that portion interdicting and restraining the Union and its members from vandalising the assets of the Bank and other employees and intimidating the latter, the Court holding that there was no evidence on the papers linking the Union with any alleged intimidation or vandalism. The Court did not give its reasons for its decision on that day but filed them later on 17 January 1995, adding certain supplementary reasons on 26 January 1995.

The Industrial Court also dealt with the question of costs. The Trades Dispute Act was amended by the Trades Dispute (Amendment) Act No 23 of 1992 by inserting a new Part III to

provide for the establishment of the Industrial Court. Section 27 of the Trades Dispute Act now provides that no costs shall be awarded by the Court except against a party found by it to have acted frivolously or vexatiously. The Learned Judge held that the Union was in fact frivolous and vexatious and accordingly granted an order for costs against the Union. It did not grant any such order against the other two Appellants, they merely being officials of the Union, who was the main role player.

The Union and the two officials in question now come on appeal to this Court against the judgment and order of the Industrial Court.

Following the confirmation of the rule nisi on 30 December 1994, the striking Bank employees returned to work on that day. Save for the question of costs, this appeal has therefore become entirely academic.

Just how academic it has become is shown by the fact that the Union filed eighteen grounds of appeal. Of these thirteen were abandoned when the appeal came to be argued before this Court. The first four deal with the service on 22 December, 1994 of the application for the rule nisi. The Appellants contended that the Learned Judge in the Court a quo erred in holding that there had been proper service of the application.

Section 18(a) of the Trades Dispute Act provides that:-

"There shall be an appeal to the Court of Appeal against decisions of the Industrial Court".

Section 2(1) of the Act defines "decisions" as including "an order and an award".

In South Africa it has been held by the Appellate Division of the Supreme Court of that country that a "decision" to be appealed against to the Appellate Division must be a "judgment or order" of a Provincial or Local Division See:-

Van Streepen and Germs (Pty) Ltd Vs Transbaal Provincial Administration 1987(A) SA 569 (A); Zweni Vs Minister of Law & Order 1993 (1) SA 523(A) at 531(C).

a dispute between litigants has a final and definitive effect on the main action that it is such a judgment or order. See:-

The Van Streepen and Germs Case Supra at 586 I - 587B; Zweni's Case Supra at 522.

A merely preparatory or procedural order would not be such a decision. It would be an interlocutory order. See:-

Pretoria Garrison Institute Vs Danish Variety Products (PTY) LTD 1948 (1) SA 839 (A) at 870; Van Streepen and Germs Case Supra at 583 F.

It is also well-established that every ruling of a Court during the progress of a suit does not amount to an order. The Court must be duly asked to grant some definite and distinct relief before its decision upon a matter raised as preparatory or procedural question can properly be called an order. See:-

Dickinson and Another Vs Fisher's Executors 1914 AD 424 at 427-8; Van Streepen and Germs Vs Transvaal Provincial Administration Supra AT 581 E.

Stated somewhat differently, a decision is a ruling if it is one which does not affect the relief sought in the main action. See:-

Nxaba Vs Nxaba 1926 AD 392; Heyman Vs Yorkshire Insurance Company Ltd 1964 H - 491 (C); Holland Vs Deysel 1970 (i) SA 90(A) at 93 A-C; Zweni's Case Supra at 535 I-J.

A ruling is the antithesis of a judgment or order. It is a decision which is not definitive of the rights of the parties nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. See:-

Zweni's Case Supra at 536B

It has been held consistently in South Africa that rulings are not appealable unless permitted by statute. See:-

Zweni's Case Supra at 532B.

This has been accepted as being well-established in Botswana. See:-

De Beers Botswana (PTY) LTD Vs Nathan Diphoko a judgment as yet unreported of the Court of Appeal delivered on 14 July 1993 in Civil Appeal No 11 of 1992.

