<u>IN THE COURT OF APPEAL OF BOTSWANA</u>
<u>HELD AT LOBATSE</u>

<u>CA CASE NO. 24/2004</u>
<u>IC CASE NO. 202/2004</u>

In the matter between:

BOTSWANA MINING WORKERS UNION **Appellant**

And

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

Advocate A.J. Freund (with him Mr. L. Mogobe & Mr. M. Kadje) for the Appellant

Advocate J.J. Gauntlett S.C. (with him Advocate A.J. Myburgh & Mr. B.B. Tafa) for the Respondent

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JUDGMENT

<u>CORAM</u> **Tebbutt J.P**
Zietsman J.A.
Mosojane A.J.A

<u>TEBBUTT J.P</u>:

What is in issue in this appeal is the legality or otherwise of a proposed strike by workers in the diamond mining industry in Botswana.

The respondent, Debswana Diamond Company (Pty) Ltd (hereinafter, for convenience, referred to as "the Company") owns three diamond mines at Jwaneng, Orapa and Letlhakane in Botswana in which it employs several thousand workers. These workers are all members of, and are represented by, the appellant, Botswana Mining Workers Union (hereinafter referred to as "the Union") a registered trade union. There exists between the parties a so-called recognition agreement which establishes and regulates the collective bargaining relationship between them and in particular imposes certain obligations on the parties in relation to dispute resolution procedures and the resort to industrial action.

In accordance with Clause 5.3 of the agreement a substantive agreement in regard to the terms and conditions of employment for the Union's members with the company is negotiated annually. The negotiations for the 2004/2005 year commenced between the parties on 18th March 2004 and they met a further nine times prior to 16th June 2004 but were unable to conclude an agreement. The Union then referred the dispute to the Commissioner of Labour in terms of Section 7 of the Trades Dispute Act No. 15 of 2004 (hereinafter referred to as "the Act") but as no settlement could still be reached, the Commissioner issued a certificate of failure to settle a trade dispute in terms of Section 8(1) of the Act. The referral of the dispute to the Commissioner and the circumstances in which it occurred is one of the aspects in contention in this appeal and it will be referred to in detail later herein. Suffice at this stage to say that by 22nd July 2004 the parties had failed to conclude a substantive agreement for 2004/2005.

On 22nd July 2004 a notice was received by the Company from the Union in which it indicated its intention to embark on a strike from 26th July 2004. This prompted the Company on 23rd July 2004 to bring an urgent application in the Industrial Court, in terms of Section 42(2) of the Act, for an order

(a) declaring the contemplated strike an unlawful strike in breach of the Act;

(b) interdicting and restraining

(i) the Union and its members from breaching the provisions of the recognition agreement

(ii) the member workers from breaching their contracts of employment by participating in an unlawful strike

(c) ordering the Union to ensure that its members complied with the provisions of the Act and of their employment contracts and/or of the recognition agreement.

The application was opposed by the Union.

After an initial postponement by the consent of the parties on 24th July 2004, the Industrial Court, on 6 August 2004, found that the contemplated strike would not be a lawful strike and therefore fell to be interdicted.

It made the following order

> "In terms of Section 42(2)(a) of the Trades Dispute Act, the Court hereby interdicts the contemplated strike called by the Respondent (the Union) at the Applicant's (the Company's) diamond mines at Jwaneng, Orapa and Letlhakane, as it is not in compliance with the provisions of the said Act."

No order was made as to costs.

The court subsequently filed full written reasons for its decision. It is against that decision that the Union now comes on appeal to this Court.

An event that occurred subsequent to the granting by the Industrial Court of the interdict is that on 23rd August 2004 some workers at all three mines went on strike. It is common cause that this was a "wild cat" and illegal strike. On that same day, i.e. 23rd August 2004, the Company brought an urgent application in the Industrial Court for the committal to prison of the Union's spokesman, one Chimbidzani Chimidza, and 31 of its members for contempt of the order of the Industrial Court set out above. Before that application could be heard the Union noted the present appeal against the Industrial Court's order interdicting and declaring unlawful the original contemplated strike, and when the contempt application (which is also opposed) came before the Industrial Court that application was postponed sine die pending the outcome of the present appeal.

In their heads of argument Counsel for the Company contended that this appeal is an abuse of process in that it has been brought for a tactical reason viz as a stratagem designed to avoid the contempt and committal applications. In support of this contention the Company's legal representatives required that the full record of the proceedings to date before the Industrial Court be put before this Court as part of the record in the appeal, designating it as Volume 2 in that record. It consists of some 360 pages. At the hearing of the appeal, however, this contention that the Union had abused the process of the Court was not pursued and no reference was made to Volume 2. No more need therefore be said by this Court in regard to this contention, save on the question of costs which will be dealt with when the whole question of the costs of the appeal will be considered.

In its application of 23rd July 2004, the Company advanced six grounds for its averment that the contemplated strike was unlawful and therefore unprotected.

These grounds are based either upon certain provisions of the Act or of the recognition agreement or, in one instance, on certain provisions of the Union's Rules and Constitution. The relevant provisions will be set out when they are referred to at the appropriate stage of this judgment. Each one of the grounds will also be set out in greater particularity when it receives detailed consideration herein. Suffice at this stage to say briefly what the grounds are and what the Industrial Court's finding was in respect of each of them. Its reasons for those findings will also be considered later.

In respect of some of those grounds the court a quo found for the Union and against the Company. In others it found against the Union. It is in regard to the latter findings that the Union's appeal is based. In regard to the former findings i.e. those against it, the Company filed a notice in terms of Rule 22 of the Rules of the Court of Appeal that it intended to contend that the Industrial Court's decision should be varied and/or affirmed by including some of those grounds as well. At the hearing of the appeal, however, Counsel for the Company stated that the Company was not pursuing this contention.

I shall state which party contests which finding when setting out the various grounds.

One further observation must be made before doing so. It is that the present Trades Dispute Act No. 15 of 2004 came into effect on 23rd April 2004, repealing the former Trades Dispute Act (Cap 48:02). The Company's application having been brought on 23rd August 2004, those proceedings and the proceedings before this court are therefore governed, where relevant, by what one may call the new Act i.e. Act 15 of 2004.

