IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. CACLB-047-08
Industrial Court Civil Case No. I.C.491-05

In the matter between:

BOTSWANA MINING WORKERS UNION **Appellant**

AND

DEBSWANA DIAMOND COMPANY (PTY) LTD **Respondent**

Advocate A J Freund S C (with Mr L Mogobe and Ms P Ntalabgwe)
for the Appellant[i]

Advocate J J Gauntlett S C (with Adv. A Myburgh and Mr B B Tafa)
for the Respondent [ii]

J U D G M E N T

CORAM: **TEBBUTT J P**
RAMODIBEDI J A
HOWIE J A

HOWIE J A

INTRODUCTION

1. This is an appeal against a decision of the Industrial Court refusing an application by appellant for condonation of its failure to prosecute timeously proceedings on behalf of its members dismissed by respondent

consequent upon an illegal strike. (For convenience I shall refer to those proceedings as "the claim.")

2. Subject to the validity and current existence of the Industrial Court Rules, which counsel for appellant challenged in this Court, the Rules required that, to initiate the proceedings, appellant had to effect referral of the matter to the Court and, simultaneously with referral or within 14 court days thereafter, to file its statement of case with the Registrar.

3. The period for referral began running on 15 December 2004 when the Commissioner of Labour issued a certificate purportedly in terms of s 8(11) of the Trade Disputes Act, 15 of 2004 (the Act). The Rules required, as is set out in paragraph 54 below, referral "as soon as possible" after certification.

4. Referral was effected five and a half months later, on 26 May 2005. The statement of case was filed on 20 July 2005, 25 court days after the date by which, in terms of the Rules, it ought to have been filed.

5. In the Court below, appellant applied for condonation of the late filing "of this case". It did not specify either late referral or late filing of its

statement of case. In considering the application the Court (Ruhukya A J) had regard to the entire period from 15 December 2004 to 20 July 2005.

BACKGROUND FACTS

6. On 6 August 2004 the Industrial Court interdicted the strike. Measures to implement the strike having proceeded nonetheless, interim orders were granted on 21 and 22 August 2004 placing shop stewards at respondent's Jwaneng and Orapa-Letlhakane operations in contempt of the interdict. On 22 August the strike began. It terminated on 3 September 2004. An application to have the shop stewards committed for contempt was countered by an appeal by appellant against the interdict. By 6 September respondent had dismissed between 400 and 500 workers that it referred to as essential services employees. Those are the persons on whose behalf appellant sought to bring the claim.

7. On 28 September 2004, the appeal against the interdict was dismissed. In the interim, on 19 September, at appellant's conference of delegates, there was a complete change of appellant's leadership, with an entirely new National Executive Committee (NEC) and a new General Secretary.

8. During October 2004 appellant, on behalf of the dismissed employees, referred a trade dispute to the Commissioner who advised that the dispute

would be mediated on 9 December 2004. Mediation could not proceed on that date and shortly afterwards the Commissioner issued the certificate referred to above. (Section 8(11) of the Act, it may be noted, contemplates a certificate issued by a mediator, not specifically the Commissioner but nothing turns on that in this appeal.) Certification in terms of the Act entitled either party to refer the dispute to the Industrial Court.

9. Turning to the relevant events of 2005, on 12 January, the new Secretary General, Mr Jack Tlhagale (Tlhagale), instructed appellant's then attorneys, Lerumo Mogobe Legal Practitioners (LM), to "file the case". However, on 19 February he was told by the old NEC (which remained at the helm of the appellant's affairs until registration of the new NEC in May) that he had no authority to instruct LM.

10. On 1 March the contempt application was heard by the Industrial Court.

11. On 14 March respondent launched an application for the review and setting aside of the Commissioner's certificate, alleging reviewable irregularities *inter alia*, in that respondent had not been given the opportunity to contest the referral to the Commissioner and that there had been no mediation. The review is still pending.

12. On 24 March the Industrial Court dismissed the contempt applications.

13. On 10 April appellant's old NEC passed a resolution to refer the dismissal dispute to the Industrial Court, to bring an application for condonation "of the case", to appoint new attorneys "to file the case" and to authorise Tlhagale to attend to the matter. The new attorneys were Boko Motlhala Rabashwa Ketshabile (to whom, for convenience, I shall refer as "Boko".) On 26 April Tlhagale gave Boko a power of attorney to seek condonation of the "late filing of the case" and to "file the case".

14. On 26 May the new NEC was registered and the dispute was referred to the Industrial Court.

15. The statement of case was due in terms of the Rules to be filed on 15 June. It was filed, as I have said, on 20 July.

16. The condonation application was brought in November 2005. The founding affidavit concluded with a request for condonation of the "late filing of this matter as prayed in the Notice of Motion". Paragraph 1 of the Notice of Motion sought an order condoning "late filing of this case".

17. Appellant failed in its founding affidavit in the court below to deal at all with its prospects of success in the prosecution of the claim. Only after this omission was highlighted by respondent did appellant seek, by way of what was called a supplementary and replying affidavit (leave for the filing of which was granted), to deal with this aspect.