The finding in the Court a quo that there had been proper service was clearly a ruling and therefore not appealable and Mr. Matlala, who appeared for the Appellants conceded that to be so. In any event it can, in my view, not be gainsaid that the fact that the application for a rule nisi was to be made was known to the Appellants, and that they were not in any way prejudiced, the Executive Committee of the Union having resolved on the very same day i.e. on 22 December 1994 to oppose the application. There is therefore no merit in those grounds of appeal.

Nor was there any merit in the ground of appeal that the Court a quo erred in holding that the application was urgent, another ground abandoned by Mr. Matlala. Once again, this was a ruling which is not appealable but, in any event, I cannot conceive of anything more urgent than an application to try to stop a strike of Bank employees on the very eve of the festive holidays which would have resulted not only the disruption of the Bank's activities, affecting all its clients, but also in a disturbance of the entire economy. As pointed out by the Bank's Counsel in their heads of argument, corporate clients would not have been able to undertake transactions, to make necessary purchases or to pay wages to their employees. Employees and individual clients would have been unable to make deposits, make essential payments or withdraw funds. The effect on the economy could have been widespread, detrimental, and, in some respects, even disastrous. The matter was clearly one of urgency.

The appeal became even more academic when Mr. Matlala before this Court did not submit that the decision of the Industrial Court on the merits of the application was wrong. Indeed, he could not have. There is, in my view, no doubt that the Learned Judge a quo was correct in holding that the strike was both, (a) illegal and (b) unlawful and unprocedural as being in conflict with a Collective Labour Agreement between the Bank and the Union.

As to the illegality, in the Schedule to the Trades Dispute Act, a number of services are specified as being essential services. Among those originally listed was the Bank of Botswana. Section 47 of the Act empowers the Minister of Labour to amend the Schedule. By an order published in the Government Gazette on 14 April 1989 the Minister added three further banks to the list of essential services. One of those was the present Respondent.

Sections 43, 44 and 45 of the Act provide that employees in an essential service cannot embark on strike action unless a secret ballot of the employees has been held on the question of whether industrial action should or should not be taken. It is undisputed that no such ballot was held. The Union therefore did not comply with the necessary statutory formalities which are a prerequisite before employees in an essential service, of which the Bank is one, can embark on a strike. The strike was therefore illegal.

It was also unlawful and unprocedural. On 6 August, 1991 the Bank and the Union entered into a Collective Agreement in terms of Sections 31, 32 and 33 of the Trade Disputes Act to regulate relations between the Bank and the Union and to lay down procedures for the negotiation of terms and conditions of employment and for the prompt and equitable settlement of grievances and disputes. In Clauses 8.10 and 9 of the Agreement it was agreed that the Union would not itself, nor would it advise or instruct its members to, embark upon a strike unless the procedures laid down in the Agreement and the Trade Disputes Act had been exhausted. It is common cause that the Union failed to comply with any of the relevant procedures. The strike was therefore unprocedural and, accordingly, also unlawful. There was therefore no appeal on the merits before this Court.

Mr. Matlala's argument today was directed solely to two points. He submitted that the application was not brought "properly" before the Court a quo, that it should therefore not have heard it and that its decision therefore should be set aside. He said that this was so for two

reasons:-

- (i) The Court was not correctly constituted as it had to be in terms of the Trade Disputes Act;
- (ii) There had not been a referral of the matter to it as required by Section 7 of the Act;

He expanded his argument thus:-

Section 18(1) of the Trades Disputes Act provides that the Industrial Court;

"shall have exclusive jurisdiction in every matter properly before it under this Act
....." (my emphasis)

Section 17(6) of the Act provides that:-

"In the exercise of the jurisdiction of the Court under Section 18, a judge shall sit with two nominated members"

Such nominated members must be selected by the Judge, one from a list of six persons nominated by the employees or Trade Unions in Botswana and one from a list of six persons nominated by organisations representing employers in Botswana.