One turns then to the six grounds.

Ground 1: Strike Rules:

It was contended that the strike would have been premature as no strike rules regulating the conduct of such strike, as required by Section 39(1) of the Act, had been agreed to or determined. The Industrial Court found against this contention as a copy of such rules, as determined by the Commissioner of Labour, was handed into the Industrial Court at the hearing before it. This finding was one of those challenged by the Company in its Rule 22 notice but which, as stated above, it is now not pursuing. No more, therefore, need be said in regard to this ground.

Ground 2: **Previous Application in the Industrial Court in regard to payment of a production bonus**

One of the contentious issues that led to the Union's intention to call a strike was the question of a demand for a bonus by the workers in 2004. In 2003 an ex gratia bonus payment was made by the Company which was the subject of a dispute before the Industrial Court and in which the latter delivered a written judgment. The Company contended that the demand for a bonus in 2004 was designed to compensate the Union's members for a perceived shortfall in 2003 and therefore was either (a) in contempt of the Court's aforesaid judgment or (b) in breach of a full and final settlement clause in the 2003/2004 Wage Agreement. The court a quo found that the demand for a bonus in 2004 did not relate to the 2003 ex gratia bonus. The Company also challenged this finding in its Rule 22 notice but does not now persist in that challenge and no more therefore need also be said in regard to this ground.

Ground 3: Defective Notice

The Company contended that 48 hours notice of the intended strike, as required by Section 39(1)(b) of the Act, was defective. The court a quo found that there had been substantial compliance with the Act and held against the Company.

The Company also challenged this finding in its Rule 22 notice but once more, does not persist therein. It accepts that the notice was a valid one.

Ground 4: Essential Services

The names of those employees required to work on essential services during a strike had to be furnished by the Company to the Union in terms of the recognition agreement. A dispute had arisen between the parties as to the names of the employees, which dispute had not been resolved by 23rd August 2004. The Court a quo found that the strike would be premature if this issue was not first resolved. It is one of the three major issues which this Court is required to determine. It will be referred to as the "essential services point" in this appeal.

Ground 5: Non-compliance with the provisions of the recognition agreement:

The agreement lays down in Clause 10 thereof the procedures to be followed before strike action can be taken. These will be detailed later herein. The Company averred that the Union had not followed those procedures; the Union in turn, contended that the Company had waived its right to require such compliance. The Court a quo found that the Company had not waived its right and that the Union had not exhausted the provisions of the agreement before referring the dispute to the Commissioner of Labour. Therefore, it held, such referral was invalid, and in consequence, in terms of the Sections 39(1)(a)(b) and (c) of the Act, the contemplated strike became unlawful. This finding is the basis for the Union's major attack on the judgment of the Court a quo. Its contentions, as well as the relevant sections of the Act and the provisions of the recognition agreement, will be dealt with fully hereinbelow in what will henceforth be called the "internal procedure point".

Ground 6: Ballot:

The Union's Rules and Constitution provide that a decision on the taking of strike action at national level has to be taken by a secret ballot of the whole of its membership, and for the taking of local strike action a secret ballot or show of hands is required. The Court a quo found, firstly, that as all the Company's diamond mines were involved, the contemplated strike would be a national strike and, secondly, that no secret ballot was held nor even a show of hands. This, it held, was a serious breach of its own procedural rules. Section 49(1)(a)(i) of the Act provides that no person may take part in a strike if it is not in compliance "with an agreed procedure." The contemplated strike would, the Court found, therefore not be a lawful strike. This was not one of the grounds of appeal filed in the original notice of appeal but it has been added in terms of a supplementary notice of appeal. It will be called the "ballot point."

The last three issues viz the essential services point, the internal procedures point and the ballot point will now be considered in detail.

Fundamental to the consideration of these issues is the concept of labour relations between employee organizations and employers, the regulation of those relations and the mechanisms for the settlement of disputes that may arise in the course of the pursuance of such regulation, including recourse to industrial action, in Botswana. Basic to the concept is the furtherance, securing and maintenance of good industrial relations in Botswana, a premise which is enshrined in the legislation dealing with such relations viz the Trades Dispute Act of 2004. The establishment and maintenance of good industrial relations finds its seed-bed in two spheres (i) the recognition as trade unions of employee organizations in the various industries in the country in terms of the Trade Unions and Employers' Organisations Act (Cap 48:01); and (ii) the conduct of negotiations between such trade unions and employers in the industry in all matters bearing upon the relations between the employees in the industry who are members of the trade union and their employers. Such negotiations are hopefully to be conducted by the parties in a spirit of goodwill, harmony and amicability. The achievement of labour harmony and sound labour relations on a collective basis is an ideal to which Botswana, as in many other countries, aims (**Van Jaarsveld & Van Eck**: Principles of Labour Law p315). It is also expressed by the parties herein themselves in the objectives set out by them in their recognition agreement referred to above, which reads:

> "1. **OBJECTIVES**
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> The Company and the Union, having met in free and voluntary association, recognizing the desirability of promoting, encouraging and maintaining harmonious working relations between the Company and the Union to the mutual benefit of both parties, and agreeing that such relations can best be achieved through the process of joint consultation and collective bargaining based on mutual trust and good faith.
>
> DO HEREIN SET FORTH matters relating to the regulation of relations between the Company and the Union.
>
> 1.1 To promote industrial peace, stability and fairness within the Company ...."