THE INDUSTRIAL COURT'S JUDGMENT

18. Having noted that neither the Act nor the Rules provided assistance in interpreting the expression "as soon as possible", the court concluded that it meant within a reasonable time. Such construction, it was reasoned, safeguarded the need for expeditious adjudication and determination of disputes as also the need for preservation of the court's integrity. The public's expectations of peace in the workplace and employers' expectations of good industrial relations would be eroded if the expeditious resolution of disputes were not ensured.

19. The court considered that the founding affidavit was lacking in material averments apart from the issue of the prospects of success. Effectively, appellant was seeking to make out its case in reply.

20. As regards lateness, as I have mentioned, the court decided the application by having regard to the whole period from 15 December 2004

to 20 July 2005. It stated that it was common cause that appellant had delayed referring the claim after issue of the certificate and also observed that filing of the statement of case took place 55 days (calendar days) after referral.

21. In so far as appellant's explanation for its lateness was concerned the learned Judge regarded it as wholly unsatisfactory. It was clear, he said, that appellant focused its time and resources on the strike and the contempt proceedings at the expense of the dismissal claim, which "took a back seat." There was no explanation for appellant's inaction at various times during the overall period and in this regard appellant had failed to take the court into its confidence. In addition, all that referral involved was a letter to the Registrar accompanied by the Commissioner's certificate and no power of attorney was needed.

22. The Court proceeded to hold that appellant's dismissed members had been supine in not themselves enquiring about the progress of the claim and their inaction was not explained. Moreoever, in so far as appellant's application papers alleged that prosecution of the claim had been impeded by conflict between the old and new NEC's, this must have been known to the members and they should have "bypassed" the feuding factions and have referred the case themselves.

23. As to the conduct of the NEC's and the two firms of attorneys involved at the various stages of the relevant history, the court held that it had been explained neither adequately nor at all. The shortcomings of its attorneys had therefore to be visited on appellant.

24. Having found appellant's explanation for its lateness unacceptable, the learned Judge stated that he could "end the ruling" without saying more but that he would, for the sake of completeness, pronounce on the prospects of success as well as prejudice and the importance of the case.

25. Coming to the prospects of success, the court *a quo* described as "distasteful" appellant's having dealt with this topic not in the founding affidavit but only in reply. The learned Judge said, however, that he would overlook that in the light of his findings on the aspects of delay and the inadequacy of the explanation for it. He contented himself with stating that, after perusing the affidavits and applying the required test (that the claim could, not would, succeed) he found that prospects of success had not been demonstrated.

26. The court accepted that the case was of great importance to appellant and the dismissed employees. It also accepted that the case had significance from the point of view of jurisprudence and the public

interest. All those aspects had warranted expeditious action by and on behalf of appellant.

27. As to prejudice, the learned Judge found that the grant of condonation would severely prejudice respondent given the length of time it would take for the claim to be pursued to finality. He also said that respondent had to continue with its business operations and could not be expected to stand by uncertain whether threatened litigation would materialise.

28. Having endeavoured to balance the parties' competing interests, the court considered that the scales were weighted in respondent's favour.

29. It remains to mention that the matter of the time taken to bring the application in the court below was referred to in the judgment as being part of the issue before the Court, but was not elaborated upon.

APPELLANT'S CONTENTIONS

30. In this Court counsel for appellant began by advancing a legal argument not raised in the court below. It was to the effect that the Rules were bereft of legal validity, alternatively that, having been made in terms of s 18(6) of the Trade Disputes Act (Cap 48:02), (the old Act) as amended by the Trade Disputes (Amendment) Act, 23 of 1992 (the 1992 Act), they

were repealed when the old Act was repealed by the Act (as I have called the current legislation). The Rules were invalid because the process by which they came into being lacked legality or because they were *ultra vires* either the old Act or the Act. Accordingly condonation was unnecessary.

31. Next, in response to the argument in respondent's heads that even if the Rules for any reason did not apply then the provisions of s 8(3) and (11) of the Act warranted the "reading in" of wording to the effect that referral had to occur within a reasonable time, it was contended that "reading in" was not competent or justified. (I shall refer to s 8 in due course.) The only legitimate approach to interpretation where more appeared to have been intended than the legislature's express words was to supply additional wording only if such was necessarily implicit in that which was expressed.

32. As to the question of lateness, appellant's case was that if referral was required within a reasonable time, the facts and circumstances canvassed in appellant's affidavits demonstrated that the requirement was met. If on the other hand referral took place after a reasonable time then the court below erred in holding that appellant's explanation was unacceptable even if it was open to some criticism. It was submitted that

the court paid insufficient heed to the various persistent problems which plagued appellant's management. In addition, the case was one in respect of which, if appellant's attorneys were at fault, such fault should not have led to refusal of condonation and, in consequence, the non-suiting of the dismissed workers. Counsel urged with some force that it would be unjust if, for mere breach of the requirements of the Rules, the workers should finally lose their right to equitable relief. Predominantly the same argument applied in relation to the late filing of the statement of case.