When granting the rule nisi, and again in confirming it, the Learned Judge sat alone. In so doing, so Mr. Matlala submitted, the Court was wrongly constituted and therefore the matter was not "properly" before it. He made this submission notwithstanding the provisions of Section 18(2) of the Act. That provides that:-

"Any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the Judge presiding."

Mr. Matlala did not dispute that in casu the matters for decision were matters of law.

However, so his submission went, it was still necessary for the Learned Judge to have selected two nominated members who had to sit with him and until he had done so there was not a "sitting" of the Court where the Judge could make his decision on a question of law or as to whether a matter of law was involved or not. There is no substance in these submissions.

In order to hold that Mr. Matlala is correct a narrow interpretation would have to be accorded to the word "sitting". It is clear that two situations can occur. One is where, during the course of a hearing, a point of law arises, such as the admissibility of certain evidence or of a document which one of the parties wishes to tender in evidence. In such event the Judge must decide if the question is a matter of law or fact and having decided that it is one of law, he and he alone must give a decision on it. He can do so with his assessors being present or he can do so in their absence. The other is where when the papers in a matter come before him it is clear that the only issue in the matter is one of law. An example would be where it is necessary to decide whether certain words in a clause in a contract of employment bear the meaning which one or other of the parties wishes to assign to them. He must decide whether this is a matter of law only and having found that it is, he and he alone can decide it. His assessors would have no part in it at all. It could, in my view, never have been the intention of the Legislature that before he can take either of the steps mentioned he must select and summon two nominated members to go to Court with him who would, and could, have no part in the proceedings. This would amount to an absurdity. It is a well-known principle in the interpretation of statutes that a Court must avoid an interpretation which would lead to an absurdity. Moreover, Section 26 of the Interpretation Act (CAP 01:04) provides that Statutes in Botswana must be liberally constructed.

It reads:-

"Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit."

Section 27 of the Interpretation Act is also germane, providing, as it does, that a positive interpretation of Botswana Statutes is to be favoured. It reads:-

"In the construction of an enactment, an interpretation which would render the enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect."

If these provisions are applied to Section 18(2) of the Trades Disputes Act the interpretation which Mr. Matlala would wish this Court to give to it would, in my view, cause the section to be rendered ineffective. A wide and liberal interpretation of the word "sitting" would not do so but would make the section effective.

Mr. Matlala also appears to have overlooked Section 18(6) of the Trade Disputes Act.

It reads:-

"The Court shall regulate its own procedure and proceedings as it thinks fit."

This, too, would enable the Judge in the Industrial Court, where called upon to decide a matter of law, to sit without assessors, should he consider it desirable to do so in order to arrive at an expeditious determination of a dispute involving such a matter before him. Section 18(1)(d) gives the Industrial Court power,

"Generally to give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it."

The concept of the Judge sitting alone is not one which is foreign to the Trades Dispute Act for in the proviso to Section 17(6) it is laid down that:-

"Where for any reason such nominated members are absent for any part of a hearing of a trade dispute, the jurisdiction of the Court may be exercised by the Judge alone"

I am therefore of the view that Mr. Matlala's contention that the Court in casu was not correctly constituted cannot succeed.

As to his second contention that a referral to the Court by the Commissioner of Labour in terms of Section 7 of the Trades Dispute Act was necessary before the Court could entertain the Bank's application, his argument proceeded thus.

Section 7, which was also amended in 1992 by the Trades Disputes (Amendment) Act, reads in its amended form as follows:-

"7. Where there is a failure, after what, in the opinion of the Commissioner, is a reasonable time, to reach a settlement of a trade dispute referred to him under Section 5, which time shall not, unless all the parties so agree, exceed forty two days, or in the case of a dispute dealt with under Section 5(6), twenty one days, and in the event of the dispute not being settled by other means, the Commissioner shall issue a certificate, notice of which, in writing, shall be served on each party, to the effect that either party or both parties may refer the dispute to the Industrial Court."