Should any dispute arise between the workers and the employer, described as a trade dispute, that dispute, too, should if possible be resolved by negotiation and mediation rather than by recourse to industrial action. The predecessor to the present Act was passed in its original form in 1982 as Cap 48:02 and provided for mediation which was to be directed towards helping, in the first instances, the parties to reach a settlement by their own efforts (See Section 4(2)). This is still the aim of the present Act which provides in Part II thereof for the establishment of a panel of mediators and arbitrators whose mediation in any dispute must also be directed towards helping the parties to resolve any dispute between them principally by their own efforts (Section 6(4).) The Act, however, recognizes that disputes are not always capable of negotiated resolution and affords in Section 39(1) the right to a party to a dispute of interest to strike or lockout. (A "dispute of interest" is defined as "a dispute concerning the creation of new terms and conditions of employment or the variation of existing terms and conditions of employment" – which is the dispute between the parties in casu). That right to strike (we are not concerned with a lock-out here) is, however, not an absolute one or one without limitations but is a qualified one. It is qualified by the procedural requirements contained in Section 39 of the Act and by the prohibitive provisions of Section 42(1) of the Act, to which I shall shortly refer. It is, in my view, clear from the provisions of those sections that the Legislature, while establishing the right to strike, wished to discourage unfettered and precipitate recourse to it by enacting the qualifications referred to. The Legislature was no doubt aware of the far-reaching effects of a strike which not only cause the employer economic harm but also harm the economy of the country, apart from bedevilling harmonious industrial relations and inhibiting collective bargaining and negotiation. The right to strike is one which must be jealously defended; but it must be one which should not be used at the mere whim of the employees. Its use is obvious. By withholding their labour, the employees hope to bring production to a halt, to cause the employer to lose business and to sustain overheads without means of recovering them i.e. to cause the employer economic harm in the expectation that this will induce him or it to accede to their demands (see **Van Jaarsveld and Van Eck** of cit.p316 and authorities there cited). Freedom to strike is integral to the system of collective bargaining. The strike is the sanction that impels the parties to bargain collectively and gives strength to the bargaining powers of the workers. (See **Brassey & Others: New Labour Law p243).** The importance of its role in the process of collective bargaining is undoubted but it should not be used indiscriminately. As stated by E.M. Grossskopf in **SACCAWU v OK BAZAARS (1929) LTD 1995 (3) SA 622(A) at 628 D-H**:

> "The important role played by the freedom to strike in the system of collective bargaining can hardly be doubted. One should not, however, infer from the undoubted existence of the freedom to strike that an employer may not do anything to dissuade workers

from striking. The ultimate object of collective bargaining is industrial peace. It is one of the ironies of collective bargaining that the attainment of the object of industrial peace should depend on the threat of conflict (Brassey Loc. Cit). The reason for this dependence is a functional one. The freedom to threaten strike action and, if needs be, to carry out the threat is protected because, in an imperfect world, the system of collective bargaining requires it. This does not mean that strikes are to be encouraged. On the contrary. It would be preferable in every respect if the bargaining parties could reach agreement without recourse thereto, and this is indeed recognized by the Act (see, for example, s 65). A strike, it has been said, 'is a blunt instrument and one which damages the public, those who are striking and those against whom the strike is directed' (Heatons Transport (St Helens) Ltd v Transport and General Workers Union; Craddock Brothers v Transport and General Workers Union; Panalpina Services Ltd and Another v Transport and General Workers Union and Others [1972] 2 All ER 1214 (NIRC & CA) at 1233h-i). Although this weapon should be available to workers, it is in everybody's interest that it be used as seldom as possible."

And as held by the full court in **STEEL &ENGINEERING INDUSTRIES FEDERATION & OTHERS v NUMSA (1) 1993(4) SA 190 (T) at 195**:

> "The legislature, in the Act, has discouraged precipitate strike action by obliging the trade union to attempt to resolve its disputes with employers or employer organizations by bargaining before resorting to industrial action; by providing for 'cooling off' periods; and by requiring a union to enjoy majority support before embarking on a strike."

In my view the same purpose was in the mind of the Legislature when it enacted Section 39 (laying down the procedural steps to be followed before striking) and Section 42(1) of the Act. Section 42(1) imposes certain substantive fetters on the right to strike. It reads as follows:

> "**42**. (1) No person may take part in a strike or lockout if
>
> (a) the strike or lockout –
>
> (i) is not in compliance with the provisions of this Part or an agreed procedure, or
>
> (ii) is in breach of a peace clause in a collective agreement;
>
> (b) the subject matter of the strike or lockout is –
>
> (i) not a trade dispute,
>
> (ii) regulated by a collective agreement,
>
> (iii) a matter that is required by this Act to be referred to arbitration or to the Industrial Court for adjudication; or
>
> (iv) a matter that the parties to the dispute have agreed to refer to arbitration."

There is no definition in the Act of either "an agreed procedure" or "a peace clause". One must look for their meaning in the context of other provisions of the Act. As set out above there exists between the parties a recognition agreement which establishes and regulates the collective bargaining relationship between them. This falls within the definition in the Act of a "Collective Labour Agreement" which is "a written agreement relating to the terms and conditions of employment concluded between one or more registered trade unions ---- and one or more employers" i.e. in casu the Union and the Company. The recognition agreement imposes certain obligations on the parties in relation to dispute resolution procedures and the resort to industrial action. It is therefore an agreement between the Company and the Union containing procedures which the parties agree to follow in the resolution of disputes and the taking of industrial action and thus, in my view, is clearly "an agreed procedure". It is, in terms of Section 37(1) of the Act, binding on the parties and in Clause 16.1 of the agreement the Company and the Union agreed that the agreement is legally binding on them. It is not uncommon for employees and employers to agree that they will not take strike action or a lockout unless and until certain procedural steps have been taken. That has happened in the present case.

A "peace clause" is said in **Barker and Holtzhausen**: South African Labour Glossary to be –

> "a provision in a collective agreement whereby the parties agree to desist from industrial action during certain periods or under certain circumstances or during the currency of the agreement."

This definition commends itself to me. It is practical in that it envisages the parties agreeing that there will be no strike action by the workers or lockout by the employers at certain times say, for example, over the Christmas holidays or the Easter period or when, for instance, part of a factory or production plant is closed for maintenance purposes or some similar occurrence during which the parties agreed industrial action would be out of place. These are provisions that there will be no strikes or lockouts i.e. that there will be "peace" at certain agreed times or under certain agreed circumstances. However, the requirement that certain procedural steps or obligations must be taken or followed before a strike or lockout can occur does not give rise to a "peace" gap. It is not a "peace clause". It is rather an "agreed procedure".

