

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSECOURT OF APPEAL
CIVIL APPEAL NO. 51/95

In the matter between:

BOTSWANA RAILWAYS ORGANISATION

- Applicant

and

J. SETSOGO & 198 OTHERS

- Respondents

Mr. M. Motswagole for the Respondents

Mr. Ian Kirby as Amicus Curiae

J U D G M E N T

CORAM: Amissah J.P.
Aguda J.A.
Steyn J.A.
Tebbutt J.A.
Hoexter J.A.

AMISSAH J.P.:

A. The Reasons for the Ruling on the Preliminary Object

This matter originated from the Industrial Court. The applicant, the Botswana Railways Organisation, which is not represented before us, brought an urgent application before that Court on Good Friday, 14 April 1995. The respondents to the application were all train crew members employed by the applicant. The urgency of the application lay in the fact that the respondents had gone on strike and, in the view of the applicant which was accepted by the Court, were as a result disrupting the Botswana

railway transport service, which is an essential service.

Because of the differences in interpretation which have been put on the decisions and orders of the two tribunals before which this matter had come, and of the submissions and arguments presented to them by the parties and the Attorney General, I find it necessary to set out in some detail the history of the matter as I see it.

Upon the judge of the Industrial Court being satisfied that the papers disclosed that the application involved issues of law, he decided to sit on the matter, as he was entitled to do under Section 18 (2) of the Trade Disputes Act (Cap. 48:02), without nominated members. Having read the papers and having heard Counsel for the applicant, the Industrial Court issued a rule nisi interdicting the alleged strike. The terms of the order made by the Court were as follows:

- "1. The Applicant's failure to comply with this Court's Rules as to notice and service of documents is hereby condoned.
2. That a Rule Nisi do issue calling upon the Respondents to show cause to this Honourable Court on Tuesday, the 25th day of April 1995 at 09.30, why an order should not be made in the following terms:
 - 2.1 declaring the industrial action embarked upon by the Respondents with effect from 10th April 1995 and any continuation or repetition thereof, to constitute a strike as defined in the Trade Disputes Act (Cap 48:02) (hereinafter referred to as "the Act) and unlawful industrial action in terms of the Act.

- [sic] 2.3 interdicting and restraining the Respondents from participating in or continuing any industrial action as aforesaid;
- 2.4 ordering the Respondents to report for work forthwith and to comply with their contracts of employment, in any event not later than Saturday, 15 April 1995 at 07.00;
- 2.5 ordering the cost of this application be paid by such of the Respondents as oppose it, jointly and severally, the one paying the other to be absolved.
3. That paragraph 2.3 and 2.4 operate as an interim interdict with immediate effect, pending the return date of this application.
4. That the Applicant be granted leave to serve this order and the application upon the Respondents by publishing same in the Botswana Railways weekly notice affixing same to all train crew notice boards at all train stations, and to serve same on the First and Second Respondents, and to announce through Radio Botswana the granting of this Order."

The respondents duly filed their answering affidavit opposing the application. In the answering affidavit the respondents raised two objections in limine against the jurisdiction of the Court. The first was in respect of the lawfulness of the judge of the Court sitting without involving the assessors as required by Section 6 of the Trade Disputes (Amendment) Act, 1992 (Act No. 23 of 1992). That objection is not relevant to the issue before us and I say no more about it. But the second objection is relevant and I reproduce it. It said:

"The order of the Learned Judge captured in paragraph 2.4 of the order of Court, ordering the Respondents to report to work forthwith and to comply with their contracts of employment, in any event not later than Saturday 15 April 1995 at 07:00 is incompetent and a nullity in law in that it infringes the provisions of Section 6 of the

Constitution of Botswana, that prohibits forced labour."

Clearly the competence of the Industrial Court to make the order it did was here raised. The Industrial Court gave careful consideration to that objection. In doing so, it recited the relevant part of Section 6 of the Constitution which states that:

"(2) No person shall be required to perform forced labour.

(3) For the purposes of the section, the expression 'forced labour' does not include

(a) any labour required in consequence of the sentence or order of a court;"

The argument put forward by Counsel then appearing for the respondents to the Court was founded on the determination of the question whether the Industrial Court was or was not a "court" within the terms of Section 6 of the Constitution. This objection was so fundamental to the legality of anything the Industrial Court did on this case that it had to be properly determined. It was the argument of the respondents' Counsel that forcing people to work against their will as, according to Counsel, the order nisi had done, could result in imprisonment for contempt and other adverse legal consequences, if the respondents were to fail or refuse to comply, but that the Industrial Court was not entitled to make such an order as it was not a "court" within the meaning of Section 6 (2) and 3 (a) of the Constitution. If the challenge was valid, then in my view, it went further than the limited confines of this case as

commenced, and affected any mandatory, coercive or injunctive order that the Court might make.

According to the judgment of the Industrial Court, Counsel for the respondents-

"..... consequently requested, as the Courts' said order, ordering the Respondents to report to work, is in his submission a contravention of the provisions of Section 6(2) of the Constitution of Botswana, that this question be referred to the High Court in terms of Section 18(3) of the Constitution, which provides as -

(3) if in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Section 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Opposing the submission, Counsel for the applicant submitted that raising this question was frivolous and the Court should exercise its discretion and not refer it to the High Court.

The Industrial Court considered the matter and decided that the objection was not frivolous or vexatious and that as the Court, was a subordinate court within the meaning of Sections 18(3) and 127(1) of the Constitution, it was obliged to refer the question to the High Court. Thereafter the judgment proceeded thus:

"From the aforesaid submissions it is clear that the parties differ in their interpretation as to the meaning of 'forced labour' and 'court' as used in subsections 6(2) and (3)(a) of the Constitution of Botswana.

The Court therefore finds that Section 105(1) of the

Constitution is also applicable, which provides as follows:

- '(1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court.'

The reason for such finding is that a question as to the interpretation of the Constitution has arisen and the Court is of the opinion that such question involves a substantial question of law."

Then followed this most crucial paragraph of the judgment. Crucial, because it gives the clearest indication of the intention behind the order subsequently made by the Industrial Court and helps determine the scope of that order. Crucial because it led to the appearance of the Attorney General as amicus curia of the High Court to assist that Court to determine, not the narrow issue of a trade dispute between the Botswana Railways Organisation and its striking employees, but the legality of the Industrial Court itself as a court within the meaning of the forced labour provisions in Section 6 of the Constitution. Crucial because it helps to determine the validity of the Attorney General's objection in limine before us after the High Court in turn had referred the interpretation of the Constitution to us for our consideration. Immediately after the paragraph quoted above, the judgment proceeded as follows, and in my opinion its words are so important that I lend them emphasis by underlining:

"The reason for such opinion is that in all future applications involving strike action, employers are bound to request similar orders, namely that the striking workers be ordered to return to work. If there is no clarity on this point, it is almost certain that similar points in limine will be raised in all such cases."

The interest of the Industrial Court was in a superior definitive judicial pronouncement of its status, not only because the matter had been raised in this case but in order to avoid the same or similar objections to its very capacity to make competent orders for the resolution of industrial disputes being raised, as it suspected was otherwise bound to be the case, in every future dispute of this kind. If that were to be allowed to happen, no doubt, the Industrial Court's existence would be useless and intolerable. In a well considered judgment of some eleven printed pages, not one other issue had been considered by the Industrial Court up to this point except this issue affecting the legitimacy of the Industrial Court as a court. The judgment then immediately proceeded to make the following orders:

- "1. In terms of Section 18(3) of the Constitution of Botswana the following question is hereby referred to the High Court for a determination in terms of Section 18(2) (b) of the Constitution: Was the interim order of the Industrial Court, dated 14 April 1995, ordering the Respondents to report for work forthwith and to comply with their contracts of employment, in any event not later than Saturday, 15 April 1995 at 07:00, a contravention of the provisions of Section 6(2) of the Constitution of Botswana, which prohibits forced labour.
2. The question as to the interpretation of the words 'forced labour' in Section 6(2) and the word 'court' in Section 6(3)(a) of the

Constitution of Botswana is hereby referred to the High Court in terms of Section 105(1) of the Constitution for a decision in terms of Section 105(2) of the Constitution.

3. The rule nisi granted on 14th April 1995 and extended on 25 April 1995 is hereby discharged.
4. No order as to costs."

One of the questions which arises for consideration by this Court is the meaning of the order itself. On the face of the order, did the Industrial Court intend, by discharging the rule nisi it granted, to terminate the proceedings before it and to render any future judicial consideration of the questions posed by it academic or moot? Did the Court actually terminate consideration of the issues raised in paragraphs 1 and 2 of the order by paragraph 3? This point I shall come to later. Meanwhile, I return to the narrative of the historical evolution of this referral before us.

The case came before Gaefele Ag.J. in the High Court. Because of the importance of the questions posed which involved the legitimacy of the Industrial Court under the Constitution and related questions the Attorney General appeared before the High Court as amicus curiae. He raised no objection to the High Court dealing with the referral of the questions by the Industrial Court. He submitted a detailed and well argued Heads of Argument to the High Court, which opened in the following manner:

"There are two points referred for decision by this Honourable Court:

- A. Is the Industrial Court a "Court" for the purposes of Section 6(3) of the Constitution?
- B. Was the interim order of the Industrial Court dated 14 April 1995, a breach of the Constitutional prohibition of forced labour?'

After posing these questions the Heads of Argument to the High Court continued:

"A.1 THE STATUS OF THE INDUSTRIAL COURT

- A.1.1. It is submitted that (subject to it having been constitutionally established) the Industrial Court is clearly a "Subordinate Court" in terms of Section 18(3) of the Constitution, and also a 'Court' in terms of Section 127(1) of the Constitution."

In sub-paragraph A.1.2 the Attorney General adopted the respondents' Heads of Argument Nos. 1 - 3 inclusive in order to avoid duplication, and then proceeded as follows:-

"A.2. THE CONSTITUTIONALITY OF THE COURT

Respondents seek to challenge the Constitutionality of the Industrial Court on four broad grounds.

- A.2.1 Ouster of the Jurisdiction of the High Court, as purported breach of S.95 of the Constitution.
- A.2.2 Lack of independence as a purported breach of the Constitution.
- A.2.3 Unconstitutional appointment of the Judge and members of the Industrial Court, as a purported breach of S.104 of the Constitution.
- A.2.4 Restriction of public attendance in certain circumstances as a purported breach of S.10 (10) of the Constitution."

This argument made by the Attorney General to the High Court clearly showed that he, at least, was keenly aware that one of the fundamental issues, if not the only issue, was the constitutional validity of the Industrial Court as a "court". The argument must have been in response to, or in anticipation of, the argument in paragraph 4 of the respondents Heads which opened thus:

"4. The question is whether 'the Industrial Court' was properly lawfully and constitutionally established.

4.1 We respectfully submit that this was not so, for the reasons that will appear hereunder."

Then followed a detailed statement citation of authorities in support of the refutation in paragraph 4.1 of the broad question raised in paragraph 4 and ending with these concluding subparagraphs:

"4.2 We submit in conclusion therefore that the Act, No. 23 of 1992, is ultra vires the constitution of Botswana and therefore null and void, in particular, the following sections, 17(2) 17(3), 17(6), 17(8), 18(3), 22 and 23.

4.3 Accordingly the 'decision' directing the Respondents to return to work and to comply with their contracts of employment is void and [o]f no force and effect, and this applies to the proceedings in respect thereof."

Paragraph 8 of the respondents' Heads of Argument concluded:

"8. Finally it is submitted that the order of the 14th April, 1995 [that is the rule nisi] compelling the employees of Botswana Railways to return to work not later than 15th April, 1995 despite hazardous conditions of work was unconstitutional and hold no force or effect, and that the court was not entitled to grant such an order."

All this argument, of course, was part of the development of the case of the respondent that the Industrial Court was not a "court" within the meaning of Section 6 (3) of the Constitution.

It is clear from these recitals, therefore, that one of the live issues, indeed, if I may say so, the basic issue, before the High Court was the constitutional validity of the Industrial Court. From the response of the Attorney General, he must have appreciated that fact at that time. He must have known that the constitutional validity of the Industrial Court was the main reason for the reference to the High Court, and not some adventitious or exoteric point raised in limine by the respondents. He argued accordingly. If the High Court did not appreciate that position, it certainly rendered itself incapable of giving a proper answer to the first question posed by the Industrial Court and, flowing from that, from giving a proper answer to the second question.