33. As to the prospects of success, appellant's submission was that no reasons, not even tersely expressed reasons, were given by the court for its bald statement that no prospects had been demonstrated. This Court was therefore not fettered in adjudicating on the matter. In view of the existence, on the papers, of sufficient grounds to establish reasonable prospects this Court should hold that such prospects existed.

34. Finally it was submitted that the court below was wrong in attaching too much weight to the expected duration of the hearing of the claim and in not examining whether respondent had suffered prejudice caused by any non-compliance with the Rules. No such prejudice had been shown.

35. In sum, as a matter of law condonation was not required, alternatively the findings of the court below adverse to appellant were misdirected. This Court was therefore at large and should grant condonation whereafter the matter should be remitted for the claim to be pursued.

RESPONDENT'S CONTENTIONS

36. On the validity and existence of the Rules, respondent's counsel said that having elected in the court below to seek condonation, and the case *a quo* having been fought on that basis, appellant could not now change course. In any event it did not avail appellant to say that its new approach involved a pure law point if, as was the case, one could not deny the reasonable possibility that had the point been raised in the court below respondent might have tendered relevant evidence to meet it.

37. The validity and existence of the Rules were in any event clear. Their origin and status was to be found in the provisions of s 18(7) of the Act. Although drafted in terms of s 18(6) of the old Act, the latter's repeal had not, in turn, repealed the Rules. They constituted valid practice directives which as a matter of law had to be complied with.

38. Even if, for whatever reason, the Rules did not apply, s 8(3) and (11) of the Act had to be construed as necessarily implying that if, mediation

having failed, the parties were at large to refer the case to the Industrial Court, referral had to be effected within a reasonable time.

39. The time taken for referral was longer than was reasonable, and the reasons tendered for the delay were properly found by the Court below to have been unacceptable. In any case the learned Judge had exercised a discretion of the kind that offered only limited scope for interference on appeal even if this Court might have decided differently.

40. On prospects of success, the court's brief finding was possibly unhelpful but did not justify the conclusion that the relevant facts were not considered. Here, again, evaluation was within the discretion of the court below and its finding could not be said to have been, in effect, reviewably wrong.

41. As to prejudice, appellant's delays and the uncertainty whether it was proceeding or not had occasioned disruption to respondent's business and to the employment of those persons employed by it subsequent to the dismissals.

42. Finally, refusal of condonation did not mean the workers lost their claim; it was merely unenforceable in the Industrial Court. Respondent contended

that this Court's judgment in Botswana Railways' Organisation v Setsogo [1996] BLR 763(CA), left it open to the workers to pursue claims against the respondent in the High Court.

RELEVANT STATUTORY PROVISIONS

43. Under the old Act trade disputes (then defined, essentially, as disputes between an employer and employees in a trade or industry pertaining to their relationship) could be reported to the Commissioner who could refer it for settlement or refer it for determination by a Permanent Arbitrator. There was no Industrial Court. That was only established by the terms of the 1992 Act which amended the old Act and did away with the office of the Permanent Arbitrator. Section 17 of the old Act now declared that the Court was established for the purpose of settling trade disputes and to further, secure and maintain good industrial relations in the country. The salient provisions of ss18 and 19 were:

> "18.(1) The Court…shall have exclusive jurisdiction in every matter properly before it under this Act, and …such jurisdiction shall include power –
>
> (a) to hear and determine all trade disputes;
>
> …
>
> (d) 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.

…

(6) The Court shall regulate its own procedure and proceedings as it considers fit.

19.(1) The Court shall not be bound by the rules of evidence or procedure in civil…proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice."

44. The 1992 Act re-defined a trade dispute to include, *inter alia*, a dispute over the dismissal of any person. Section 7, which had enabled the Commissioner to refer a dispute to the Permanent Arbitrator, now required the Commissioner, absent settlement of a dispute, to issue a certificate that either party or both could refer the dispute to the Industrial Court. No time was set for referral.

45. The Act repealed the old Act. However the title of the Act reads:

"An Act to re-enact, with amendments, the Trade Disputes Act"

and all subsidiary legislation made under the old Act and not inconsistent with the Act was saved (s 55(1)).

46. Section 7 of the Act provides for referral of a trade dispute for mediation. Subsection (1) says that a party to the dispute "may" refer it and subsection 2 reads:

> "An employee referring a dispute concerning termination of employment shall refer the dispute within 30 days of the date of such termination."

47. Section 8 deals with the process of mediation and contains the following subsections:

> "(3) Where the mediator fails to mediate a dispute [within 30 days] the parties…may refer the dispute to…the Industrial Court.
>
> …
>
> (11) The mediator may issue a certificate of failure to settle before the expiry of [30 days] to the effect that either party may refer the dispute to the Industrial Court…"

The section lays down no time for referral.

48. Section 18(1)(a) and (g) repeats the terms of s 18(1) (a) and (d) of the old Act (with a single minor difference in (a)), and s 18(7) and s 19(1) repeat exactly what was contained in s 18(6) and s 19(1) of the old Act.