It is convenient in dealing with the three issues on which the Industrial Court found against the Union to start with the "internal procedures point." That involves a consideration of the recognition agreement between the parties which, as has just been held, is an "agreed procedure", the terms of which must be complied with or else the contemplated strike would not have been legal and, in particular, a consideration of Clauses 10 and 11 thereof.

Clause 10 provides:

"10 **SETTLEMENT OF DISPUTES**

The JNCC will meet to resolve or settle those disputes which arise at JNCC level and/or those referred to it by the operations if they arise out of or pertain to substantive or procedural agreement matters.

10.1 **Disputes Arising at JNCC Level**

Where at the meeting of the JNCC, the parties fail to agree on a matter which was tabled for negotiation, the JNCC will adjourn to allow the parties time to consider each other's position.

10.1.1 The JNCC shall reconvene within 10 days of the first failure to agree in an attempt to resolve the disagreement.

10.1.2 In the case of a further failure to agree, the two parties shall prepare a joint statement setting out the nature of the disagreement and refer such joint statement to their principals.

10.1.3 The JNCC shall convene again within 15 days of the last meeting. Should the dispute remain unresolved the joint statement shall be amended to reflect the positions and desired settlement of each party, and deadlock shall be declared.

10.1.4 The parties may after the declaration of a deadlock mutually agree to refer the matter to private mediation.

10.1.5 Should the dispute still remain unresolved after private mediation each party shall then be free to declare a dispute in terms of the Trades Dispute Act of 1983 as may be amended from time to time.

10.1.6 The parties may jointly agree to reduce or extend any time period or omit any stage referred to in this clause."

In the Court a quo the Company submitted that the contemplated strike would be an illegal strike because of a failure by the Union to comply with the requirements set out in Clause 10 and that for that reason (among other reasons) the interdict should be granted. This submission was upheld by the Court a quo. The Union submits that the Court a quo erred in this respect.

It is common cause that the Agreement is a "Collective Labour Agreement" as defined in Section 2 of the Act. Section 37(1) provides that every Collective Labour Agreement shall be binding upon the parties thereto. Clause 16.1 of the Agreement provides also that "the Company and the Union intend this Agreement to be legally binding on them." Clause 11.1 of the Agreement provides:

> "11.1 The Company and the Union agree not to cause, countenance or support any lockouts, strikes, restrictive practices or industrial action of any kind until the matter or matters in dispute have been dealt with in accordance with the procedures as stipulated under this Agreement, under the Trades Disputes Act of 1982, as may be amended, from time to time or any other relevant legislation."

Section 42(1)(a)(i) of the Act provides:

> "42(1) No person may take part in a strike or lock out if -
> (a) the strike or lockout –
> (i) is not in compliance with the provisions of this Part or an agreed procedure."

It is common cause that the procedure set out in Clause 10 of the Agreement was not followed. Despite this fact Mr. Freund, for the Union, submits that the contemplated strike would not have been an illegal strike for the following reasons.

His first submission is that Clause 10 need not be complied with in respect of a strike if the provisions of PART VI of the Act are complied with. He relies for this submission on Section 42(1)(a)(i) of the Act which provides that no person may take part in a strike if the strike is not in compliance with the provisions of Part VI of the Act or an agreed procedure. Mr. Freund lays emphasis on the word "or" and submits that as long as the provisions of Part VI of the Act are complied with the procedures set out in Clause 10 of the Agreement need not be followed.

I have difficulty in accepting this submission. The Act provides how and when a strike can be called. The parties to this appeal entered into an agreement setting out an agreed procedure which must be followed before a strike is called. If Mr. Freund's submission is correct it would mean that before resorting to a strike the Union members need only comply either with the terms of the Act or with the terms of the Agreement. This would mean that in concluding the Agreement the parties intended to provide a procedure alternate to that set out in the Act, and to provide that if the terms of the Agreement are implemented the provisions in the Act can be disregarded, and vice versa. Such an intention is not stated in the Agreement. In my opinion the clear intention of the Agreement was to add to, and not to detract from, the terms of the Act, and Section 37(1) of the Act gives statutory recognition to the Agreement by providing that "Every collective labour agreement shall be binding upon the parties thereto." Section 42(1)(a)(i) of the Act provides that no person may take part in a strike if the strike is not in compliance with the Act or an agreed procedure. It does not provide that a person wishing to take part in a strike need comply only with the provisions of the Act, and need not comply with the terms of a specific agreement entered into between the parties.

It could not have been the intention of the legislator to provide that an agreement entered into between the parties, and given statutory recognition, could thereafter be ignored by the parties. The use of the word "or" in Section 42(1)(a)(i), which is couched in negative terms, does not indicate this intention and my conclusion is that compliance with Clause 10 of the Agreement was required to add legality to the intended strike. This conclusion is in keeping with the terms of Clause 11.1 of the Agreement which provides that the parties agree not to cause, countenance or support any strikes "until the matter or matters in dispute have been dealt with in accordance with the procedures as stipulated under this agreement ----."

In the course of his argument Mr. Freund referred to Section 39 of the Act. This section reads:

> "39(1) Every party to a dispute of interest has the right to strike or lockout if –
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> (a) the dispute has been referred to the Commissioner in accordance with section 7, and, subject to subsections (2) and (3), the dispute still remains unresolved after 30 days;
>
> (b) after the 30 days has expired, 48 hours notice of the commencement of the strike or lockout has been given in the prescribed form to the Commissioner and the other parties to the dispute; and
>
> (c) the strike or lockout conforms to –
>
> (i) the provisions of this Part, and
> (ii) any agreed rules regulating the conduct of a strike or lockout, or
> (iii) any rules determined by the mediator in terms of section 40(1)

Mr. Freund submitted that it is unthinkable that the lawgiver intended, before the right to strike could arise, that there should also have to be compliance, before a referral to the Commissioner was competent, with any procedural provisions contained in a collective agreement. On the facts, the dispute was referred by the Union to the Commissioner on 17th June 2004, and on 22nd July a notice of intention to strike on 26th July was given by the

Union to the Commissioner and to the Company. Mr. Freund submitted that the Union had complied with the provisions of the Act and that the contemplated strike would therefore not have been an unlawful strike.