The learned judge, after considering the papers and hearing the arguments of Counsel, answered the first question referred to him in the negative. He also gave his interpretation of the words "court" and "forced labour" as required by the second question. But he referred the question of the constitutionality of the Industrial Court to this Court for consideration under section 15 of the Court of Appeal Act [Cap 04:01]. The reasons set out by him for adopting this course are significant and ought to be

reproduced here in full. He said:

"It is convenient to now deal with the objection raised by the Applicant's Counsel at the commencement of argument. In the Respondent's heads of argument there were additional constitutional questions. The Respondent's Counsel sought to argue the questions whether or not the 'Industrial Court' is a Court of Law having jurisdiction in Botswana and secondly whether the Industrial Court was properly, lawfully and constitutionally established.

In a nutshell this Court was being invited to decide on the status of the Industrial Court. This I declined to do because the Applicants were not fully prepared and ready to argue such additional questions. The other reason was that there are only two questions referred to this Court by the Industrial Court. It was therefore, not necessary for the Court to deal with the matter not properly before it and decide on questions not relevant to the issues it is asked to decide.

After careful thought I have decided that the additional questions that the Respondents sought to argue be referred to the Court of Appeal for consideration and determination. This I now do under the provisions of Section 15 of the Court of Appeal Act [Cap 04:01]. It may also be necessary to have the issue determined once and for all. The same question appear [s] to have been posed but not decided in the case of BOTSWANA BANK EMPLOYEES UNION & ANOTHER v. BARCLAYS BANK OF BOTSWANA LIMITED C.A. No. 1/95 Industrial Court Case No. 40/95. It appears that the Deputy Attorney General appearing amicus curiae in these proceedings was in fact ready to argue the questions as reflected in the heads of argument. Now that the Government's representative is appearing amicus curiae it may be opportune for the Court of Appeal on the issues raised. I may mention that I would have heard argument on the additional questions, but since the Applicants were not ready I could not have adjourned the matter as Counsel was involved and it would have necessitated more costs as a result. This is because the matter has been adjourned on a number of occasions.

Having said all that, the following questions are hereby reserved under Section 15 of the Court of Appeal Act, for consideration by the Court of Appeal namely.

1. Is the Industrial Court a Subordinate Court in terms of Section 105 of the Constitution or a specialised division of the High Court in terms of sections 17 and 18 of the Trade Disputes Act (as amended) and if so, is it competent to adjudicate on constitutional issues

brought before it, or

2. Does the Trade Disputes Act (as amended) offend against the provisions of Section 10(a), 95 and 104 of the Constitution.

I have broadly set out the questions in view of the arguments appearing in both the Respondents, and Attorney General's heads of argument."

Pausing here for the moment, I must observe that I find it difficult to understand how the respondents, in putting forward constitutional arguments in support of their contention that the Industrial Court was not a "court", as they have always maintained, and as a result of which the question of the status of the Industrial Court was referred to the High Court, could be described by the High Court as putting forward questions additional to those referred to the High Court. And I am totally at a loss to understand how the unpreparedness of the applicant to answer the respondents' argument makes any difference to the nature or relevance of the argument presented by the respondents to the reference to that Court.

The above account, in my view, shows the circumstances in which this matter came before us on 23 January, 1996. At the hearing Mr. Kirby, Deputy Attorney General on behalf of the Attorney General raised an objection in limine. We were taken aback by this objection as we had no prior notice of it, and at the time of raising it, no papers. We, nevertheless, heard the objection and thereafter asked Counsel appearing before us to file Heads of Argument which crystallise the points they made for our

assistance. We are grateful for the Heads submitted. At this stage, I think I should set out the objection raised, which was as follows:

- (a) the referral by the Industrial Court to the High Court was improper; and
- (b) The reservation of questions for the Appeal Court was not proper.

The nub of the objection to the reference by the Industrial Court to the High Court was the fact that in the same order making the reference, the Industrial Court discharged the rule nisi which it had previously made declaring the industrial action embarked upon unlawful in terms of the Act, and making other consequential orders. According to the Attorney General's argument, as the order was discharged, it terminated whatever matter the Industrial Court was seized of. In support of this argument reference was made, as had been made by the Industrial Court, to Sections 18(3) and 105 as the two sections under which referrals of under the Constitution could be made. Section 18 (3) provides that:

"18(3) If in any proceedings in any subordinate Court any question arises as to the contravention of any of the provisions of Sections 3 to 16 (inclusive) of this Constitution, the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Sections 3 to 16 of the Constitution are the sections in the Constitution on the Fundamental Rights and Freedoms of the Individual. What section 18(3), therefore, says is that if in

any proceedings in any subordinate court a question arises as to the contravention of any of the provisions on the protection of the fundamental rights and freedoms of the individual, that question may, and if any party to the proceedings so requests, must be referred by the person presiding in that court to the High Court, unless in his opinion the raising of the question is merely frivolous or vexatious. If there was indeed a question of law arising in proceedings before a subordinate court as to whether a fundamental right protected by Sections 3 to 16 of the Constitution had been breached, that subordinate court was entitled to refer the question to the High Court. The question which had arisen in the proceedings before the Industrial Court was whether in making the rule nisi ordering the respondents to report back to work it did or did not require them to perform forced labour contrary to section 6(2) of the Constitution. The Industrial Court took the view that it was not contravening the provision on forced labour because it was a "court". In so far as the question of infringement of Section 6 (2) of the Constitution had been alleged, the procedure laid down in Section 18(3) for referral is eminently appropriate. The Industrial Court, taking the view that it was a subordinate court, as the reference order itself recites, made the reference of the first question under that subsection. As far as I can see, no one can quarrel with that.

In the view of the Industrial Court there was also a question of

interpretation of the terms "court" and "forced labour" for the High Court to consider and in respect of that it referred the second question under Section 105 of the Constitution. I must here say that, in my view, if the High Court properly determined the first question, there would be no further need for an interpretation of the word "court" as posed by the second question. However, I proceed with a recital of Section 105. It provides as follows:

- "105(1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court.
- (2) Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court in which the question arose shall, subject to any appeal, dispose of the case in accordance with that decision."

On the face of the provisions, section 18(3) does not require that a matter referred to the High Court should be returned to the referring Court for further action. Section 105, on the other hand does. As I have stated earlier, the first question was referred under section 18(3), while the second question was referred under Section 105. The objection of the Attorney General applies to the reference of both questions on the ground that they became academic once the rule nisi was discharged. It is, therefore, necessary to consider whether references under Section 18 (3) must have the same objectives, attributes and

consequences as those made under section 105. The Attorney General contends in his Heads of Argument with respect to the two referral sections that:

"A.3 In both procedures the question must arise 'in any proceeding' in any subordinate court. The question need not be the principal issue in dispute between the parties. In the case of a Section 105 referral it is made clear by subsection (2) that the matter must go back to the original subordinate Court which must give effect to the High Court's determination. The Constitution is silent on this point in a Section 18(3) referral.

A.4 It is submitted that common sense dictates that determination of the question referred must be necessary for determination of the case in the subordinate court. If this were not so, then the question would be irrelevant to the issue being adjudicated by the Subordinate Court. The intention of the legislature could never have been that an irrelevant issue, however interesting or important, could be referred to the High Court at will.

A.5 It follows that the Subordinate Court cannot determine the case before it before receiving the High Court decision on the point referred. Thus on a referral the subordinate Court must adjourn the proceedings to await the High Court decision, which, on receipt, it must apply in its determination of the case. It is submitted that this applies equally to Section 18(3) referrals, notwithstanding the silence of the legislature on the point."

With all due respect, I take a different view. As the Attorney General rightly points out section 18(3) is silent on the point about the matter referred going back to the Court making the reference whereas section 105(2) requires that the matter must go back. The argument based on this difference by the Attorney General, therefore, amounts to a request for the use of section 105(2) to cut down the generality of section 18(3). To my mind, the question which ought rather to be asked in these

circumstances is why two sections dealing with referrals by subordinate courts on questions of law in constitutional matters in the same Constitution should have been differently worded. If they served the same purpose and should be treated in the same fashion, surely only the one section would have sufficed. The obvious answer to why two sections were used is because the Constitution intended them to deal with different matters and to have different scope or coverage.

Section 105 is the general provision which deals with questions involving the interpretation of the Constitution. Section 18(3) deals with the specific question of alleged contraventions of the constitutional provisions on the protection of fundamental rights and freedoms of the individual. They need not in their operation be cast the same way. If the framers of the Constitution had intended that in both types of referrals the answers must be returnable to the referring court before the questions acquired validity, I am sure the Constitution would have said so. It was the easiest thing to provide that in section 18(3) the matter referred should be sent back to the referring court, or be dealt with in the same manner as in section 105. The Constitution did not choose to do so. Why, in the circumstances, should we use the provisions of section 105 to qualify or cut down the amplitude of section 18(3)?

I know of no other way of achieving this end except by arguing

that section 105(2) impliedly amends section 18(3). But section 18(3) deals with a specific matter, namely, alleged infringements of the provisions of the Constitution guaranteeing fundamental rights and freedoms. And as we know, one of the cardinal maxims of interpretation of statutes is "generalalia specialibus non derogant." Of this maxim, Craies on Statute Law (7th ed. 1971) says in explanation at page 377:

"The general rule, that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent enactment is general, the rule of law being, as stated by Lord Selbourne in Seward v. Vera Cruz (1884) 10 App.Cas.59,"

In that case, his Lordship said at page 68:

"Now if anything is certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

See also the cases of Corporation of Blackpool v. Starr Estate Company, Limited [1922] A.C. 27 and North Level Commissioners v. River Welland Catchment Board [1938] 1 Ch.379.

This canon of interpretation applies in Botswana and to the construction of its Constitution. For Section 32 of the Interpretation Act [Cap 01:04], which is described in its preamble as "an Act to provide for the interpretation of the Constitution and other enactments," provides that:

"32. Where an enactment expresses a general rule in terms which are wide enough to relate to a particular case for which a special rule has been provided in an earlier enactment, the special rule, if not repealed by the later enactment, shall not be affected by it."

And as the definition of "enactment" in Section 49, is ".....an Act or statutory instrument or any provision of an Act or statutory instrument" this canon of construction applies not only to two different statutes but two different sections of the same statute. From the foregoing review, it should be clear that in my opinion, section 105(2) does not qualify or amend section 18(3). If section 18(3) chooses not to specify that the matter referred under it ought to be sent back to the referring court, there must be some reason for it. It could be, as in this case, that the reference should determine legal questions not only for the particular case from which reference is made, but for future cases. Further, situations may arise which we may not be able to categorise or conceptualise today where the freedom from the limitation which apparently characterises section 105 may be needed.

At best, therefore, the Attorney General's argument, in so far as it demands that the result of the reference must go back to the subordinate court while the proceedings from which reference was made continues, and must help the subordinate court in deciding the case before it, affects the second question on interpretation posed by the Industrial Court but not the first, which is the more important question of the Industrial Court's

own constitutional legitimacy.

Had it been necessary to rule that, in such circumstances, the second question referred under section 105 should be severed from the first question referred under Section 18(3) on the ground that the second question had been rendered incompetent by the termination of the proceedings before the Industrial Court as a result of the discharge of the rule nisi, I would have had no hesitation in doing so. But I must confess that I am not, in any case, impressed by the argument that a discharge of a rule nisi granted for a narrow purpose in a case where constitutional questions of major importance to the public arise automatically terminates the case by the discharge of that rule. The matter is one of construction of the whole order. The question in each case is whether on a reading of the whole order made the discharge of the rule nisi finally disposed of the case under consideration. I think not. Take this very case, for example, had the respondents succeeded on the arguments they advanced in support of their contention that the Industrial Court was not a "court; the logical consequence would have been that the order nisi was incompetent and should never have been made; the Industrial Court itself had no power to make an order requesting anybody to return to work and would, as a corollary, have no power to rescind such an order. What would be the purpose of sending such an answer to a body without constitutional legitimacy or authority? I illustrate the point by referring to

what was at stake in these proceedings. The relevant provisions of section 6 of the Constitution which give the protection against forced labour which is the section of the Constitution which the respondents claim has been contravened by the Act establishing the Industrial Court, which proscribes forced labour but excepts from this proscription any labour required in consequence of the sentence or order of a court.