THE RULES

49. Because the record contains two sets of Rules which differ in material respects and because the affidavits and counsel's written argument showed that the parties were not *ad idem* as to which set applied at the times relevant to this matter, the Court requested clarity in that regard and also as to the origin and status of the set which did apply. An affidavit was duly filed by an attorney of the firm acting for the respondent, the contents of which are not in dispute.

50. The Industrial Court was established by the 1992 Act which came into force in October 1992. The first Judge of the Court was De Villiers J. In 1994, before the Court's first sitting, he compiled a set of draft initial Rules. The draft was supplied to the Attorney-General, Botswana Federation of Trade Unions, the umbrella body of employers and the Permanent Secretary in the Ministry of Labour and Home Affairs. The Federation engaged counsel to submit representations in respect of the draft. Amended drafts followed. Thereafter a set of initial Rules came into existence which was used when the Court's first case was heard in September 1994. It was replaced by a new set – the current Rules – which was compiled in July 1995. Finalised after deliberations with and input from the various concerned parties, and after many revisions it was

published, but not gazetted. Copies were provided to the unions and employer bodies for distribution to their members, and to the other concerned parties. Copies have always been available at the office of the Registrar of the Industrial Court. Copies were supplied to the Commissioner for furnishing to parties wishing to refer a dispute to the Industrial Court. The existence of the Rules is also indicated in standard forms issued to parties by the Registrar preparatory to such proceedings. The Rules have been in the public domain since first published and are referred to in The Labour Laws of Botswana by Andrew Briscoe, published in 2000. I shall hereafter, when discussing the Rules, refer to that set identified as the one current at all material times, namely the 1995 version.

51. Turning to the contents of the Rules, the following appears under the title "Rules of the Industrial Court":

> "(Made under the discretionary powers granted to the Court in terms of Section 18(6) of the Trade Disputes Act)".

52. The Preamble, after reference to ss17(1) and 19(1) states:

> "…(T)hese Rules are therefore made to assist the Court in achieving the aforesaid objectives of the Act and when interpreting these Rules, the Court will have regard to substance rather than form (Rule 12(4)) in order to dispense substantial justice between the parties."

53. Rule 1, after stating that the Rules shall apply to proceedings in the Industrial Court, goes on to provide:

> "(2) These Rules shall not have the force of law and shall serve merely as guidelines for the conduct of proceedings in the Industrial Court.
>
> (3) Non-compliance with any of those Rules shall not render any proceedings void unless the Court, in its discretion, so directs in terms of Section 18(6) of the Act."

54. Rule 4, which is central to the issues, contains the following provisions:

> "4. <u>FORM AND CONTENT OF PROCESS</u>
>
> (1) Any trade dispute, as contemplated in Section 5 (1) (a) of the Act, which need not necessarily be referred to and which has not been referred to the Commissioner of Labour, may as soon as possible be referred by any party to the dispute directly to the Industrial Court for a hearing and determination.
>
> (2) Any trade dispute, as contemplated in Section 5(1)(a) of the Act, which has nevertheless been referred to the Commissioner of Labour and any trade dispute, as contemplated in Section 5(6) of the Act, which has to be referred to the Commissioner of Labour, may as soon as possible

after the Commissioner of Labour has issued a certificate in terms of Section 7 of the Act, be referred to the Industrial Court for hearing and determination by any party to the dispute.

(3) A letter of referral, (Form IC.1) and where applicable, accompanied by the said certificate, shall be deemed to be a proper referral of such dispute to the Industrial Court.

(4) Such party (the Applicant) may simultaneously with the delivery of such letter of referral or shall within 14 days thereafter, file with the Registrar, a statement of case, as near as may be in accordance with Appendix 1 to these Rules, and serve a copy thereof on the Respondent, which statement of case shall:

(a) be signed by the party by whom it is delivered;

(b) contain in full the title of the matter, the names of the parties and where possible, the number assigned by the Registrar to the matter at the head of such statement;

(c) contain clear and concise particulars relevant to the unresolved trade dispute and any further material facts on which the applicant relies for the relief sought;

(d) be divided in paragraphs including subparagraphs, in respect of content, which paragraphs shall be consecutively numbered and which shall, as near as possible, each contain a distinct averment;

(e) set out clearly the nature of the relief sought;

(f) contain an address at which the Applicant will accept service of process in the proceedings;

(g) contain a notice that if the other party (the Respondent):

(i) intends opposing such application, he is required within 14 days after delivery of the said statement of case, to deliver a reply referred to in subrule (5);

(ii) fails to deliver such reply, a determination, including an order as to costs, may be made in his absence;

(h) contain a list of books and documents relevant to the application, which are in the applicant's possession or under his control.

…

(9) Any late delivery of a statement of case or statement of defence may be condoned by the Court on good cause shown in terms of Rule 12(1)(a)."