Section 39(1)(c)(i) provides that a party has the right to strike if the strike conforms to "the provisions of this Part." Sections 39 and 42 both form part of Part VI of the Act and Section 42(1)(a) provides that no person may take part in a strike if the strike is not in compliance with the provisions of Part VI of the Act or an agreed procedure.

It is clear, as set out above, that Clause 10 of the Agreement entered into between the parties constitutes "an agreed procedure". The provisions of Section 39(1) of the Act must be read with Section 42(1). My conclusion, as stated above, is that the correct interpretation of Section 42(1)(a)(i) is that the members of the Union could not take part in a strike until there had been compliance with Clause 10 of the Agreement. If in fact Clause 10 had not been complied with the contemplated strike would thus have been an unlawful strike.

Mr. Freund's alternative submission is that in fact the requirements of Clause 10 were complied with. Clause 10.1.6 provides, inter alia, that the parties may jointly agree to omit "any stage referred to in this clause." He submits that by reason of the facts to which I shall now refer, the Company had either waived compliance with the provisions of Clauses 10.1.2 to 10.1.4 or there was a tacit agreement between the parties to omit the stages contained in those clauses.

The facts of the matter are the following. In terms of Clause 5 of the Agreement a joint negotiation and consultation committee (JNCC) was established by the parties. This committee met on several occasions to discuss the terms of employment of the members of the appellant Union. Meetings were held (in the year 2004) on 18th March, 25th March, 14th and 15th April, 29th April, 10th and 11th May, 26th May, 10th June and 16th June. The position reached at the time of the meeting on 16th June was that the Company had offered to the Union a cost of living adjustment in the amount of 6.5% whereas the Union had demanded an adjustment of 27%. Negotiations then broke down and it was accepted by both parties that a resolution of their dispute by further negotiation at that stage was not possible. The Company then proposed that Clause 10 of the Agreement be invoked. In its founding affidavit the Company alleges that the Union's response was that it wished to invoke Clauses 10.1.5 and 10.1.6, that it was abandoning all other steps set out in Clause 10 and that it considered that it had the right unilaterally to disregard the Clause 10 procedure. The Union's response thereto, set out in paragraph 24 of Chimbidzani Chimidza's affidavit, is the following:

> "The allegation that the Respondent (the Company) wished to invoke the provisions of 10.1.5 is correct. However, the parties had themselves expressly or impliedly invoked the provisions of 10.1.6. The provisions of <u>10.1.6</u> is not mandatory but permissive and either party was free to invoke the same provisions should the other party not cooperate."

The Union also stated in its opposing affidavit that the proposal by the Company to invoke Clause 10 "was absurd in that both parties had long waived the provisions of Clause 10.1.1 to 10.1.4 by virtue of the multiplicity of meetings not contemplated by Clause 10." This statement formed the basis of Mr. Freund's submission.

Mr. Freund referred us to the first part of Clause 10.1 which reads as follows:

10.1. where at a meeting of the JNCC, the parties fail to agree on a matter which was tabled for negotiation, the JNCC will adjourn to allow the parties time to consider each other's position.

10.1.1 The JNCC shall reconvene within 10 days of the first failure to agree in an attempt to resolve the disagreement.

10.1.2 In the case of a further failure to agree, the two parties shall prepare a joint statement setting out the nature of the disagreement and refer such joint statement to their principals.

In his submission Mr. Freund laid emphasis on the words "within 10 days of the first failure to agree" in Clause 10.1.1. His submission was that Clause 10 was automatically invoked, and the procedure set out in the clause automatically started to run, at the very first meeting between the parties if there was any point on which they failed to agree. He submitted further that at the second meeting between the parties the provisions of Clause 10.1.2 had to be brought into operation if all issues between the parties had not been resolved. This was not done in this case. Instead, further meetings were held. This, Mr. Freund submits, meant either that the Company had waived the requirement that the procedure set out in Clause 10 be complied with, or that the parties had tacitly agreed, in terms of Clause 10.1.6, that the further stages in Clause 10 be omitted.

Mr. Freund's submissions, as stated above, rely on a waiver by the Company or a tacit agreement between the parties.

In order to establish waiver the onus is on the party alleging a waiver to prove, on a balance of probabilities, that the other party, with full knowledge of its rights, decided to abandon those rights expressly or by conduct plainly inconsistent with an intention to enforce them. See e.g. **HEPNER v ROODEPOORT – MARAISBURG TOWN COUNCIL 1962(4) S.A. 772 (A)**, **at 778 E-F**. In the case of **BORSTLAP v SPANGENBERG EN ANDERE 1974 (3) S.A. 695 (A)** it was held further that clear proof of an alleged waiver of rights is required especially where reliance is placed on a tacit waiver.

In the present case there was clearly no express waiver by the Company of its right to require that the provisions of Clause 10 be complied with. In fact at the meeting on 16th June 2004 the

Company expressly denied any intention to waive its rights and insisted that Clause 10 be implemented.

As regards an alleged implied agreement by the parties that the various stages referred to in Clause 10 be omitted, this is specifically denied by the respondent. Mr. Freund's submission is that at the time of the 16th June meeting, because several other meetings had been held by them, the parties had already impliedly agreed that the Clause 10 procedure would not be followed. This was not the attitude taken up by the Union at the 16th June meeting. Passages from the minutes taken at that meeting (unconfirmed but not disputed) reflect the attitude of the Union:

> "Management explained that they proposed the invoking of Clause 10 of the Memorandum of Agreement not to prompt third party intervention. Instead adopted a legitimate process enshrined in the bilateral agreement allowing for a cooling off period. They added that doing so should provide an opportunity for the parties to re-think their positions. The Union raised its discomfort with the action to invoke Clause 10 of the Memorandum of Agreement, stating that it was a symptom of the need for third party intervention."
>
> "They (the Union) stated that their interest was to avoid the application of Clause 10 of the bilateral agreement. However, given Management's insistence, they proposed that all initial steps in terms of the provisions thereof be waived."