The reasoning behind the argument of the respondents as I understand it, therefore, is that if the Industrial Court is not a "court" within the meaning of the exemption, and in their estimation the Industrial Court was not a "court" within the meaning of section 6(3)(a) of the Constitution, obliging them against their will to go back to work amounts to requiring them to perform forced labour contrary to section 6(2) of the Constitution.

On any view, the argument raises a point of great constitutional importance to the public regarding the machinery for the settlement of the industrial disputes in the country. That question is far weightier than the narrow question raised by the applicant which led to the issue of the decree nisi. I would go further to say that as far as those proceedings are concerned, the constitutional issue now overwhelmed and replaced the narrow issue of sending the respondents back to work, which the applicant had asked the Industrial Court to do. That

constitutional question, nevertheless arose out of those narrow proceedings brought, and entitled the Industrial Court, if it took the view prima facie that it was a court until determined otherwise, as indeed the Industrial Court did, to refer the question of its own status to the High Court. It was the Industrial Court's decision to do so, and that is what it did. Discharging the rule nisi, the main objective of which was to get the respondents back to work at a time when the respondents had in fact already gone back, does not exorcise the existence, or diminish the importance, of that constitutional issue. Nothing prevents the High Court from sending the answer to the constitutional question back to the Industrial Court, except, of course, that if the High Court were to uphold the respondents' submissions on the constitutional question, that would terminate the existence of the Industrial Court. In that case, the next action might have to be taken, not by the Industrial Court, but by the legislature. If the Industrial Court, on the other hand were to be held to be a court; consequences might still flow, despite the discharge of the rule nisi, from its orders which would require it receiving the answers of the High Court.

It should not be forgotten that the reason given by the Industrial Court judge himself for referring the questions on interpretation of the Constitution to the High Court was that in all future applications involving strike action, employers were bound to request orders similar to what he had given in the rule

nisi, i.e. that the striking workers be ordered to return to work, and if there was no clarity on the point, it was almost certain that similar points in limine, obviously by striking workers, would be raised in all such cases. For the respondents in this case, the order nisi even though discharged entailed serious consequences. The order was based on the decision of the Industrial Court that they were engaged in an illegal strike. Even though the order is discharged, the decision on which it was based would make them liable to penalties for engaging in an illegal strike under Section 39 of the Trade Disputes Act. For the Industrial Court, the consequences of the referral may be even more serious, if it were to be declared to be an unconstitutional body. Faced with circumstances such as these, to say that the issues before the Industrial Court were terminated and thereby relegated to the status of academic issues, by the bare discharge of a rule nisi, which was already spent in its primary purpose of getting striking workers back to work and which had no relevance to the existence or vitality of those constitutional issues which the proceedings gave rise to, is to take an extremely technical and narrow view of what the proceedings before the Industrial Court turned out to be. The Industrial Court judge himself asked the questions to which he needed answers. To say that in the same order he intended and indeed did deprive himself of his interest in receiving the answers, or the interest of the respondents in ensuring their own future from the consequences of adverse proceedings, is wholly

unreal.

I find myself unable to accede to the submissions of the Attorney General on this point. To my mind, the two matters referred by the Industrial Court judge to the High Court were competent and live despite the discharge of the rule nisi.

The next objection was to the power of the High Court to refer this matter to us. That deserves to be dealt with more briefly. The High Court having given a judgment in the case, referred the constitutional point to this Court. In my view, the High Court in so far as it took the view that the constitutional issues raised by the respondents before it were additional to the questions posed by the Industrial Court, failed to appreciate the scope of the questions posed. To arrive at the conclusion whether the Industrial Court is or is not a "court" within the meaning of Section 6(3) of the Constitution the High Court had necessarily to advert its mind to any argument put forward, whether correct or not, which is relevant to that determination. In this case, that would include arguments on the constitutional legitimacy of the Industrial Court itself. For it seems to me that the determination of a challenge to constitutional legitimacy of a tribunal which purports to be a court is, a necessary precondition to a determination of the question whether or not the tribunal is a court. In the circumstances the view that the referral did not cover the constitutional legitimacy of

the Industrial Court, especially after the case of Botswana Bank Employees Union and Another v. Barclays Bank of Botswana Limited Civil Appeal No. 1/95, judgment of the Court of Appeal given on 13 July, 1995 (unreported), had been referred to, does seem to me strange. In that case, if my memory serves me right, the question of the status of the Industrial Court was first raised incidentally and casually by Counsel in the course of an appeal in which the status of the Industrial Court was not in issue. Although, Counsel urged us to decide it as the question was bound to recur, we declined to do so, and I think quite properly, on the ground that it was a question which was academic with respect to the appeal before us. One of the considerations in our taking that view was that in the manner in which it was raised it was not, and could not have been, fully and properly argued to enable us to take a view. The Attorney General was unrepresented in the case, and in any case it was unnecessary to the decision of the issues before us. If the question was bound to recur, as Counsel claimed, then we would deal with it when it was properly before us. I think that time is now. In my view the invitation to decide on the status of the Industrial Court in this case was not issued by the respondents incidentally to some other issue before us, it was of the very essence of the issue referred to the High Court by the first question, as well as the request in the second question to interpret the word "Court". And as shown by the Heads of Argument of the Attorney General and of Counsel for the respondents already recited in this judgment, the way I

understand it was how those parties understood it. The issues arising from that question cannot be additional to the questions posed by the Industrial Court. And it was obviously an error on the part of the learned judge to treat those issues as unnecessary or irrelevant for the determination of the questions asked of him. The fact that the applicant was not prepared or ready to argue those points does not ipso facto detract from or diminish the relevance or importance of the constitutional point to the determination of the questions posed. In declining to deal with that aspect, the learned judge deprived himself of the ability to deal with the Industrial Court's questions properly. But it was also obvious from his judgment that he was in some difficulty over dealing with the constitutional aspect of the question whether the Industrial Court was a "court". Had he been able to deal with it, he would, I am sure, have done so without reference to us. Hence his referral of the question.

The referral was made under section 15 of the Court of Appeal Act. That section provides that:

"15. A judge of the High Court may reserve for the consideration by the Court of Appeal any question of law which may arise during any civil or criminal proceedings before him."

That section predicates, for a proper reservation, the emergence of a question which is one of law in the course of proceedings, whether civil or criminal, before a High Court judge and the reservation of that question to the Court of Appeal. The

question for our consideration is whether those preconditions have been satisfied. The unequivocal answer to that is, yes. But the Attorney General has asked us to use the terms in another Act, granting a power of referral not to the High Court but to himself, to interpret the scope of operation of this section. He cites Section 336 of the Criminal Procedure and Evidence Act [Cap 08:02] which provides that:

"336(1). Where the High Court, at any stage of criminal proceedings, gives or makes any decision, ruling, opinion or statement on or in relation to a question of law and the Attorney General has any doubt as to the correctness thereof, he may submit that decision, ruling, opinion or statement to the Court of Appeal and cause the correctness thereof to be argued before the Court of Appeal on behalf of the State in order that the Court of Appeal may determine the correctness thereof for the future guidance of all courts.

(2). For the removal of doubt, it is hereby declared that the application of subsection (1) extends to an opinion or statement which is not essential to the determination of any issue."

Why should we do what the Attorney General has asked? Because, as he submits had the legislature intended to grant to the High Court an unfettered power of referral it would have used the same or similar wording as that used in section 336 of the Criminal Procedure and Evidence Act. The point being that the legislature should have repeated the words used by section 336 of the Criminal Procedure and Evidence Act in section 15 of the Courts Act. And why should we legislate for the legislature? The question for us as interpreters of the law, is whether there is any doubt in a reading of section 15 as to what it means. I find

none. If the words are plain and unambiguous, our task is to apply them as they are. As was said by Scott L.J. in Croxford v. Universal Insurance Co. 1936] 2 K.B. 253 at page 281 -

"Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in a statute."

In the circumstances I find it difficult to understand what benefit I would derive from a comparison of section 15 with another piece of legislation. The fact that section 15 of the Court of Appeal Act is not couched in the same words as section 336 of the Criminal Procedure and Evidence Act does not mean that in its own way section 15 does not achieve the same comprehensiveness which section 336 does.

In his oral argument, the Attorney General also submitted that the use of the word "reserve" in section 15 in contradistinction from "refer" meant that the intention of the legislature was that our answer to the question reserved must go back to the High Court while it was still seized with the case from which the reservation was made. According to the Oxford Shorter English Dictionary, of the several meanings of the word "reserve" the ones most appropriate to the circumstances of this case is "set apart or keep for a person or for a special use; 'set apart' or keep back (in a case of absolution) to be dealt with by a superior authority." In neither of these meanings is there a specific requirement of a reversion to the person who makes the

reservation. The use of the word does not advance the objection of the Attorney General further.

Section 15 does not say anything about whether the reference should be to enable the High Court to decide the very case before it. I cannot say that because it is silent on this point a reference or reservation for future guidance of the Courts is excluded. On a plain reading of the section the power existed for the use of the High Court judge in this case, and he used it. I find no fault with that. Further, the fact that there is a right of appeal to the Court of Appeal under section 106 of the Constitution from a decision of the High Court, does not, in my opinion, alter this view. The right of appeal is conferred on aggrieved parties; the right to reserve questions of law is conferred on the court. They serve different purposes which, in my view, are not inconsistent.

I am reminded that in the case of Mokgadi v. The State 1988 B.L.R. 435 this Court refused to countenance a referral of questions by a High Court judge of questions he had raised in a previous case, but which in his view had not been answered by the Court. But that case presented a different set of problems from the present case. As Aguda J.A. said of that case at p.438:

"With respect to the learned judge, he clearly over-stepped his jurisdiction by, in effect, ordering this court to make a ruling in respect of an unspecified matter. It is not clear to whom the order that some matter or question be referred to the Court of Appeal for decision is directed."

Then after quoting section 15, Aguda J.A. continued -

"In the case now before us, the learned trial judge has not formulated any question of law in respect of which he was making a reference to this court."

Obviously, in that case the reference in terms was wholly defective. I find no guidance or analogy in it for the present case.

I may also add that in the interpretation of statutory provisions in Botswana, I do not find the interpretation given in other jurisdictions to express statutory provisions different from our provisions of great help.

For the reasons given, I think the objection in limine must fail. I would accordingly dismiss it and order the argument on the merits to proceed.

A majority of my Brothers agreed with the view expressed in these Reasons for the Ruling. We accordingly, decided to hear, and did hear, the reference on its merits. What now follows is my view on those merits.

B. The Decision on the Merits

The original applicant in the proceedings before the Industrial Court, the Botswana Railway Organisation, although represented, took no active part in the proceedings on the merits. Arguments

were presented by the respondents and the Attorney General, in his capacity as *amicus curiae*. In sum, the argument put to us in some detail in this difficult case was, on behalf of the respondents, that in creating the Industrial Court, Parliament established a court which offended against vital provisions of the Constitution, and which, therefore, was unconstitutional and invalid. The Attorney General's submissions on this question set out the arguments for and against the Industrial Court being a court in the accepted sense of the word, and although not urging on this Court any particular answer to the questions posed to us by the High Court, was on balance inclined to the view that if Parliament set out to create a court, it failed to do so. According to him, the institution which resulted from Parliament's efforts was some hybrid which could not qualify as a court.

To be able to answer the questions put to us by the learned High Court judge it is necessary to determine the nature of the institution now known as the Industrial Court; and to find out the nature of that institution, it is necessary to examine in some detail the legislative evolution of the circumstances, and the context, in which the Industrial Court was established.

The Industrial Court was created by an amendment of the Trade Disputes Act [Cap. 48:02]. The amendment did not change the object of the main Act, which was:

"An Act to provide for the settlement of trade disputes generally and the settlement of trade disputes in essential services, for the control and regulation of industrial action and for matters incidental thereto."