55. Rule 12 provides –

"12. <u>GENERAL POWERS OF THE COURT</u>

(1) Without prejudice to the general discretion granted to the Court by Section 18(1)(d) of the Act, the Court may on application or of its own motion at any time:

(a) before or after the expiry of any period condone any failure to comply with any rule including time periods save for the time within which an appeal may be noted to the Court of Appeal and may abridge any time prescribed by these Rules.

…

(4) The Court in the exercise of its powers and discretion and in the performance of its functions, or in any matter incidental thereto, may act in such manner as it may consider expedient in the circumstances in order to achieve the objectives

> of the Act, and in so doing it shall have regard to substance rather than form, save as is otherwise provided in the Act."

<u>DISCUSSION</u>

56. Counsel for the appellant laid great stress, in advancing the invalidity argument, on the absence of gazetting, on an alleged inadequacy of publication, on the statement in Rule 1(2) that the Rules did not have "the force of law" and on the attempt by the drafter, in Rule 4(2), to impose a time limit which neither the Act nor the old Act required. In any event, it was said, the repeal of the old Act had the effect of repealing the Rules.

57. In my view, the mere fact of the repeal must not be looked at in isolation. The title of the Act states the legislative intention to re-enact the old Act subject only to some amendments. And although the Rules do not constitute subsidiary legislation, the saving of such legislation also conveys the intention to retain, subject to the amendments, the regulatory scheme which existed under the old Act. In addition, and more importantly, s 18(6) of the old Act, which empowered the Industrial Court to direct how its proceedings had to be conducted, and in terms of which the new Court, through De Villiers J, drafted the Rules, was re-enacted *pari passu* with the repeal in precisely the same terms. Legislation which empowered the Industrial Court to give directives by way of rule-making,

therefore existed at all material times despite the repeal. The Rules were consequently never stripped of their legal foundation.

58. The Rules' disavowal of "the force of law" is no more than an acknowledgement that they cannot be viewed and acted upon as if they were gazetted subordinate legislation such as, for example, the Rules of the High Court. (The consequences of non-compliance could conceivably be treated differently if they were.) The purpose of the disavowal, read with the Act, the preamble to the Rules, and, indeed, the Rules as a whole, was clearly to afford the Industrial Court the greatest flexibility in the attainment of an expeditious and just procedure by which to dispense substantial justice. That said, the Rules do not in the least imply that compliance was unnecessary. The converse is true.

59. Consequent upon their compilation the draft Rules were discussed with all the players in the relevant field and, having been finalised, their existence and applicability was notified widely and remains the subject of ready communication to intending parties before the Industrial Court. The legislation, old and current, empowered the Court to make its own procedural law by way of statutorily authorised directives. It did so. That law was published and is knowable. In addition, that power enabled the Court to lay down time limits in regard to which the Act is silent. Far from

impeding the Act's objectives, the supplementary provisions provided by the Rules serve to achieve them. The virtually universal requirement that law be adequately accessible and sufficiently precise – stressed by appellant's counsel with particular reference to authorities he subsequently provided – was met in this case.

I conclude that the invalidity submission cannot succeed in any respect. The imposition of the requirement in Rule 4(2) that referral had to be effected "as soon as possible" was, subject to interpretation of that expression, a valid provision. It is therefore unnecessary to deal with respondent's "reading in" contention.

60. The next issue is lateness. The court below construed the words "as soon as possible" as meaning "within a reasonable time." I agree. Literally, if a person must act "as soon as possible" this conveys the need for such expedition as would compel putting aside all his other commitments. This not only entails having regard to all aspects of the situation in which the actor subjectively finds himself but it is also unreasonably demanding. There must, in order to deal with all claimants as evenly as possible, be an objective criterion. Reasonableness is the obvious one to which courts resort and understandably so. The time envisaged, must be such that the act required to be performed – referral of the dispute – can be reasonably accommodated within the period and with reasonable expedition, having

regard to what referral entails and making due allowance for such time as would be required were the claimant not a single individual but a union acting through representatives and representing multiple individuals.

61. It needs emphasis, I think, that this part of the enquiry is not concerned with the explanation for lateness. An alleged defaulter's explanation has nothing to do with the question whether conduct required of him was late and, if so, by how much.

62. Objectively viewed, the action that referral entailed was the writing of a letter in standard form (in terms of the Rules), the annexing to it of the Commissioner's certificate and the delivery of those documents to the Registrar. The only other formality would have been to obtain the necessary authorisations from the individuals themselves and appellant's relevant official(s).

63. The court below said that it was common cause that appellant "delayed in referring its case to the court" and having regarded that aspect as common cause, did not find when referral ought to have taken place. Appellant's counsel contended that it was not common cause that the referral was late and that to find lateness the court ought to have found by when referral should have been effected.

In any event condonation was unnecessary in respect of referral because it was not out of time and, consistent with that, the condonation sought in the Notice of Motion was directed only at late filing of the statement of appellant's case.