> "Management reiterated their position that the provisions of Clause 10.1.1 of the Memorandum of Agreement be followed -------
> The Union on the other hand stated that their action should not be understood to be a unilateral declaration of a dispute but contextualised it by putting emphasis on the point that they had made an effort for the parties to continue the negotiations without invoking Clause 10 of the agreement. However, given Management's insistence on the usage of the clause referred to above, they advanced the application of Clause 10.1.5 and 10.1.6."

It is clear from these passages that the Union proposed at the meeting on 16th June that the procedures set out in Clause 10 be waived. The Union did not suggest that these procedures had already been waived, which is the stand taken by the Union in its replying affidavit and is the basis of Mr. Freund's submission.

It is also interesting to note that the Union referred to the continuation of negotiations without invoking Clause 10.

Mr. Freund submitted that Clause 10 envisages the holding of 3 meetings over a period of 25 days. The fact that several meetings were held over a much longer period proves, he submits, that the parties had, in terms of Clause 10.1.6, impliedly agreed that the procedure set out in Clause 10 would not be followed. The Company's contention is that Clause 10 did not preclude the possibility of negotiations being conducted and meetings being held prior to the coming into force of Clause 10, and that when it became clear to the parties that such negotiations were unlikely to result in an agreed resolution, it was open to either party to insist that the Clause 10 procedure be then implemented.

In passing, it may be noted that Clause 10.1.6 refers also to another possible agreement between the parties, namely an agreement to reduce or extend any time period referred to in Clause 10. If there was any implied agreement between the parties, to be inferred merely from the fact that several meetings were held, could it perhaps have been an implied agreement to extend the Clause 10 time periods, rather than an implied agreement to ignore altogether, or to omit, the procedure outlined in the Clause? However, it is the Company's submission that there was no tacit agreement to alter or omit the terms of Clause 10, and I now deal with this submission.

The purpose of the Act is not merely to legalise strikes but also to give to the parties ample opportunity to settle their differences through negotiation before having to resort to more drastic action.

Mr. Freund's interpretation of Clause 10 would have the effect of limiting the scope for negotiations between the parties to only three meetings before the declaration of a deadlock. This result would conflict with the spirit and intention of the Trade Disputes Act. This is conceded by Mr. Freund but he submits that that is what the parties apparently intended by their agreement.

We do not know from the papers what transpired at the JNCC meetings prior to the meeting of 16^{th} June and why the procedure set out in Clause 10 was not followed. It is, however, clear from what was said by the parties at the meeting of 16^{th} June, as reflected in the minutes of that meeting, that up to then the parties were still bargaining with one another with offers and counter-offers being considered by them and that no point of irreconcilable confrontation had been reached and thus a "failure to agree" within the sense and context of Clause 10.1.1.

In my opinion it could not have been the intention of the parties to the Agreement to limit negotiations to three meetings before implementing Clauses 10.1.3, 10.1.4 and 10.1.5. What makes the interpretation of the clause difficult, however, is the phrase "within 10 days of the first failure to agree" in Clause 10.1.1.

Clause 10 is headed "SETTLEMENT OF DISPUTES" and it provides that the JNCC will meet to resolve or settle those "disputes" which arise at JNCC level. In Clause 10.1 the phrase "Where at a meeting of the JNCC the parties fail to agree on a matter which was tabled for negotiation" is used. In Clause 10.1.3 the word "dispute" is again used.

It appears that the phrases "dispute" and "failure to agree" are used interchangeably. Where at a meeting proposals and counter-proposals are submitted for the parties to consider it may be correct to say that the parties have failed to agree, but would it be correct to say that a "dispute" has arisen between them? Could it have been the intention of the parties to the agreement that Clause 10 be implemented only where a definite "dispute" has arisen between the parties, and should the word "dispute" be interpreted to mean when both parties have taken a definite stand on an issue and when further negotiation at that stage appears to be fruitless? Such an interpretation of Clause 10 would avoid the restriction on the freedom of negotiation over a reasonably extended period which restriction would result from the more strict interpretation suggested by Mr. Freund. In my opinion, bearing in mind the spirit and purpose of the Act, and of Agreements concluded in terms of the Act, the interpretation which does not restrict the freedom of negotiation is the interpretation to be given to Clause 10.

On this interpretation it has not, on the papers, been shown that a "dispute" had arisen before the holding of the 16^{th} June meeting. If a dispute arose only on 16^{th} June the Company acted within its rights in demanding that the Clause 10 procedure be then implemented.

In my opinion the Union failed to prove a waiver of rights by the Company or a tacit agreement by the parties to ignore or omit the procedures set out in Clause 10.

For the contemplated strike to be a lawful strike the Clause 10 procedures had to be followed. The Union exhibited a clear intention not to comply with Clause 10. The Court a quo was therefore correct in concluding that the contemplated strike would be an illegal strike, and in granting the interdict order.

I turn next to the ballot point.

The Rules and Constitution of the Union state that it "exists to organise and unite all workers employed in mining, quarries, prospecting, drilling and allied industries." Its objective, as set out in the Rules is inter alia, to "secure the complete organisation of all workers employed in mining, energy, chemical, quarries, prospecting and drilling in the republic of Botswana."

In regard to those specific Rules that are germane to this judgment Rule 21.3 provides that:

> "No cessation of work shall take place unless provisions of the Trade Disputes Act in respect of settlement of disputes have been fully complied with and that two-thirds (2/3) of the members have voted in favour of the proposed action unless sanctioned by the Union".

Rule 23 provides, (I cite only the material sections thereof) under the heading "Secret Ballot", that

> "1. Decisions on the following matters shall be taken by a secret ballot of the whole membership -----

> (d) The taking of a strike action at national level -----
>
> 2. Decisions on the following matters shall be taken by a secret ballot or show of hands or (sic) the branch membership ----
>
> (b) the taking of local strike action."