In the original Act, the machinery set up for the settlement of trade disputes was a multi-faceted instrument which included efforts by the responsible Minister, the Commissioner of Labour, and the possibility of contributions by the Permanent Arbitrator, an investigator or a committee of investigation, and a Sole

Commissioner or Board of Inquiry. The mechanism for bringing disputes before all these persons or bodies and the functions to be discharged by them was set out in detail in sections 4 to 16 of the Act.

Under sections 4 to 6, the Commissioner, if satisfied that a labour dispute existed or was apprehended, had the discretion to mediate between the parties himself or to authorize some other person to do so. If the dispute was reported in writing to him by either party and specified that the party consented to referral of the dispute to the Permanent Arbitrator, in case it was not settled by other means, the Commissioner had the option of referring it for settlement to such means as he considered to exist by virtue of any collective labour agreement; that is, unless he considered that such means had already been tried and had failed. Where the Commissioner did not consider that reference to settlement through a collective bargaining process was appropriate, or where that process had been tried and had, after a reasonable time, failed, he himself was obliged, without prejudice to his powers of mediation or asking a third person to do so, to enquire into the matter, and to take such steps as appeared to him necessary to reach a settlement. Then, section 7 made provision for what should be done where there was failure after a period considered reasonable by the Labour Commissioner to reach a settlement after his intervention. Because of the change in the course which was to be taken at this juncture by the Trade Disputes (Amendment) Act, 1992, I think I should reproduce this section in full. It said:

"7. (1) Where there is a failure after what, in the opinion of the Commissioner, is a reasonable time to reach a settlement of a trade dispute following his intervention in accordance with section 6, the Commissioner shall -

- (a) where there has been lodged with him the written consent of every party to the dispute, signed by or on behalf of the party, to the referral of the trade dispute to the Permanent Arbitrator in the event of a settlement of the dispute not being

reached by other means, whether that written consent was annexed to the report of the trade dispute in accordance with section 5(3) or has subsequently been lodged with the Commissioner, refer the dispute to the Permanent Arbitrator; or

- (b) where such written consent of every party to the dispute has not been lodged with him, report the failure to reach a settlement of the trade dispute to the Minister,

and, in either case, forthwith serve notice in writing on each party to the dispute that he has done so.

(2) Where -

- (a) failure to reach a settlement of a trade dispute has been reported to the Minister by the Commissioner in accordance with subsection (1)(b); and
- (b) the Minister has not, prior to the service of notice on each party to the dispute in accordance with subsection (1), decided to take steps under section 9(1), 10(1) or 11(1) and served on each such party the notice required by section 9(2), 10(2) or 11(2), as the case may be,

the Minister shall decide whether to take steps under section 9(1), 10(1) or 11(1) and, where he decides to take such steps, he shall, in the case of each party to the dispute, serve on the party the notice required by section 9(2), 10(10) or 11(10), as the case may be, within seven days immediately after the day on which notice was served on the party in accordance with subsection (1).

(3) Where, in the circumstances described by subsection (2)(a) and (b), any party to the dispute is not served with notice under section 9(2), 10(10) or 11(10) within seven days immediately after the day on which notice was served on the party in accordance with subsection (1), all practicable means for reaching a settlement of the trade dispute shall be deemed, for the purposes of this Act, to be exhausted."

In short, where there had been lodged with the Commissioner of Labour a written consent by every party to the dispute, to refer the matter to the Permanent Arbitrator, the Commissioner had to refer the dispute to him. Where, on the other hand the written consent for such referral had not been lodged with the

Commissioner, he was obliged to report the failure to reach a settlement to the Minister, and the Minister could take any of the actions open to him under section 7(2).

As indicated by the references in the text of section 7, the Minister, whenever seized with knowledge of a trade dispute, whether actual or apprehended, had three options that he could follow, depending on the circumstances. Section 9 gave him power, where any industrial action in furtherance of the trade dispute, whether actual or declared by the parties, had been declared by him to be unlawful under the Act; or the dispute involved an essential service; or the Minister was satisfied that the dispute had or might jeopardize the essentials of life or the livelihood of the people of Botswana or a significant section of them or might endanger public safety, or the life of the community, to refer the dispute to the Permanent Arbitrator. I will, for convenience, later refer to this type of dispute as a dispute of a nature critical or sensitive to the State or people of Botswana. The course of action indicated could be taken by the Minister, whether or not the dispute had been reported by the Commissioner or whether or not the parties had consented to the course adopted by the Minister. But section 10 gave the Minister power alternatively to "investigate any such matter appearing to him to be relevant to the dispute or to refer any such matter for investigation by a sole investigator or by a committee of investigation" appointed by him for the purpose. An investigator or committee appointed under the section was, after the investigation, obliged to submit a report on it with proposals and recommendations for settlement to the Minister, although the Minister was not precluded by any recommendations made by the investigator or committee from making recommendations of his own as he thought fit.

Then sections 11 to 16 provided for the Minister yet a third course of action, for it gave him the power, instead of

appointing an investigator or a committee under section 10, to appoint a Sole Commissioner or a Board of Inquiry to inquire into any matter appearing to him relevant to a trade dispute which was in existence or was apprehended. As seen from section 11(2), the Minister could at the same time as his reference to the Sole Commissioner or board of inquiry, or later, refer any matter appearing to him to be relevant to trade disputes in general or to such classes of trade disputes as he might specify to a Commission of Inquiry. This Commission of Inquiry seemed to be fashioned upon the ordinary Commissions of Inquiry under the Commissions of Inquiry Act, (Cap.05:02) appointed to inquire into other aspects of life, conditions and matters in the country. It had power to require by order in writing, on pain of a fine or imprisonment, persons to furnish particulars on matters specified in the order, to attend before it to give evidence on oath or otherwise; and to produce any document relevant to the inquiry. It was not bound by any rules of evidence, provided that where a witness objected to answering questions or to producing a document on the ground that it might incriminate him or on any ground on which he could so object in proceedings before the High Court, his objection had to be accepted by the Commission. The Commission had to inquire into the matters referred to it and to submit a report, which may by order of the Minister be published. The public, including the news media, could be admitted or excluded from its proceedings or part of it. Legal representation was permitted if the Commission consented to it.

Part III of the Act then dealt in detail with arbitration by the Permanent Arbitrator, making provision, in so doing, for the appointment and powers of the Permanent Arbitrator, awards made by him, and other matters related to proceedings before him.

It seems to me that the difficulty in understanding the new scheme for the resolution of industrial and trade disputes which

was established by the Trade Disputes (Amendment) Act, 1992 is due to a large extent to the fact that the extensive changes which it introduced were made in the form of amendments to the original Act, and not embodied in a fresh statute which from then on would provide a single source of information and knowledge of the process for the settlement of trade disputes. The method adopted for the change meant that any reader was bound to refer forwards and backwards from the original Act to the amending Act on a number of occasions; a process in which the essential features of the scheme which the new Act intended to introduce may be lost. The 1992 Act, for example, widened the scope of the meaning of trade dispute given in the original Act. But as that does not really affect the issues raised by this reference from the High Court, I say no more about it.

What is important to this reference is the fact that by the Trade Disputes (Amendment) Act, the machinery for the settlement of trade disputes was radically changed. All references to the Permanent Arbitrator were deleted. For the Permanent Arbitrator, the Industrial Court was substituted. The different methods of settlement of disputes were replaced by two, namely, mediation by the Commissioner of Labour or reference to the Industrial Court. Section 7 of the original Act, for example, which gave the Minister the power to opt for any one of three courses made open to him, was amended by the substitution for that section of the following:

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

The new section did away with the reference to the Minister. It

therefore did away with the optional courses which the Minister could adopt when such reference was made to him. The Labour Commissioner himself was empowered by the new section 7 to issue a certificate that either party or both may refer the dispute to the Industrial Court. Consistently with that, section 8 of the original Act, which dealt with reference by the Commissioner of a dispute with the consent of the parties to the Permanent Arbitrator, was deleted. The old section 9(1), which gave the Minister power to refer the dispute which was critical or sensitive to the State or people to the Permanent Arbitrator, was amended by the substitution for "Permanent Arbitrator" by "Industrial Court". No more could the Minister refer such matters to the Permanent Arbitrator, he had to refer them instead to the Industrial Court. As the amended section 9(1) is of importance in being the second method of referring a case to the Industrial Court, I quote it. It now reads:

"9. (1) Where the Minister is satisfied that a trade dispute exists or is apprehended and where -

- (a) any industrial action, whether actual or declared, in furtherance of the trade dispute has been declared by the Minister under this Act to be unlawful;
- (b) the dispute involves an essential service; or
- (c) the Minister is satisfied that the dispute has or may jeopardise the essentials of life or the livelihood of the people of Botswana or a significant section thereof or may endanger the public safety or the life of the community,

the Minister may, whether the dispute has or has not been reported to the Commissioner under section 5 and whether the parties consent or do not consent to his doing so, refer the dispute to the Industrial Court."

Turning back to the amendments of the Act, we find that the following sections were all deleted. Section 10, which dealt with the Minister's ability to investigate a trade dispute himself or to refer it to an investigator or a board of investigation; section 11 which gave him power to refer such

disputes to a Sole Commissioner or Board of Inquiry; section 12 which dealt with the powers of the Sole Commissioner or Board of Inquiry; section 13 which dealt with the publication of the reports of inquiry; section 14 which dealt with the holding of proceedings of inquiry; section 15 which restricted the publication of reports of proceedings of an inquiry; and section 16 which provided for legal representation before the inquiry.

By the new section 7, therefore, the Commissioner of Labour has to notify the parties that either or all of them may at that stage refer a dispute, which he has been unable to settle after his intervention, to the newly created Industrial Court. And by the amended section 9, the Minister can now refer disputes of a critical or sensitive nature to the State or people, which have come to his knowledge, to the Industrial Court. That he can do, whether the dispute has or has not been reported to the Commissioner under section 5 and whether the parties consent or do not consent to the reference, as before. These are the only two methods now provided by the Act by which a dispute may come before the Industrial Court. There is no other procedure laid down for bringing proceedings before the Industrial Court. I am therefore constrained to conclude from that that proceedings cannot be brought before the Industrial Court, unless they are brought by reference under the two methods specified, namely, by either one or all of the parties referring a dispute to, it which had previously gone before the Commissioner, but which the Commissioner had notified the parties that his efforts had proved unsuccessful in settling. Alternatively, by the Minister referring a dispute to it under section 5. In my view, an Industrial Court has no jurisdiction to hear an urgent application, as was done in the instant case, which is brought before it otherwise than by the two methods of reference mentioned in the new sections 7 and 9 of the amended Act.

The machinery created by the original Act, on the other hand, was one of a process for the resolution of disputes, which had to follow a charted course and which could end with one of several methods of settlement. The reference to the Permanent Arbitrator was not the only means of settlement when the Commissioner was unable to deal with the matter amicably. Nor was it the only mode of settlement when a dispute got to the notice of the Minister, whether through the action of the Commissioner or not.

The Industrial Court which replaced the institution of the Permanent Arbitrator was described as "the Court" in Part III of the Act. I think the Memorandum to the Bill deserves to be looked at for an indication of what the intention of Parliament was when it set out to create this "Court". We are entitled to do that by virtue of section 24(1) of the Interpretation Act [Cap.01:04] which provides that:

"24. (1) For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard ... to any memorandum published by authority in reference to the enactment or the Bill for the enactment, ... and to any papers laid before the National Assembly in reference to the enactment or to its subject-matter, but not to the debates in the Assembly." [emphasis mine]

The published Memorandum to the Trade Disputes (Amendment) Bill, 1992 contained the following passages:

"The purpose of the Bill is to replace the Permanent Arbitrator by an Industrial Court, and to provide for the establishment of the Court and the appointment of a judge or of judges to man the Court.

As a result of the introduction of the Industrial Court the role of the Commissioner and the Minister in the settlement of industrial disputes is very much reduced. The Commissioner will still have an important role in mediating between the parties before the dispute is referred to the Court. And the Minister will still have an important role where the dispute is in an essential service or where there is a threat to the livelihood or the safety of the people of Botswana. But in each case the final settlement of the dispute will be a matter for the Court."