64. What must be observed in assessing these arguments is that, in the first place, the founding affidavit acknowledged in a number of passages that prosecution of the claim had been delayed. Secondly, as already indicated, referral only occurred on 26 May 2005 and filing took place on 20 July 2005. In other words when appellant resolved on 10 April to seek condonation it was not yet out of time for filing the statement of case – it had not yet effected referral. Notionally it could have filed its statement of case a few days after referral on 26 May and have been well within the 14 court day period laid down in Rule 4(4). On appellant's argument no condonation was necessary at all on 10 April. Yet it resolved to apply for condonation. The delay acknowledged in the founding affidavit, and implicitly in the resolution and power of attorney, was delay in respect of prosecution of the claim. Such delay, as at 10 April 2005, was confined, strictly speaking, to delay in respect of referral. That appellant drew no distinction between referral and filing a statement of case and regarded the two as essentially one is apparent from Tlhagale's letter of instructions of 12 January 2005 in which he wrote "we instruct that you file the case".

That terminology was repeated in subsequent documentation and that is how the words "filing of this case" came to be used in the Notice of Motion.

There were clear grounds for the learned Judge's statement, therefore, that it was common cause that appellant delayed in referring the claim.

65. I would pause here to remark that analysis of the context in which appellant's various representatives, legal and otherwise, used the terms "file" or "filing" demonstrates that both parties erred in submitting in this Court that condonation was not sought for late referral.

66. Reverting to appellant's argument, it is so that the court below did not make a finding as to the date or time by when referral ought reasonably to have taken place. If the period in Rule 4(4) is anything to go by, no period substantially longer would appear to be reasonably needed for referral. The period of 14 court days generally represents 18 to 20 calendar days (depending on how many weekends have to be considered). Making allowance for closure of attorneys' offices over the end of the year holiday period one is justified in finding that what was necessary for referral could reasonably have been achieved by the end of January 2005. Significantly, the letter of instructions to LM was written on

12 January 2005. Quite ordinary efficiency would have achieved referral during the remainder of the month. In the judgment of the court below referral was substantially out of time. In my opinion there were ample grounds for that conclusion.

67. As to the lateness of the filing of the statement of case, the plain fact is that filing was 25 court days late. The approach of the court whereby it considered the whole composite period from 15 December 2004 to 20 July 2005, and found lateness of the prosecution overall, is not open to sustainable attack.

68. Turning to the explanation advanced on behalf of appellant, it is immediately evident from the founding affidavit that appellant's time and resources were devoted to the other litigation in which it was involved. There was the appeal against the interdict and, secondly, the contempt proceedings. The latter only ended on 24 March 2005. In addition appellant's leadership became acrimoniously divided in relation to the issue of the dismissed workers. Tlhagale frankly admitted that it appeared that the claim of the dismissed workers suffered and did not receive the urgent attention it required. He went on in the founding

affidavit:

> "10.4 As the other cases were in progress, and as the entire manpower of the (appellant) has focused on them, it was my genuine belief that the matter of the dismissed workers had, at least been filed with this Honourable Court.
>
> 10.4.1 I must candidly point out to this Court that I personally did not make any enquiries about it as I was actively involved in the other two cases and attended physically at the offices of (appellant's) attorneys thereanent as well as at court."

69. The difficulty I have with that explanation is, firstly, that by 28 September 2004 the appeal had been disposed of. He cannot have been involved in both the other cases after that. Secondly, the deponent himself wrote the letter of instructions to LM on 12 January 2005 and then, having been told on 19 February that he had no authority to instruct them, he advised them accordingly. He cannot have thought the claim had been filed by 19 February in those circumstances. Thirdly, it was he who, pursuant to the resolution of 10 April 2005, gave the power of attorney to Boko on 26 April which, to his knowledge, was intended for an application for condonation because the case had not yet been "filed", in any respect.

70. In the papers and in counsel's argument for appellant, the rift in appellant's leadership received considerable attention. It was variously described as a "crisis" or as a circumstance "paralysing" the appellant. The old and new NEC's, it was alleged, were particularly divided in respect of the claim, the old NEC having been obstructive in handing over the reins to the new NEC and having failed to instruct LM or to place LM in funds to pursue the claim.

71. The court below found the appellant's "non-action" between 12 January and 10 April 2005 unexplained. This was a reasonable conclusion. The founding affidavit failed to reveal what it was that the old NEC found problematic about the claim. Only in reply did the reason emerge. It was there alleged that the old NEC took the view that because the strike had been illegal no claim was maintainable. As abundant case law shows, this was a clearly wrong view of the law. The misapprehension could quickly have been dispelled by simple enquiry to appellant's attorneys. In the period January-April 2005 they were LM who were then still engaged in dealing with the contempt matter. There is no suggestion that the old NEC had any difficulty in dealing with LM. Indeed, the old NEC, being the body that obviously authorised the appeal against the interdict and the contempt case, remained in charge of appellant's affairs till registration of the new NEC and it was the old NEC that authorised the claim. The

question then arises why the old NEC could not, and did not, make that enquiry. There is no explanation on record.