It seems clear to me, reading Rules 23 and 21 together, as one must do, that what is required, whether it be a secret ballot or a show of hands, is a two-thirds majority of the members. Who it may be asked are "the members"?

In regard to the taking of strike action "at national level" this would, in my view, be the whole of the membership of the Union. After all, that is what the Rule says. It was argued that the "whole membership" would only involve all those members in a particular sphere of the mining industry e.g. all the worker members in the diamond mining industry and not those in the coal mining industry, for instance. This would, however, require the Court to give a meaning to the wording of the Rule different from that contained in it. One can also appreciate that if a section of the Union's members wished to call for a cessation of work in the mining industry throughout Botswana, all members of the Union would want to express their support of, or dissent from, such a strike by exercising a vote in regard thereto and would desire, further, that what they voted for i.e. either for or against the strike, should be secret. In regard to local strike action the members involved would, I think, obviously be those members present at any meeting called to decide whether a local strike in a particular area should take place. It would not, in my view, involve all the Union members in that local area, whether present at a meeting or not. There cannot be a show of hands in those circumstances. A show of hands can only take place at a meeting. The last three words of Rule 23(3) occasion some difficulty by reason of the word "or" appearing therein. Is this a misprint of the word "of" i.e. must there be a secret ballot or show of hands "of" the branch membership or can the decision to strike at local level be taken only by those members of the Union who are also members of the relevant local branch? If the word "or" is properly used then a two-thirds majority of the latter would suffice. It is however, not necessary for this Court to come to any firm finding on this point in view of the fact that it is, I think, obvious that this was not a contemplated local strike, involving as it did mines at Jwaneng, Orapa and Letlhakane, geographically far removed from one another.

It is furthermore not a series or number of local strikes, as was somewhat tentatively, and without much confidence it seemed, suggested in argument by Mr. Freund. All the diamond mine workers in Botswana were to take part in the contemplated strike. The contradistinction in Clauses 23(1) and (3) is between local strike action and a strike "at national level". The latter wording must be stressed. It does not refer to a "national" strike but to a strike "at national level". While such strike was no doubt not a "national" one in the sense that all the workers in whatever industry throughout the country would cease work, it involved the workers in all the mines in the diamond mining industry throughout the country and was therefore, in my view, a strike, in so far as the diamond mining industry was concerned, "at national level."

The Union's Rules therefore required a two-thirds majority in a secret ballot of all the Union's members for a valid decision to strike to be taken in accordance with the Union's Constitution. It is common cause that no such ballot was held. Did this, however, render the contemplated strike illegal in terms of the Act?

The answer to this lies, in my view, in two spheres. The first is what the purpose is that underlies the provisions of Rules 21 and 23. It must immediately be emphasized that they do not form part of any agreement between the Union and the Company. They are part of an agreement between the Union and its members, membership of a Union being a contractual relationship. Consonant with its aims to organize and unite its members would be a need to ensure that its worker members or sections of them, did not engage in strikes of which the Union or the general body of its members did not approve; in other words to indulge in strike action as a frolic of their own. Rules 21 and 23 are therefore there, in my view, to ensure that the Union has a measure of control over its members in regard to the taking of strike action. Embarking on a strike without complying with those rules would be a breach by the member or members of the rules vis-à-vis the Union but would it involve any breach of any agreement between the Union and the Company? Or put differently, is it a non-compliance with an agreed procedure i.e. a procedure agreed upon by the parties in their collective agreement? In the recognition agreement the following appears:

> "**RECOGNITION**
>
> 3.1 The Company hereby agrees to recognize the Union as the representative and negotiating body for members ---------
>
> 3.2 -------------------
>
> Recognition is granted on the basis of the Constitution of the Union as registered by the Registrar of Trade Unions in terms of the Act and as set out in Appendix A to this Recognition and Procedural Agreement."

It was contended by Counsel for the Company that by these clauses there was an incorporation of the Union's Rules in regard to ballots for strike action in the collective agreement between the parties and the need for a ballot thus became an "agreed procedure". I cannot agree. The "Recognition" clause merely recognizes the Union as the body which will represent its members in negotiations with the Company and that it does so on the basis that it is a registered Union with a proper constitution. The agreement provides that it will represent its members in terms of the collective agreement for collective bargaining purposes only. Nowhere is it stated, or even suggested, that the Company will have any say in the relationship between the Union and its members or the control over the latter by the Union. Nor simply by the Company's agreeing to recognize the Union as the body with which it will negotiate and collectively bargain for the workers, can the rules of conduct of the Union's members with the Union become part of any agreed procedures between the Company or the Union.

The second sphere involves what I have already referred to viz that strike action is a right conferred by the Act, the limitations in regard to which must be restrictively applied and which consist in Section 42(1) of the Act of a non-compliance with the provisions of the Act or of an agreed procedure, i.e. one agreed upon by the Union and the Company, or a breach of a "peace clause" in a collective agreement. A breach by the Union's members of the Rules of the Union are not, as I have held, a non-compliance with an agreed procedure nor a breach of any "peace clause" in the parties' collective agreement.

It was further contended that the Union had acted ultra vires its powers in seeking to embark on a strike without complying with

Rule 23. This contention is also, in my view, without substance. The Union is given in Section 39(1) of the Act, the right to strike provided it is not prohibited from doing so by the provisions of Section 42(1). It does not, in my view, exceed or act in conflict with the powers so given to it by not heeding a provision in its rules as to how its members must decide whether to embark on a strike or not. In any event it can in terms of Rule 21 sanction a strike. It can do so, in my view, even if there is not strict compliance with Rule 23. That sanction, it would appear, emerges in this case from the factual position that the decision to go on strike followed after meetings at the three mines called by the Union, and where motions to go on strike were proposed and unanimously accepted by those attending the meetings, with no counter-proposals being moved.

I therefore hold that the Court a quo was incorrect in granting the interdict on the ground that no secret ballot by the Union members had been held prior to the latter giving notice of its intention to strike i.e. on the ballot issue.