From the Memorandum, the intention of Parliament behind enacting

the amendment is quite clear; it is to abolish the institution of the Permanent Arbitrator, and replace it with that of the Industrial Court. The role of the Commissioner of Labour and the Minister in the settlement of industrial disputes is reduced in each case to dealing with matters preceding settlement of the dispute by the Industrial Court. In the case of the Commissioner of Labour, his role is limited to a mediatory role; and in the case of the Minister, he is limited to dealing with matters of a nationally sensitive nature. "But," as the Memorandum stated, and I repeat it by way of emphasis, "in each case the final settlement of a dispute will be a matter for the Court." That the legislature set out to establish an institution which they understood to be a "court", there can be no doubt.

By the amended section 17 of the Trade Disputes Act,

"17. (1) There is hereby established an Industrial Court, herein referred to as 'the Court', with all the powers and rights set out in this Act or any written law, for the purpose of settling disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana."

The amended section 18(1) which deals with the jurisdiction of the Industrial Court opens with the following:

"18. (1) The Court, or any division of the Court, shall have exclusive jurisdiction in every matter properly brought before it under this Act, and without prejudice to the generality of the foregoing, such jurisdiction shall include power -

- (a) to hear and determine all trade disputes;
- (b) to enjoin any employee or employer, or any trade union or employers' organization, from taking or continuing any industrial action;
- (c) to refer any matter to an expert and, at its discretion, to accept his report as evidence in the proceedings;
- (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."

It will be recalled that the first of the two questions asked of this Court by the High Court Judge is whether the Industrial Court a subordinate court in terms of section 105 of the Constitution or a specialised division of the High Court in terms of section 17 and 18 of the Trade Disputes Act [as amended] and if so, whether the Court is competent to adjudicate on constitutional issues brought before it.

The question which has caused me some anxiety as a result of the arguments put before us is one which is preliminary to the question asked by the High Court, and that is, whether the Industrial Court is a court at all within the meaning of the Constitution. If the conclusion is that it is not really such a court, then the question posed by the High Court does not arise in either of the alternatives in which it has been put. That question which has agitated my mind, therefore, needs to be addressed as a matter of priority before an answer can be attempted to the learned High Court judge's question.

According to the Attorney General, the indices which show that the Industrial Court is not a court are that:

- "(a) That two members of a three man court may not be lawyers, or qualify to be judges, but may nevertheless overrule the judge on questions of fact.
- (b) That the tenure of office of the members (as opposed to the Judges) is uncertain.
- (c) That the Court is specifically empowered to take into account Government policies and directions.
- (d) That the Court is empowered to interpret its own decisions.
- (e) The Minister is empowered to refer certain disputes between parties to the Industrial Courts even without the consent of the parties.
- (f) That the Court is not bound by the rules of evidence in civil or criminal proceedings.

- (g) That in certain circumstances witnesses may be compelled to answer questions notwithstanding that they may incriminate such witnesses (section 19(6)).
- (h) That the Court may refuse to hear a matter and compel the parties to attempt further to reach a settlement (section 20(21)).
- (i) The Court is empowered to make compensation orders *mero motu* and to order re-instatement under contracts of employment (section 24).
- (j) The Court is empowered to make awards (e.g. a pay rise) on the basis of equity, and with retroactive effect (section 25(4)). This an ordinary Court would not be able to do.
- (k) Similarly such an award compels the Employer to contract on the basis of the award with all its other employees (section 26(4)).
- (l) The Court is not empowered to award costs, save in exceptional circumstances."

The question is whether any or all these points raised in respect of the Industrial Court either singly or in combination deprive the Industrial Court of the character of a court?

If we look more closely at the points raised as prejudicial to or destructive of the character of the Industrial Court as a court *seriatim* we find first of all that the fact that the two laymen who with the Industrial Court judge constitute that Court could, if they agree, overrule the judge. But courts have been known in which the decision on the facts may be taken away from the presiding judge. Take the case of a jury trial, for example, it is true that Botswana does not have jury trials, but in all countries in the Anglo-American system of the law which have a jury trial, the decision as to the guilt or otherwise of the accused is by the jury of laymen who can on the facts ignore the opinion of the judge. No one has said that the court trying a case by a jury is not a court. In cases where there are lay assessors, there are some countries which hold that where the assessors are unanimous, the judge is obliged to follow their

opinion of the case even though the statute provides that the judge may override the opinion of such assessors, and that to so override their opinion, the judge must give cogent reasons why he must depart from it. In others, he cannot even override their opinions. Jurors and assessors have no tenure in the courts they serve, yet the absence of tenure makes no difference to the character of the tribunals in which they serve. Members of the jury are often called upon to deal with only one case in their lives.

Secondly, the fact that the Industrial Court is specifically empowered to take into account Government policies and directions cannot determine its character as a court or otherwise. The matters over which it exercises jurisdiction are not ordinary contracts between two or three parties. They involve relations which are governed not only by statutes but also by a complex web of government policies and directives. To require that the Industrial Court, whether or not it is a court properly so called, should have those very matters which would lead the tribunal to form a just and equitable view of a dispute cannot alter the tribunal's character one way or other. After all, even the High Court takes into account public policy, although what is public policy is determined by that Court itself. The mere mention of policy should not frighten off consideration of the main character of the institution which has to look at it. Further, although the Industrial Court is empowered to pay regard to Government policies and directions, it is not obliged to follow them blindly. Besides, where Government is not a party to an industrial dispute, consideration of its policies or directives does not confer an advantage on any one of the parties before the Court or lead to an imperfect exercise of judicial power.

Thirdly, courts are very often given a power of reviewing their own decisions. In doing so, they have to interpret their own

decisions. If no legislation spells out the fact that a court may interpret its own decisions, that should not deprive the tribunal of its character as a court.

Fourthly, must a tribunal be a court only because the party comes to it directly or of his own volition? Some courts cannot be approached at all unless a special procedure is used. One cannot bring one's dispute directly to an appellate court. This disability cannot affect the nature of the jurisdiction exercised by the appeal court. An accused person does not usually come to court of his own volition. The situations in which the Minister is empowered to refer a dispute to the Industrial Court are situations where the interest of the State is specifically or indirectly affected by the industrial dispute. I have related them above. They are the situations enumerated by section 9 of the Act, as amended, where any industrial action, whether actual or declared, in furtherance of the trade dispute has been declared by him Minister to be unlawful under the Act; or the dispute involves an essential service; or the Minister is satisfied that the dispute has or may jeopardize the essentials of life or the livelihood of the people of Botswana or a significant section of them or may endanger public safety, or the life of the community. They are situations in which Government must necessarily have an interest. The conduct of the parties referred to the Industrial Court might jeopardise important State interests.

Next, I am quite sure that whether or not an institution is a court is not determined by it not being bound by the rules of evidence in civil or criminal proceedings. Take the case of customary courts. They are obliged by section 14 of the Customary Courts Act [Cap.04:05] to apply customary law and the provisions of any written law which the court may be authorised to administer. They are also obliged by section 20 of that Act not to impose upon any person any punishment unless a criminal

trial has been held in accordance with the provisions of the Customary Courts (Procedure) Rules. Would the customary law include the complicated laws of evidence as applied in the High Court? I do not think so. But does the customary court fail to qualify as a court because it does not apply the intricate rules on hearsay or similar fact evidence? Many Commonwealth countries, including South Africa and Zimbabwe have small claims courts. The legislation establishing these courts often specifically excludes the rules of evidence from their procedures - see, e.g. section 26(1) of the Small Claims Courts Act, 1984 of South Africa which states that,

"26. Procedure - (1) Subject to the provisions of this Chapter [the Chapter on Procedure and Evidence], the rules of the law of evidence shall not apply in respect of the proceedings in a court, and a court may ascertain any relevant fact in such manner as it may deem fit."

Similarly, there is no insistence by the presiding officer in a Zimbabwe Small Court on the strict procedures and rules of evidence which are followed in the High Court. Surely, this does not make the Small Claims Courts of South Africa and Zimbabwe any less courts within the ordinary meaning of the term? Countries in the civil law tradition have no separate law of evidence at all. But they have courts.

As to point (g), the constitutional protection given by section 10(7) is against an accused person being compelled at his trial to give evidence. The rule against answering self-incriminatory questions is an ancient rule of evidence which originated in England from the unpopularity of the procedure in the Star Chamber under which those who were charged with an offence were interrogated on oath. In its modern form it is set out in by Goddard L.J. in Blunt v. Park Lane Hotel Ltd. [1942] 2 K.B. 253 at page 257, where he said that:

"The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or [in a criminal case] forfeiture which the judge

regards as reasonably likely to be preferred or sued for." But the rule has been changed from time to time by statute where necessary. A recent example of this in England is the development of the Anton Piller order.

In Botswana this privilege against self-discrimination is incorporated in section 258 of the Criminal Procedure and Evidence Act [Cap.08:02], which provides that:

"258. No witness in any criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which, if the answer to such question would, in accordance with the law of evidence which was in force on 31st December, 1987, have a tendency to expose him to any pains, penalty, punishment or forfeiture, or to a criminal charge, or to degrade his character..."

Note should be taken of the fact that this section confers the privilege only in criminal cases, and in any case excepts from the privilege contrary provisions of the Act or any other law.

The provision in section 19(6) of the Trade Disputes Act as amended, which was identified by the Attorney-General as an indicator of the non-curial character of the Industrial Court, is to the effect that:

"19. (6) If a witness objects to answering any question or to producing any document on the ground that it will tend to incriminate him, or on any other ground on which he could lawfully object if the objection had been made in civil or criminal proceedings in the High Court, he shall not be required to answer such question or to produce such document, nor shall he be liable to any penalty for refusing to do so:

Provided that if the Court is of the opinion that the answer to such question or the production of such document is necessary for the fair and just determination of the matter before it, it may hear the matter, or such of it as is necessary, in camera, in which case the witness shall be obliged to answer the question or produce the document, as the case may be, and such answer or such production shall not be admissible in evidence in any other civil or criminal proceedings against the witness."

As in the case of the Anton Piller order, so here the privilege is abridged and protection given against the admissibility of the evidence procured through that method in a subsequent criminal proceeding.

I could go on item by item refuting in detail the indicators given by the Attorney General against the Industrial Court being a court. But I find it unnecessary. I will, however, advert to three aspects. It is correct that the Industrial Court is given the power if in its opinion "the parties have not made sufficient attempt to reach agreement" to "remit the matter to the parties, or to the parties and the [Labour] Commissioner, with such directions or advice as it may deem appropriate". Bearing in mind the fact that disputes which come before the Industrial Court sometimes originate from reports made under section 5 of the Act to the Commissioner of Labour, is it strange that the Court should be invested with power to send the dispute back to the Commissioner to try to settle it between the parties? Courts often claim or are expressly given powers to promote settlement between the parties. It is not unknown in this Court to suggest settlement to parties. That does not detract from recognition of any such court which advises or promotes a settlement from being known as a court. Specific powers given by statute to a court to make compensation orders *mero motu* or to order reinstatement under contracts of employment or to make awards (e.g. a pay rise) on the basis of equity, and with retroactive effect or compelling an employer to contract on the basis of the award with all its other employees may make changes in current operative contract law or enforcement procedures. But the legislature has power to make such changes in the law; and to confer such powers cannot be said to change the nature of the institution to which the powers are granted. And if an institution is created by Parliament with all the attributes of a court but is not empowered to award costs, save in exceptional circumstances, that to my mind would not make the institution any

the less a court. The power to award costs is a right which can be conferred or taken away by Parliament.

In my opinion, it would be a mistake to deny the character of a court to an institution merely because it does not exercise the powers of the High Court or similar Courts, or does not do things which by statute, common law or the Rules of Court are done by these Courts. We should remember that adjudicative functions can be exercised by an institution created by statute with special powers. The fact that it does not conduct its proceedings in accordance with the High Court Rules or live by the rules of evidence governing trials before the High Court does not deprive the institution from being an institution which administers justice according to the laws governing it.