72. There is also no explanation as to what broke the alleged deadlock between the old and the new NEC's so that on 10 April the old NEC did authorise the claim. The question is why that could not have been done much sooner, in other words why the factors that eventually moved the old NEC to act in April did not or could not have prevailed earlier.

73. That referral only occurred on 26 May 2005 when the resolution had been passed on 10 April 2005, was also inadequately dealt with. Appellant merely stated in its papers that the power of attorney would not have been accepted by the Registrar, and the new NEC could not have acted until registration of the new NEC. As that only happened on 26 May, this was the reason for the hold-up. This is not understandable. If the old NEC authorised the claim, and remained the body to act on appellant's behalf until registration, one does not know why it did not take the further steps that were necessary. From late April appellant was represented by Boko. No affidavits were tendered from Boko or for that matter, from LM to explain any aspects of the delays that continually occurred.

74. The court below criticised the apparent lack of concern on the part of appellant's members and considered that they could have acted on their own if the NEC's were so engrossed in their conflict. In the replying affidavit Tlhagale did say that during March-April 2005 dismissed employees met with him wanting to know why their case was not being prosecuted and that the old NEC was "reluctant" to attend such meetings. However, this ties in with the question why, if the old NEC was prepared on 10 April to authorise the claim, why they did not do so earlier. No affidavit by an old NEC member was put up. The employees were entitled to look to their union and the latter was entitled to look to its attorneys but when unexplained delays occurred as often as they did in this case, the court below was justified in concluding that nobody was blameless. Despite its firmly worded criticism of the employees' inaction, the eventual finding was no more than that they were "not entirely without blame." There were adequate reasons for that observation.

75. As to the delay from the date of referral until 20 July 2005 when the statement of case was filed, much of what I have said as regards the shortcomings in appellant's proffered explanation applies here as well. In the replying affidavit appellant said the delay was necessitated by the need to obtain "a statement of the fact of the dismissal" from the appellant and the dismissed workers and to compile a list of their names.

Respondent's counsel said that a list had been provided to appellant by respondent shortly after the dismissals and that the contents of the statement of case eventually filed demonstrated that the facts it contained must have been known long before. There is obvious force in these criticisms. The learned Judge referred to this particular delay as one of the matters under the heading "Issue for Determination". He also, as I have mentioned, took the whole period from 15 December 2004 to 20 July 2005 into account in assessing the worth of appellant's explanation. Apart from the fact that the filing on 20 July was undeniably 25 court days late, such filing had already been long delayed by the substantial delay in referral in any event. A reasonable basis existed for the court below to consider the acceptability of the explanation by having regard to the whole period. Unquestionably, the pattern of dilatoriness that characterised appellant's conduct from 15 December 2004 to 26 May 2005 extended to the time between the latter date and 20 July. It cannot be said, therefore, that the court failed to consider the last-mentioned phase or to evaluate appellant's tendered explanation in respect of it. In addition, I come back to the point made earlier that what appellant sought condonation for was, in truth and in context, the lateness of its prosecution of the claim, comprising both the referral and the filing of statement of case.

76. The delay or delays (whichever way one looks at it) which appellant asked to be condoned involved substantial lateness. And the reasons advanced to try to explain it were, with every justification, labelled by the court below as wholly unsatisfactory. The court was therefore justified in stating that those features were in themselves sufficient to cause the application to fail.

77. To aggravate appellant's problems there was the delay in making the condonation application in November 2005 when it had already been resolved on 10 April 2005 to seek condonation. It is trite that an applicant for condonation must proceed with reasonable expedition after becoming aware of its default. Despite whatever disputes there were between the NEC's, the events of April-May 2005 show that appellant was able to obtain the resolution and power of attorney necessary for the claim and to refer the claim. It had the assistance of attorneys in all those respects. It was not satisfactorily explained why the condonation application was not brought in that period. Again, an explanation by either LM or Boko was conspicuous by its absence. If a reasonable explanation were capable of being given by them one would have expected it to have been provided. The inference is justified, in all the circumstances of the case, that no such explanation existed.

78. In the founding affidavit it was said that one of the difficulties facing appellant at the time the affidavit was drawn was that appellant's funds were still being held by branch committees loyal to the old NEC. However, that feature obviously did not disable appellant from making the application which came before the court. The court below included this delay in its summary of the "Issue for Determination". It was not mentioned again in the judgment but was a pertinent circumstance of the case, present to the mind of the court below, to which this Court must have regard in determining whether the discretionary decision of the court below was relevantly flawed. Thus far I have no reason to find that it was.

79. Turning to the prospects of success of the claim, appellant contended that there were various grounds for contending that the prospects were reasonable. It is convenient to summarise them as follows:

1. The dismissals were selective: some strikers were not dismissed; essential services employees were singled out yet non-essential service employees were also dismissed who were on final warning for unrelated offences.