The final one of the three issues is the "essential services" point. This Court has found, as set out above, that there was a non-compliance with an agreed procedure viz that contained in Clauses 10(1) of the collective agreement between the parties and that therefore the Industrial Court was correct in granting the interdict it did. Section 42(2) of the Act provides as follows:

> "(2) The Industrial Court may interdict –
>
> (a) a strike or lockout not in compliance with the provisions of this Act; or
>
> (d) conduct –
>
> (i) in contemplation or in furtherance of a strike or lockout;
> and
> (ii) that is not in compliance with this Act."

The Court a quo found as follows:

> "that because of the aforesaid findings on the ballot issue and the parties internal procedures issue that the contemplated strike would not be a lawful strike such contemplated strike falls to be interdicted."

On the essential services point, the Court referred to Clauses 11.2, 11.3 and 11.5 of the recognition agreement. Clause 11.2 provides

> "11.2. The Union agrees that services essential for the maintenance of safety, security and health will, in the event of a strike,

> continue to be performed. The Company agrees to use employees during the strike who are employed on such services for their normal defined routine duties."

Clause 11.3 sets out what those essential services are. Clauses 11.5 provides as follows:

> "11.5. The Company agrees, in the event of a strike, to provide the Union with the names of all those employees required to work on essential services and will specify the length of time that the employee will be required to work."

It is common cause that the Company in terms of Clause 11.5 provided the Union with a list of what I might call the essential service employees, with which list the Union, however, at first disagreed and then rejected completely. The Union also disagreed that although the Company would, in the event of a strike provide a list of essential service workers, it was bound by that list.

The Court a quo found that there was a factual dispute on the papers as to the interpretation of Clauses 11.2 and 11.5 and that until this had been resolved the contemplated strike would be premature as it had not been ascertained which employees may participate in the strike and which may not. This was, however, as appears from its finding cited above, not the crucial ground for the Court's granting of its interdict.

In the light of this Court's agreement with the Industrial Court's finding that on the internal procedures issue the contemplated strike would not have been lawful and fell to be interdicted on that ground (this Court, as set above, does not agree with the finding of the Court a quo on the ballot issue) it is not necessary for this Court to enter upon a consideration of the factual dispute referred to by the Court a quo or to decide whether a failure to agree on the essential services employees rendered the contemplated strike premature and, as a result, constituted a ground for the interdicting of the strike in its entirety. It accordingly makes no finding on the essential services point.

The Court therefore, for the reasons set out above, holds that the Industrial Court was correct in finding that there was a non-compliance with the provisions of Clause 10.1 of the collective agreement between the parties which was an agreed procedure and that the strike was not therefore legal in terms of Section 42(1) of the Act and fell to be interdicted.

The appeal therefore fails and the order of the Industrial Court is confirmed.

There is finally the question of costs.

Section 29(1) of the Act provides that no costs shall be awarded by the Industrial Court except against a party held by the Court to have acted frivolously or vexatiously or to have deliberately delayed proceedings. Obviously acting in accordance with this Section, the Court a quo as set out above, made no order as to costs. There is no such provision in the Act in respect of the Court of Appeal in regard to an appeal to it from the Industrial Court in terms of Section 18(5). Counsel for the Company asked that if the appeal should fail, the Company should be awarded costs of the appeal, including the costs of two counsel.

Mr. Freund submitted that the Legislature's intention, to be gleaned from Section 29(1), was that no costs orders should be made in matters in the Industrial Court or emanating from it, save in the exceptional circumstances mentioned. It seems to me, however, that in the absence of an express provision to that effect, such an interpretation would place an unnecessary limitation on the discretionary powers of this Court in regard to costs in matters before it as contained in Rule 29(3) of the Court of Appeal Rules viz that it shall have power to make such order as to the whole or any part of the costs of appeal as may be just. Moreover this Court has in the past in appeals from the Industrial Court, made costs orders in respect of those appeals. (See e.g. **BOTSWANA BANK EMPLOYEES UNION AND OTHERS v BARCLAYS BANK OF BOTSWANA LTD 1995 BLR 459; BOTSWANA BUILDING SOCIETY v BOLOKWE 1999 BLR 459**, to mention but two of them.)

I am aware that it has been held by the South African Court of Appeal, in an appeal from an Industrial Court, that a costs order, especially where the dispute has been a genuine one, may damage any on-going relationship that will survive after the dispute has been resolved and may thereby detrimentally affect industrial peace and the conciliation process. (See **NUM v EAST RAND GOLD AND URANIUM CO. LTD (1991)12 ILJ 1221**). However, in the present case the relationship between the parties has no doubt already been disturbed by these entire proceedings and by the events that preceded and followed them and that an appropriate costs order, based on the outcome of this appeal, will not, I feel, further damage that relationship.

I am therefore of the view that in the present case there is no reason why the appeal having failed, costs should not follow the result and the Company, as the successful respondent, should not have its costs of the appeal, save in regard to one aspect of them. That is the matter to which I alluded earlier herein viz the costs in regard to the abandoned contention that there had been an abuse by the Union of the process of the Court, including those in respect of Volume 2 of the record. The Union's legal advisers were obliged to deal with the contention and in so doing to consider the contents of Volume 2, involving them in time and effort. It seems to me, therefore, that the fairest order of costs would be that the Union which has not succeeded as substantially as the Company, should pay two-thirds of the Company's costs of the appeal.

The appeal was a heavy one involving complex issues and one of importance to both parties and the costs of two counsel are warranted.

In the result therefore the following order is made:

1. The appeal is dismissed.
2. The appellant is to pay two-thirds of the respondent's costs of appeal, such costs to include the costs of two counsel.

DELIVERED IN OPEN COURT AT LOBATSE ON THE 28TH DAY OF SEPTEMBER 2004.

....
P.H. TEBBUTT
(JUDGE PRESIDENT)

I agree ....
N.W. ZIETSMAN
(JUDGE OF APPEAL)

I agree ....
J. Z. MOSOJANE
(ACTING JUDGE OF APPEAL)