I have said a great deal about what does not deprive an institution of the character of a court. What then is a "court" within the meaning of the Constitution? The Constitution itself gives no answer to this question. It has no definition of the word "court" in its general interpretation section, that is, section 127. But that interpretation section, defines "subordinate court" which means:

- "...any court established for Botswana other than -
- (a) the Court of Appeal;
 - (b) the High Court; or
 - (c) a court martial.

That takes us no further than the knowledge that any court established for Botswana which is not one of the three named courts must be a subordinate court. That knowledge is helpful in our consideration of the question posed by the High Court, insofar as decides the point that if the Industrial Court is a court but not a division of the High Court, then it must necessarily be a subordinate court.

The other relevant statement in the general interpretation

section of the Constitution is section 127(2) which provides that:

"(2) In this Constitution, unless the context otherwise requires, references to offices in the public service shall be construed as including references to the offices of judges of the Court of Appeal and judges of the High Court and the offices of members of all subordinate courts (being offices the emoluments of which, or any part of the emoluments attaching to which, are paid directly out of moneys provided by Parliament)."

Judges are thereby made members of the public service. The Chapter on the Judicature does not open with some grand statement of the purpose of courts as some constitutions do in providing that the judicial power of the State is thereby conferred on the courts or the judiciary. It simply provides for the High Court, the Court of Appeal, the Judicial Service Commission and the interpretation of the Constitution. The Customary Courts are not dealt with, nor is there an express provision in the Chapter on how courts, especially the subordinate courts defined in section 127 of the Constitution are created. There is an oblique reference to the fact that it is Parliament which creates courts in section 104(2)(b) and (c) which prescribes the offices to which subsection (1) which confers power on the President acting in accordance with the advice of the Judicial Service Commission to appoint, discipline or remove, refers. That reference is to all offices of magistrate and such other offices of President or member of any court or connected with any court as may be prescribed by or under an Act of Parliament.

Obviously, Parliament has the power to prescribe which members of courts not otherwise created or expressly regulated by the Constitution, should be appointed by the President acting in accordance with the advice of the Judicial Service Commission. That power, together with the power of Parliament to legislate for the peace order and the good governance of the country would entitle Parliament to create whatever subordinate courts it deems necessary, and to specify which of its members are to be

appointed by the President acting on the advice of the Judicial Service Commission. In this regard, it should be noticed that the Magistrates Courts of the land are not, apart from the reference given in section 104(2)(b) above dealt with at all by the Constitution. They are wholly constituted and regulated by the Magistrates' Courts Act [Cap.04:04]. Customary Courts are not referred at all in the Chapter on the Judicature in the Constitution, it being left to the Customary Courts Act [Cap.04:05] to constitute and to regulate them.

But although the general interpretation section has no definition of a court, there is in section 19(1) of the Constitution, a definition of "court" for the purposes of the Chapter II, which is the Chapter on the Protection of Fundamental Rights and Freedoms of the Individual. It says:

"19. (1) In this Chapter, unless the context otherwise requires -

'court' means any court of law having jurisdiction in Botswana other than a court established by a disciplinary law, and in sections 4 and 6 of this Constitution a court established by disciplinary law."

In other words, except in the case of sections 4 and 6 of the Constitution, a court is any court of law having jurisdiction in Botswana other than a court established by disciplinary law. But that is really not a definition; it is a delimitation of a "court" acting legally. If the institution described as a court is acting within a jurisdiction for which it has competence, it qualifies as a court, otherwise it is not a court. "Disciplinary law" is itself defined in the same section as "a law regulating the discipline of any disciplined force." i.e. a naval, military or air force, the police force or the prison service. But in the case of section 4 of the Constitution, which deals with the protection of the right to life and section 6 which deals with the protection from slavery and forced labour, the expression "court" includes a court established by disciplinary law. Incidentally, section 6 is the section which the respondents rely

on in their claim that the orders of the Industrial Court, which is an unconstitutional court, to employees who take industrial action to go back to work against their will, amount to forced labour practices.

A definition of "court" as a court having jurisdiction in Botswana, however, does not give us much assistance on the question as to the nature of a court. It does not tell us anything about the attributes by which we recognise the institution which is a court. The Constitution otherwise assumes that its readers know what a court is. It will be noticed that from the definition, an institution which is described as a court established by disciplinary law, could with respect to some provisions in the Constitution not be a "court", but with respect to some others, be a "court". Failing a specific section of the Constitution which gives the definition of a "court", we turn next to the Interpretation Act [Cap. 01:04] for assistance. Section 2 of the Act applies its provisions not only to ordinary Acts of Parliament and instruments made thereunder, but also to the Constitution. Section 49 of the Act, which gives the definition of certain words when used in enactments, simply says that:

"49. In an enactment -
'court' means a court of competent jurisdiction;"

It gives the same jurisdictional qualification given in section 19(1) of the Constitution, which has proved unhelpful in determining the attributes of a court. It does not help us in the determination of which institution, when acting within its jurisdiction may be described as a court. For that we should have to turn to the ordinary understanding of what a court is. Our next resort would be the dictionary and other texts which give us an indication of what a court is. The Concise Oxford Dictionary opens its definition of "court" with "an assembly of judges or other persons acting as a tribunal in civil and criminal matters." As a matter of historical evolution in

English law, and I daresay in African customary law, the courts originated in the place where the power of the sovereign or ruler in his administration of justice to his subjects held his proceedings. The jurisdiction of the sovereign over his people was the highest manifestation of sovereign power, and the sovereign or ruler would usually exercise his judicial power with advice from advisers and friends, who later became his council. This later developed into a jurisdiction of persons with specialised knowledge to exercise the judicial power of the state or customary entity. Courts came to be constituted by judges with specialised knowledge of the law. However, it is not always that courts are constituted only by people learned in the law. Laymen often form part of courts, and may even in some cases form the entire bench. The English development is neatly put by Walker in *The Oxford Companion to Law* as follows:

"A court was originally the King's or a great lord's palace or mansion, the place where he stayed with his retinue of friends and advisers, e.g. the Court of St. James's, and the name became transferred to the group of confidants, advisers, and chief administrators, to those who, singly or in groups, in the sovereign's or lord's name exercised judicial functions and also to the places where justice is administered. In the last sense a court is accordingly a person or group of persons having authority to hear and determine disputes according to rules of law. Tribunals or adjudicators who exercise adjudicative functions by virtue of contract or of the voluntary submission of persons to their decisions, such as arbitrators, disciplinary bodies or committees of clubs, trade unions, and the like are not, strictly speaking, courts because they do not exercise jurisdiction by force or authority of law. Nor is a person or body a court merely because he or it has to hear evidence, to act fairly and impartially, or reach decisions, or because it is subject to appeal."

Thereafter Walker gives classifications between civil and criminal courts, courts of general and courts of special jurisdiction, superior and inferior courts, trial and appellate courts etc. Of these classifications, the one of interest to this case relates to the distinction drawn between courts of general and courts of special jurisdiction. Of this distinction,

Walker says:

"...Courts of general jurisdiction, whether civil or criminal, may deal with practically any kind of case, civil or criminal as the case may be, brought before them. Courts of special jurisdiction may deal only with stated and limited kinds of issues. This latter class includes ecclesiastical courts, courts-martial, commercial courts, industrial or labour courts, probate courts, juvenile courts, traffic courts, and many others."

It is significant that the industrial or labour court is expressly mentioned amongst the courts of special jurisdiction. In Black's Law Dictionary, this type of specialised court is described as "court of limited jurisdiction" as opposed to a "court of general jurisdiction".

From all this, we derive the conclusion, that a modern court must principally, though not wholly, be an adjudicative body; and it must derive its authority to exercise its functions not by agreement of those appearing before it, or the mandate of a club or society to which potential parties before it might belong, but from the sovereign power of the State. Those within the jurisdiction of that State who wish to have their disputes resolved with the backing of coercive sanctions against a losing party, and those who have offended against the laws of the State, may bring their cases or may themselves be brought, as the case may be, before this State instituted adjudicative body. The distinction between a state based and a consensual adjudicative body is the main distinction between a court and an arbitral tribunal. The test is not the procedure or the content or manner of receiving evidence, it is the will of the State that the body should exercise judicial powers, in the sense of deciding and resolving disputes, whether of a general or a specialised kind, within the State and the enforcement of the judgments with the power of the State.

The first two of six characteristics of courts and other adjudicative authorities given by Bennion in his Statutory

Interpretation (2nd. ed.) at pages 61 to 62 [the others are omitted as not having a bearing on this case] are:

- "(1) A court is an authority charged with the function of exercising the judicial power of the state. Only a court as thus defined has power authoritatively to determine what the law is, and therefore what is the legal meaning of a relevant enactment.
- (2) Subject to any enactment, a court has an inherent power to regulate its own procedure and ensure its orders are effective."

In his comment on these characteristics appear the following extract:

"... the Contempt of Court Act 1981 s 19 defines the expression 'court' as meaning any tribunal or body exercising the judicial power of the state. The 'court' may be a judge, stipendiary magistrate or other authority possessing expert legal knowledge. On the other hand the deciding agency may be a bench of lay magistrates, a jury, or some other lay body. In the latter case it is likely to be required to reach its decision under the guidance of a legal expert comprised in the 'court', though this is not invariable. Many tribunals have mixed lawyer and non-lawyer membership. This may even be the case with an appellate tribunal."

Then in illustration of the first characteristic stated, he gives the following example at page 63:

"Example 19.1 The Employment Appeal Tribunal consists of two lay members and a legally qualified chairman. Not infrequently the lay members outvote the chairman on questions of law."

In the final analysis, therefore, I find that an institution is a court if it is established by the State, in the sense that it is created by its Constitution or by its legislative body, such as Parliament, acting under powers conferred by the Constitution, as an adjudicative body which hears and determines disputes between persons within the jurisdiction of the State or the State itself brought before it by the State or other persons and does so by applying the laws of the State or at least the laws of natural justice and whose decisions are enforced by the coercive powers of the State.

From all that I have stated above, I have no doubt that with respect to the Industrial Court, Parliament set out to establish a court and in fact succeeded in establishing a court.

As pointed out earlier, the Constitution did not specify which institutions constituted subordinate courts, all it did was to say that courts were subordinate if they were not the Court of Appeal, the High Court or a court-martial. Nor did it put a limitation on the establishment of subordinate courts. Section 17 of the Trade Disputes Act, as amended, provided that:

17. (1) There is hereby established an Industrial Court, herein referred to as 'the Court' with all the powers and rights set out in this Act or any written law, for the purpose of settling industrial disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana."

I have mentioned earlier that the Memorandum to the Bill for the enactment of the amendment stated that, "The purpose of the Bill is to replace the Permanent Arbitrator by an Industrial Court, and to provide for the establishment of the Court and the appointment of a judge or of judges to man the Court." In the face of that it would be strange if we were to hold that Parliament did not set out to create a court. Its intention and purpose is quite clear from the Memorandum to the Bill as well as section 17(1). The Court is a court of limited jurisdiction, in that it dealt only with industrial disputes, but that merely characterises it as a court of special or limited jurisdiction; it is no less a court. The institution it did establish was given authority by the power of the State. It is not an institution which parties or potential parties have agreed to establish. It clearly has adjudicative functions. We have already noted the jurisdiction given to it by the amended section 18(1).

Clearly, a tribunal which has power to hear and determine all disputes whether of a general nature or of a particular kind is

an adjudicative tribunal. In the performance of that duty, it is given all the powers of a court. It derives its authority from State power in the form of its governing legislation, and not from the agreement of parties or potential parties; it has adjudicative powers, for it is given power to hear and determine all trade disputes (see section 18(1)(a) of the Act); it has power to enjoin the parties appearing before it to refrain from doing certain acts (section 18(1)(b)); it has power to compel the appearance under pain of penalties before it to give evidence or to produce documents (section 19); and its decisions have "the same force and effect as a judgment or order of the High Court", and are "enforceable in like manner as such judgment or order" (see section 25(2)). As we have noted, the fact that section 19(1) makes the Industrial Court free from being bound by the rules of evidence or procedure in civil or criminal proceedings and empowers it to disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice, does not diminish its judicial function. Indeed, it seems to me that the limitation of the type of irregularity which can be disregarded to one which is unlikely to result in a miscarriage of justice rather confirms its function as an adjudicative tribunal.