Section 5(i) provides that:-

"Any trade dispute, whether existing or apprehended, may be reported to the Commissioner by each party or by an organisation acting on behalf of a party to a dispute."

Sections 5 and 7 form part of Part II of the Act which deals with the procedure for settling disputes generally and enables the Commissioner to fulfil a mediation role between the parties so as to attempt to resolve amicably a trade dispute. Before the amendment of Section 7 where there was a failure, with the intervention of the Commissioner, to resolve a dispute amicably using the procedures at his disposal including those contained in any collective labour agreement between the parties, he could refer the matter to what was then known as the Permanent Arbitrator. The latter has, by the amendment to the Section, been replaced by the Industrial Court. It is only where the dispute has been referred to the Commissioner in terms of Section 5(1) that he then, consequent on a failure to conclude an amicable settlement of it, can issue a certificate that the parties may refer the matter to the Industrial Court. Section 7, however, does not preclude a party to a trade dispute from approaching the Industrial Court directly. In the first place, Section 5(1) provides that the parties may report their dispute to the Commissioner. They, or any of them, do not have to do so. In such event, the machinery for a referral by the Commissioner to the Court does not come into operation at all. It could never have been the intention of the Legislature, in my view, that in such event the Industrial Court would be precluded from adjudicating upon the dispute should the parties or one of them bring the dispute

before it.

Having regard once again, to the sections of the Interpretation Act cited above and applying them so as to enable the Industrial Court to function effectively, I hold that a referral by the Commissioner is not a sine qua non for an application to be brought before the Court.

In any event, in the present case the facts are that the Union never referred the dispute to the Commissioner. It unilaterally embarked on its strike on 19 December 1994 and it was only on the following day viz 20 December 1994 that it reported to the Commissioner, as a fait accompli, that its members were on strike. It does not now lie in the mouth of the Union to contend that the Bank's application to have the strike declared illegal is barred by reason that there was no referral of the matter to the Court when it itself did not report the dispute to the Commissioner in terms of Section 5(1) but simply proceeded to go on strike without any attempt to settle its dispute with the Bank using the procedures available under the Act. There is no merit in this submission either and it, too, cannot succeed.

Two of the issues raised before the Court a quo were,

- (i) that the Unions' members alleged that they were entitled to the 8% bonus claimed whereas the Bank's averment was that it was merely an ex gratia payment and'
- (ii) that the Bank's having paid an 8% bonus annually for some 8 years previously, its employees had a legitimate expectation that it would continue to be paid.

The Learned Judge found against the Union on both points holding, in the light of a large number of circulars sent out by the Bank each year, stating that the payments were ex gratia and of which the employees must have had knowledge, that they could have had no illusions as to the status of such bonus payments. He also rejected the notion of any legitimate expectation in regard to them. Although both those findings were challenged in the notice of appeal, Mr. Matlala also abandoned such challenge before this Court. Nothing more need therefore be said about them,

save to say that in my view the Learned Judge's finding that the payments were indeed ex gratia was fully justified on the evidence before him.

The Appellants did, however, persist in their challenge of the Learned Judge's order as to costs. Mr. Matlala's submission in this regard was based on the premise that as the Bank's application was not properly before the Court a quo, the Court was not entitled to make any costs order in respect of it. He conceded, however, that if this Court held that the matter was properly before the Industrial Court, the Learned Judge was entitled to make the order he did. This Court has so held and therefore Mr. Matlala's submission falls away.