2. Section 41(2) of the Act forbids dismissal of a strike participant.

3. Respondent failed to consult appellant before the dismissals.

4. The dismissed workers were not given individual hearings.

5. No ultimatum preceded the dismissals of some workers.

6. Some were dismissed despite returning to work in compliance with an ultimatum.

7. Ultimatums gave insufficient time for compliance.

8. Some workers were unfairly dismissed after returning to work.

9. The ultimatum did not single out essential services workers.

80. Counsel for respondent stated in their heads that grounds 2, 7, 8 and 9 were not advanced before the court below. I did not understand that statement to be contested. If the court *a quo* was not required to consider those grounds they cannot be taken into account now as grounds for attacking the judgment appealed against. I would add that s 41(2) clearly means that a striker may be dismissed during a strike for any valid and fair reason even if he is not dismissed for participation as such. The provision does not assist appellant's case.

81. The factual basis for grounds 5 and 6 is disputed on the affidavits. Given that an applicant for condonation is not required to establish allegations as he has to in a trial or opposed motion, the ambit of the dispute disables one from finding any prospects on those grounds to be reasonable.

82. As to the remaining grounds, that the dismissals were selective and not preceded either by consultation with appellant or individual hearings,

counsel for the respondent accepted that those dismissed included persons on final written warnings but contended that the differentiation of those workers and the essential services employees from the non-dismissed strikers (who received final written warnings) was based on objective considerations. Those dismissed, he contended, were differently circumstanced from those not dismissed. Counsel for the appellant did not seek to argue that the parity of treatment principle would still apply if objective reasons for differentiating existed. Such reasons are apparent from the record. I do not think it can be said that the court below did not have a reasonable basis for thinking that the selectivity argument was bereft of reasonable prospects of success.

83. As regards consultation, the real point sought to be advanced is that appellant ought to have been told beforehand that it was intended to single out the essential service employees. Appellant seeks to rely on South African case law and the Code of Good Practice: Dismissal in schedule 8 to the South African Labour Relations Act. No statutory or judicial authority in this country was cited.

84. With reference to pre-dismissal hearings, Botswana case law does not support appellant's submission that the absence of such hearings was unfair. In Phirinyane v Spie Batignolles [1995] BLR 1(IC) at 5 E-F the

court observed that a hearing could not reasonably be expected in the course of an illegal strike where the worker refused to respond to a proper ultimatum. And in NALCGPWU v The Attorney-General [1995] BLR 48 (CA) at 81 H this Court remarked that "an ordinary hearing in a strike situation may not lead to a just result." Here, again, counsel for appellant sought assistance from South African case law, agreement with which by Botswana courts one can only regard as a matter for speculation.

85. Bearing in mind the approach on appeal against a narrow discretionary decision, I am not persuaded that the court below could not reasonably have decided against the appellant with regard to the issues of consultation and hearings.

86. Turning to the question of prejudice, it was submitted for appellant that the court *a quo* misdirected itself by not addressing the question whether the delay in prosecuting the claim had prejudiced appellant. It was said that no such prejudice had been shown and that the anticipated duration of the hearing that would ensue were condonation granted was not a factor to which material weight should be accorded. The court below, I apprehend, therefore did not err, in appellant's submission, in having regard to subsequent prejudice. The question was simply whether it had reasonable grounds for considering that the circumstances existing and

inherent in the events between December 2004 and the application in the court below showed, or justified the inference, that the delay in prosecuting the claim occasioned some prejudice to respondent. Put thus, the question really goes a long way to answering itself. The respondent had had to fill the vacancies left by the dismissed workers and get on with conducting its business. Its interest in expeditious disposal of the claim was self-evident and objectively understandable. This is what the court below meant, in my view, when it said of respondent's situation that if an undertaking is to continue "running and operating with maximum efficiency it cannot stand by not knowing whether threatened legal suit is or is not going to be instituted." The respondent's interest in the finality of the claim did not only pertain to the future but to the period to which I have referred, when the dilatoriness and the ineptness of appellant's progress, or lack of it, would have given rise to just such uncertainty as that to which the learned Judge referred. And the longer a litigant has to retain his lawyer the greater his legal expenses, not all of which are recoverable as costs of suit. It has therefore not been shown that in considering prejudice the court below misdirected itself.

87. Apart from having reasonable grounds for the conclusions it reached in respect of the elements of the case discussed above, the court below was aware of the need to weigh up all the relevant considerations in the

scales. It did so and found for the respondent. It has not been shown that the decision is open to appellate interference. In the result the appeal cannot succeed.

88. As to costs, the costs of two counsel were asked for by respondent. Appellant's counsel did not assent to such an order. Having regard to the extent to which the effort and industry by means of which counsel for appellant – commendably – enlarged and expanded upon the issues which were before the court below, it was a reasonable expedient for respondent to employ two counsel.

89. The appeal is dismissed with costs including the costs of two counsel.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30th DAY OF JANUARY 2009.

C T HOWIE
[JUDGE OF APPEAL]

I agree --------------------------------
P H TEBBUTT
[JUDGE PRESIDENT]

I agree --------------------------------
M M RAMODIBEDI
[JUDGE OF APPEAL]

[i] Lerumo Mogobe Legal Practitioners Attorneys for the Appellant
[ii] Collins Newman Attorneys for the Respondent