Does the Industrial Court as set up, then offend against the Constitution? If it does, then the legislation must be struck down as unconstitutional, whatever the intention or act of Parliament in its establishment. Mr. Motswagole, Counsel for the respondents, contended that the amending Act did offend the Constitution in two important respects: firstly, it offends in conferring upon the Industrial Court exclusive jurisdiction in all industrial disputes to the Court. This offence is due to the fact that it deprives the High Court of part of its original general jurisdiction in all matters. Secondly, the Act also offends against the Constitution in the manner of appointment of the members of the Court. Instead of all judges and other

judicial officers being appointed by the President acting on the advice of the Judicial Service Commission, the Trade Disputes Act gives the power of appointment of the judge of the Industrial Court to the President without the intervention of the Judicial Service Commission. The two lay members of the Court are selected by the judge, one each from two panels, one of six persons nominated by the organization representing employees or trade unions in Botswana, and the other from a panel of six persons nominated by the organization representing the employers. According to Counsel, this departure in the appointment process from that provided for judges of courts militates against the separation of powers entrenched in the Constitution.

I think the view that section 18(1) as recited above deprives the High Court of its general jurisdiction in all matters or even derogates from that jurisdiction in any way is wrong. The reading of the section which leads to this erroneous conclusion confers exclusive jurisdiction in all industrial disputes on the Industrial Court. If this was indeed so, then the argument as to the unconstitutional diminution of the jurisdiction of the high Court, would be irrefutable. But that reading is not what the section says. It says that "[t]he Court ... shall have exclusive jurisdiction in every matter properly before it under this Act ..." I have added the emphasis to show that all the provision says that the court should be seized exclusively of matters which are properly brought before it under the Act. That does not mean that all industrial matters have become the exclusive preserve of the Industrial Court. It means when a matter, which because of the limited nature of the Court's jurisdiction which is related to an industrial or trade dispute is properly brought before the Court, the Court should have exclusive jurisdiction to hear and determine that reference. It will be recalled that only two methods are provided by the statute for bringing a matter properly before the Industrial Court. One of these is by issue of a certificate by the

Commissioner of Labour under the amended section 7 to the effect that either or both parties to a trade dispute which had been reported to him but cannot after a reasonable time be settled through his efforts, may take the dispute to the Industrial Court. The other is by reference by the Minister of what I have described as the type of sensitive dispute from a national perspective to the Court under section 9(1). It is only when a matter comes before the Industrial Court through either of these two means that it can be said to be properly before the Court under the Act. And it is only when a matter is properly before the Industrial Court that it could be said to have exclusive jurisdiction over it.

If one remembers that under the original Act there were several methods of resolution of industrial disputes, with the Minister alone having the power to investigate a matter himself, or to refer the dispute to a sole investigator or a committee of investigation or to a sole commissioner or a board of inquiry or to the Permanent Arbitrator, it does not appear to me strange that the legislature, in order to indicate the reduction of the Minister's powers in the resolution of industrial disputes as had been indicated by the Memorandum to the amendment, should wish to make clear the point that once a matter has properly been put before the Industrial Court, it is only that Court which has the jurisdiction to determine it. This is a jurisdiction exclusive of any other method previously available for the disposal of a dispute which follows the processes laid down in the Trade Disputes Act. The expression of exclusivity in this regard, has nothing to do with the diminution of the general jurisdiction of the High Court. Surely the suggestion cannot be maintained that when the Commissioner certifies to the disputing parties that they can refer their dispute to the Industrial Court, they are under an obligation to do so? What duty or sanction is imposed by the law on either of them if they decided not to proceed to the Industrial Court? In my view there is none. That either or

both of them may take the matter before the Industrial Court cannot mean that they must take the matter before the Court. And if that be the case, what may follow next? In my view, the unlimited jurisdiction conferred by the Constitution on the High Court must mean that the parties can take their dispute to the High Court, if they so desire, and if they think the dispute is of a nature which is susceptible to settlement by the processes of that Court. It is not unknown for subordinate courts to be given a limited jurisdiction by their parent statute over the same issues as are justiciable by the High Court, and for people to choose to go to those subordinate courts with their problems instead of the High Court, even though the latter has unlimited jurisdiction. But the fact that there is such a court does not mean that the High Court's jurisdiction is curtailed. Nor does the conferment of unlimited jurisdiction on the High Court mean that the court with limited jurisdiction carved for it is unconstitutional. People go to the court with limited jurisdiction because it is convenient, or quicker or more cost-effective or for any number of reasons. But that does not mean that the jurisdiction of the High Court has been eroded thereby. Take the Magistrates Courts as an example. Are they unconstitutional because they have in a limited sphere a parallel jurisdiction to the High Court? The answer is, no. Parties can in fact contract to confine their disputes to the jurisdiction of the Magistrate's Courts. The context in which the word "exclusive" is used in section 18(1) does not, to my mind, support the contention suggested that an unconstitutional diminution of the jurisdiction of the High Court has been occasioned. I am confident that the usefulness of the Industrial Court as constituted does not depend on an exclusion of the High Court from the determination of trade disputes as defined in the Act. I am sure that it was not the intention of Parliament to order such an exclusion, and that it did not so order. Courts with special jurisdiction, like industrial courts and, in some, jurisdictions, tax courts, are usually established, not because

Parliament intends to force everybody with a problem of that specialised nature to go to those courts and nowhere else, but because they provide a service which the ordinary courts are not as well equipped to provide. The Industrial Court will be used by parties who think that the procedures of the ordinary courts are not the best designed to settle the kind of disputes with which they are faced. And so long as it provides services in the settlement of those disputes which parties to trade disputes perceive to be superior to that obtainable in the ordinary courts, the parties would prefer to go to it rather than to the ordinary courts.

The other major objection to the amending Act's constitutionality is the appointments issue. According to this argument, the appointment of a judge or a presiding officer of a subordinate court must be by the President but only on the advice of the Judicial Service. By section 96(2) of the Constitution, "puisne judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission." Thus, if the Industrial Court were a division of the High Court, in the amended section 17(1)(3) requiring that "Industrial Court judges shall be appointed by the President from among persons possessing qualifications to be puisne judges of the High Court" without obliging the President to act in accordance with the advice of the Judicial Service Commission, it would be providing an unconstitutional mode of appointment of a puisne judge. And by section 104(2)(c), the same method of appointment with the advice of the Judicial Service Commission applies to "such other offices of President or member of any court or connected with any court as may be prescribed under an Act of Parliament". If, therefore, the Industrial Court were a court coming within the context of section 104(2)(c), then the mechanism for the appointment of its judge by the President without advice from the Judicial Service Commission would be equally unconstitutional.

For reasons that I will presently give, I do not think that the Industrial Court is a division of the High Court. That leg of the argument does not, therefore, apply. That, therefore, leaves me to consider the argument in the context of section 104(2)(c) of the Constitution. The question is whether that provision demands that all judges must be appointed in accordance with the advice of the Judicial Service Commission. If that was intended by the Constitution, nothing would have been easier than for it to provide simply that the judges of all courts must be so appointed. But the Constitution did not choose to do that. Indeed, no general role in the appointment of judges or judicial officers was given by the Constitution to the Commission. Instead, specific provisions were made by the Constitution with respect to the appointment of specific judicial officers. The appointment of High Court judges with its advice was dealt with specifically in section 96(2) which said:

"96. (2) A puisne judge shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission."

The appointment of the judges of the Court of Appeal was dealt with in identical words except for the substitution of the words "The Justices of Appeal, if any," for "A puisne Judge". When it comes to section 104, again the general statement of the role of the Commission was avoided in favour of the specific identification of the persons who should be appointed with the Commission's advice. The section proceeds in the following manner:

"104. (1) Power to appoint persons to hold or act in offices to which this section applies, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the President acting in accordance with the advice of the Judicial Service Commission." [emphasis supplied]

If, therefore, an office of a person exercising judicial office does not come within the ambit of the application of the section, the Judicial Service Commission has no role in the appointment

of that person whatever, unless that role has been conferred by statute. Section 104 then proceeds in subsection (2) to name the offices to which its declaration in subsection (1) applies. They are:

"104. (2) The offices to which this section applies are -

- (a) the office of Registrar of the Court of Appeal and High Court;
- (b) all offices of magistrate;
- (c) such other offices of President or member of any court or connected with any court as may be prescribed by or under an Act of Parliament."

As the judge and other members of the Industrial Court do not come within subsection (2)(a) or (b) the interpretation of subsection (2)(c) is left as the one of interest to us. The whole argument of Mr. Motswagole on this point stands or falls on which of two readings we adopt in the interpretation of that paragraph. One of those two readings would make the words "as may be prescribed by Act of Parliament" qualify the word "court" only. That means that whenever Parliament by Act prescribes a court, then automatically the President of that court and members of or connected with that court come within the sphere of appointment by the President acting in accordance with the advice of the Judicial Service Commission. The second reading makes those words extracted from the paragraph of the subsection qualify not only the court but also the personnel of or connected with the court. Thus, Parliament may choose to prescribe, when establishing a court that neither its President or its members should be appointed by the procedure laid down in section 104 of the Constitution. It is only when it prescribes positively that these appointees should be given their appointment in every case by the President in accordance with the advice of the Judicial Service Commission that they come under the regime established by section 104.

The first of the two possible readings given is the interpretation urged on us by Mr. Motswagole. At first blush, that view appears most attractive. It supports the constitutional doctrine of separation of powers which Montesquieu propounded. Mr. Motswagole, himself argues that the Constitution of Botswana promotes that theory. But the Constitution did not establish that theory in this country in its rigid form. None of the various arms of government: the Executive, the Legislature and the Judiciary, comes to life or lives in a hermetically sealed enclave. The President, in whom the executive power of the State is vested by section 47 of the Constitution is not elected directly by the people, but through the elected members of the National Assembly. Parliament which exercises the legislative power of the State consists, according to section 57, of the President, who is the person who wields executive power, and the National Assembly. But for our immediate purpose, it is even more important to recognise that the Constitution does not isolate the judicial arm from the other arms of government. The procedure for the appointment of judges, for example, is not as clear-cut as Mr. Motswagole's argument appears to portray. The two highest judicial officers of State, namely the Chief Justice and the President of the Court of Appeal, are by specific constitutional provision appointed by the President alone without the intervention of the Judicial Service Commission. Nothing prevents him from consulting with the Commission if he wishes to consider their advice, but nothing obliges him to do so, if he does not. In the same Chapter IV in the Constitution on the Judicature which established the Judicial Service Commission and provides for the appointment of puisne judges and Justices of Appeal by the President in accordance with the advice of the Commission, section 96(1) provides that:

"96. (1) The Chief Justice shall be appointed by the President."

And section 100(1) provides that:

"100. (1) The President of the Court of Appeal shall,

unless the office is held ex-officio by the Chief Justice, be appointed by the President."

In neither case does the Constitution contemplate nor provide for the intervention of the Judicial Service Commission. It is hoped that this is not an adverse comment on the independence of the respective courts over which they preside. But whatever comment they give rise to, these provisions would be directly contrary to a rigid scheme of separation of powers in the Constitution.

Outside of the Constitution, we find that the Customary Courts are given recognition by Act of Parliament [Cap. 04:05]. That Act makes no provision for appointments to be made on the advice of the Judicial Service Commission. In the case of the Customary Court of Appeal, section 40(1), (2), (3) and (4) gives the power of appointment of the court itself and its president to the Minister. These Customary Appeal Courts, as well as the members of the Customary Courts, whose appointments are not made by the President, with or without the advice of the Judicial Service Commission, no doubt, exercise substantial judicial powers in the State. The decisions of the Customary Courts of Appeal may come into the mainstream of judicial administration under the Constitution through further appeals to the High Court. I do not think that their position as courts can be denied on the grounds that the method of appointment of their judges does not include the advice of the Judicial Service Commission.