In any event, an award of costs is in the discretion of the Court a quo and this Court will not interfere with it unless it is satisfied that the Court a quo did not exercise its discretion properly or did so arbitrarily or unreasonably or on an incorrect principle. I am not so satisfied. Indeed, in my view the Learned Judge was quite correct in making the order he did. The facts are that at a meeting on 18 December 1994 the Union was asked by the Commissioner to refer the dispute to him in terms of Section 5 and 43 of the Act, as the Bank was an essential service and that if they did not do so and went on strike, the strike would be illegal. Despite that, the Union's members went on strike on 19 December 1994. Their opposition to the Bank's application, as the Learned Judge found, had no leg to stand on and he was in my view quite right in holding that the Union's stubborn and defiant proceeding with its ill-founded opposition was frivolous and vexatious. Its appeal against the costs to order must also therefore fail.

There is, finally one aspect to which I must refer. In the Court a quo the Union took as one of its points of opposition the following. It said that the declaration by the Minister in 1989 of the Bank as an essential service, without giving the Union a hearing before doing so, violated the constitutional rights of freedom of speech and of association of its members. It submitted that the Industrial Court should not grant the Bank's application as the Minister had

acted ultra vires and accordingly the Union's failure to comply with those sections of the Trades Dispute Act relating to essential services could not have the effect of making the strike an illegal one.

The Learned Judge rejected this submission. He held that any question as to whether the Minister acted ultra vires and in violation of any constitutional right was one to be tested in a competent court, which the Industrial Court was not, it having no jurisdiction to adjudicate on constitutional matters.

Although the finding was initially challenged in the notice of appeal, it too was one of the grounds of appeal abandoned at the hearing of the appeal before this Court.

Despite this, Mr. Kuny, who with Mr. Spilg appeared for the Bank, invited this Court to enunciate what he described as "guidelines" on the status of the Industrial Court. Counsel submitted that the Industrial Court is a specialised division of the High Court and therefore as such would be competent to adjudicate on constitutional issues brought before it. They asked this Court to find it to be such. The invitation for this Court to express its view on the matter, so it was submitted, was because issues involving the constitutional rights of employees and employers and their respective organisations were arising more and more frequently in the Industrial Court.

This Court declined the invitation. Its reasons for doing so are these. In the first place the matter was not one which it was necessary for the Court to decide in regard to the appeal before it. It is not the function of this Court to express what would amount to gratuitous views in regard to matters which are not pertinently before it and which are not germane to the issues it is called upon to decide. Secondly, it is obvious that the Government of Botswana would have a real interest in any declaration by this Court of the sort it was invited to make. It would affect not only the constitution but also the Trade Dispute Act. Neither the Government nor any of the relevant Ministers who would be affected by such a declaration was before this Court and

therefore no consideration could be given to the issue raised in their absence.

Reverting then to the appeal, although most of the grounds of appeal were abandoned, the Bank had to be prepared to meet them. Although most of them had no substance, they were wide-ranging. The appeal was also one of importance to the Bank. In my view it was therefore entitled to engage the services of two Counsel.

None of the grounds of appeal with which the Appellants persisted has succeeded for the reasons set out above.

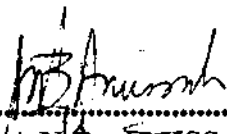
It follows that the appeal must be dismissed with costs, such costs to include the costs of two Counsel.

DELIVERED IN OPEN COURT THIS 13th DAY OF JULY, 1995.



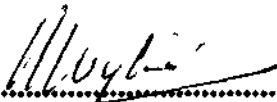
P. H. TEBBUTT
JUDGE OF APPEAL

I agree



A.N.E. AMISSAH
JUDGE PRESIDENT

I agree



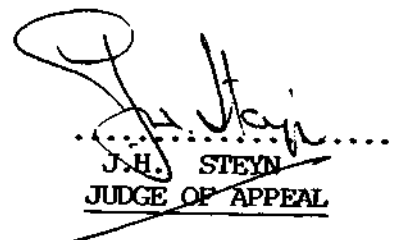
R.T. HON. LORD N. WYLIE
JUDGE OF APPEAL

I agree



G.G. HOEXTER
JUDGE OF APPEAL

I Agree



J.H. STEYN
JUDGE OF APPEAL