Besides, when the reading of the section as advocated by Mr. Motswagole is considered, if the President or member of any court or connected with any court is automatically to be appointed by the President acting in accordance with the advice of the Judicial Service Commission by the mere fact of Parliament prescribing the court, one may well ask who the members "connected with the court" would be? Whom does that expression cover? One can understand "members of a court" as being the judges of the court, but what meaning should we give to members

connected with a court? Could these people be known without specific prescription in the Act in connection with the court established? Would it be any officer who is connected with the court, such as the clerks, the minor officials, even the cleaners? These questions together with the natural reading of the provision as set out in section 104(2)(c) lead me to the conclusion that Mr. Motswagole's contention cannot be right, and that the Constitution contemplated and therefore gave power to Parliament not only to prescribe courts as it deemed fit from time to time, but in that prescription, to further prescribe whether and which president and members of or connected that particular court ought to be appointed by the President acting on the advice of the Judicial Service Commission. In my opinion, therefore, the Industrial Court does not offend against section 104 of the Constitution.

The Industrial Court, is not a division of the High Court. Nothing in the Act creating it said that it should be a part of the High Court. If it were otherwise, its judge would have had to be appointed by the process designated in section 96(2) of the Constitution. He is, according to its parent legislation, not to be so appointed. If it were otherwise, its rules would have been the same as, or similar to, the Rules of the High Court. Instead, we see special provisions mentioned in its parent Act specifically empowering it to act without cognisance of those Rules. The Court is not placed under the Chief Justice who is the authority in charge of the administration of the High Court. The fact that appeals from the Industrial Court lie, according to its Act, direct to the Court of Appeal does not make it a part of the High Court. Such appeals are a specific jurisdiction conferred on the Court of Appeal by Parliament. The jurisdiction and powers of the Court of Appeal are expressly stated in section 99(1) of the Constitution to be "such jurisdiction and powers as may be conferred on it by this Constitution or any other law." Nor does the provision that the decision of the Industrial Court

should have the same force and effect as a judgment or order of the High Court and be enforceable in like manner make the Court a part of the High Court. If the Industrial Court were a part of the High Court, this express statutory provision would not have been necessary. The decisions of the Industrial Court would in that case have had automatically that force and effect. Not being, in my opinion, a part of the High Court, I do not see how in this respect, the Industrial Court offends against the provisions of section 95 of the Constitution.

It is impossible to conclude this judgment without once again referring to the case of Botswana Bank Employees Union and Another v. Barclays Bank of Botswana Limited. It will be recalled that I referred to it earlier in my reasons for dismissing the preliminary objection to the hearing of this appeal. I have to repeat that the fact that we decided that case as we did does not serve as authority for the constitutionality or otherwise of the Industrial Court. It is correct that in that case, we held that a referral by the Commissioner of Labour was not a sine qua non for an application to be brought before the Industrial Court. That finding in itself gives an indication of the argument then raised by Counsel on the point. His point was that for an application to be brought before the Industrial Court, it must be referred by the Commissioner to the Court. I have in this case sought to demonstrate that under the amended Act, the reference to the Court is not made by the Commissioner himself but by either or both of the parties after the Commissioner has issued a certificate to them that either may refer the matter which he could not resolve to the Court. In the strict sense, the conclusion on the argument presented that reference by the Commissioner is not a sine qua non for an application before the Court is correct. Indeed, under the present dispensation he does not ever refer a dispute to the Court. Although when the basic question as to whether the applicant in the Barclays Bank Case had the right to bring an

application before the Court is considered, my position in this case is that on a proper interpretation of all the provisions, the pursuance of the process established for the resolution under the amended Act, would mean that a party cannot come directly before the Industrial Court without the exhaustion of the remedial efforts of the Commissioner, unless, of course, the dispute is over an essential service or one important to the security of the State, in which case, the Minister may make a reference to the Court when he has notice of it, without the intervention of the Commissioner.

According to the doctrine of the binding effect of judicial precedent which we apply in this country, a subsequent court of inferior status is bound to follow an earlier decision of a superior decision, and sometimes the court is bound by its own or the decision of a court of coordinate jurisdiction. I, for the present, do not debate the question of the appropriateness of a final court of appellate jurisdiction being obliged at all times to follow its own previous decisions, as it has been found in some jurisdictions that such blind application of a previous decision whatever be the circumstances may lead to undue repetition of a decision which may be recognised by all as in principle erroneous. But the doctrine of the binding nature of judicial precedent applies to the ratio decidendi of a case and not to all dicta or pronouncements in it. And the ratio decidendi of the case depends on the issue or issues raised, the facts and arguments made in support thereof, the findings on them, if any, and the holding on the law as applied to the facts and arguments. It is when judged by the doctrine that I come to the conclusion that the decision in the Barclays Bank Case is not binding on us.

As I pointed out earlier, the issue of the constitutionality of the Court was not raised in substance until Counsel was on his feet addressing us. Counsel then invited us to enunciate what

he described as "guidelines" on the status of the Court, as it was an important matter affecting the constitutional rights of employers and employees and their respective organisations arising more and more frequently in the Industrial Court. The Court declined the invitation. In giving the reasons why the Court adopted that course, Tebbutt J.A., in a judgment in which the four other members of the Court, including myself, concurred, said this:

"In the first place the matter was not one which was necessary for the Court to decide in regard to the appeal before it. It is not the function of this Court to express gratuitous views in regard to matters which are not pertinent before it and which were not germane to the issues it is called upon to decide. Secondly, it is obvious that the Government of Botswana would have a real interest in any declaration by this Court of the sort it was invited to make. It would affect not only the Constitution but also the Trade Disputes Act. Neither the Government nor any of the relevant Ministers who would be affected by such declaration was before this Court and therefore no consideration could be given to the issue raised in their absence." [emphasis supplied]

I still think that that observation was right. As things were, there was no really prepared argument on the question. The Attorney General was not a party to, nor was he represented in, the case. We felt that the case then before us could be decided without dealing with that adventitious matter suddenly broached by Counsel. But that is not the case here, where the constitutionality of the Court has been directly challenged, and is understood by all parties to be the basic issue in the case. The Attorney General, representing the Government, is here before us as amicus curiae to ensure that the views of Government are fully heard. And the matter has been exhaustively ventilated. This, therefore, is the first opportunity that this Court has had

to speak advisedly on the question of the constitutional validity of the Industrial Court, and on the consequences which flow from such a determination. I think we ought to rule positively on it without having to rely one way or the other on our decision in Botswana Bank Employees Union and Another v. Barclays Bank of Botswana Limited.

For the reasons given above, I hold that the Industrial Court as established does not violate the Constitution either in its jurisdiction or in its manner of appointment of judge and members. I would answer the questions posed as follows:

- "1. Is the Industrial Court a Subordinate Court in terms of section 105 of the Constitution or a specialised division of the High Court in terms of section 17 and 18 of the Trade Disputes Act [as amended] and if so, is it competent to adjudicate on constitutional issues brought before it?"

To that question my answer is that the Industrial Court is a subordinate court. With regard to its competence to adjudicate on constitutional issues brought before it, I repeat section 105(1) of the Constitution which provides that:

"105. (1) Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court."

The Industrial Court is therefore competent to deal with constitutional issues arising in proceedings before it, provided the Court is of the opinion that the issue raised is not a substantial question of law which it ought to refer to the High Court. Even where the question of law is of a substantial nature the Industrial Court may still choose to deal with it if the Court feels capable of doing so, because the Constitution, in its use of the word "may" to describe the Court's powers, confers a discretion. But in any event, if either of the parties before the Industrial Court requests that the constitutional issue

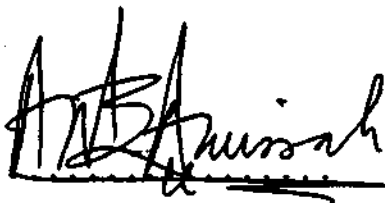
should be referred to the High Court, however insubstantial the issue is in the opinion of the Industrial Court, and whether or not the Court feels capable, however substantial the issue is, to deal with it itself, that Court's competence over the issue is ousted and it must refer the issue to the High Court for determination.

The second question posed by the High Court is:

"2. Does the Trade Disputes Act [as amended] offend against the provisions of section 10(9), 95 and 104 of the Constitution?"

To that question, my answer is, no.

I must express my indebtedness to both Counsel for the very able and exhaustive manner in which they presented their arguments in this case.

.....

A.N.E. AMISSAH

JUDGE PRESIDENT

AGUDA. J.A.:

(A) INTRODUCTION:

I have had the privilege of reading in draft the judgment prepared by my learned Brother, Amissah, Judge President, as well as the judgments prepared by my learned Brothers Steyn and Tebbutt JJA.

As appears from the judgment of Amissah J.P. an objection in limine raised during argument on 23 January 1996 was, by a decision of the majority of the court sitting in this case, not sustained; and this Court accordingly decided that it should consider and provide answers to the questions reserved for it by Gaefele Ag.J. in the High Court. The answers to those questions are authoritatively set forth in the concluding paragraphs of the judgment of Amissah J.P.

The effect of the objection in limine was that this Court should decline to answer the questions reserved for its consideration by the High Court for the following two reasons:-

- (1) because the referral to the High Court by the Industrial Court was improper and legally ineffective; and
- (2) because the reservation by the High Court of questions for the consideration of the Court of Appeal was improper and legally ineffective.

Having regard to the stance which I adopted at the time when the objection in limine was taken, I am constrained to write this short judgment. I considered then, and it remains my view, that the objection in limine was well-founded. Moreover, the judgment of Amissah J.P. on the merits in my respectful opinion itself supplies a further and cogent reason in support of the objection in limine, namely, that upon a proper interpretation of the Trade Disputes (Amendment) Act, 1992, No. 23 of 1992, the Industrial

[REDACTED]

Court in any case lacked jurisdiction to entertain the application which on 14 April 1995 the applicant brought before it. That application forms the substratum of the proceedings which culminated in this Court.

Since it appears to me to be likely that procedural problems of the kind which have bedevilled this case may confront this Court on future occasions, I wish shortly to state my reasons for concluding that the objection in limine was well-founded in law. In so doing I shall not repeat the facts stated in the judgment of Amissah J.P. save insofar as such repetition is necessary to clarify my own view of the matter.

(B) THE ESTABLISHMENT OF AN INDUSTRIAL COURT
BY ACT NO. 23 OF 1992 AND A SUMMARY OF THE
EVENTS LEADING UP TO ITS GRANTING ON 14 APRIL
1995 A RULE NISI AT THE INSTANCE OF THE APPLICANT

In 1982 Parliament enacted a Trade Dispute Act. It was Act No. 19 of 1982, and is now Cap 48:02 of Compilation of the Laws of Botswana 1987. The preamble to the Act says that it is -

"An Act to provide for the settlement of trade disputes generally and for the settlement of trade disputes in essential services, for the control and regulation of industrial action and for matters incidental thereto."

In 1992 Parliament deemed it necessary to amend the Act in substantial ways, and passed the Trade Disputes (Amendment) Act, 1992, No. 23 of 1992, the date of commencement being 9 October, 1992. In this matter we are concerned primarily with the Amendment to Part III of the Act by which a completely new Part III was substituted for the existing one. The new Part III bears the title "Industrial Court"; and the new sections substituted are sections 17 to 23. Section 17 (1) says that "There is hereby established an Industrial Court, herein referred to as 'the Court', with all the powers and rights set out in this Act or any other written law, for the purpose of settling trade disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana." It would appear that subsequent to the Act coming into effect Mr. David Johannes De Villiers was on May 16, 1994 appointed in terms of Section 17 (3) ^{of the Act} as the first Judge ~~of the Act~~ of the Industrial Court.

Now it would appear that a trade dispute arose between the Botswana Railways Organisation and some of its workers numbering 199, as a result of which those workers stayed away from work as from April 10, 1995. The Organisation thereupon made an ex parte application to the Industrial Court Judge on Good Friday, April 14, 1995, a public holiday in Botswana, and the application was heard on the same day.

The orders prayed in the Notice of Motion, omitting irrelevant parts, were as follows:

"2. That a Rule Nisi do issue calling upon the

Respondents to show cause to this Honourable Court on a date and time to be determined by the above Honourable Court, why an order should not be made in the following terms:

- 2.1 declaring the industrial action embarked upon by the Respondents with effect from 10th April 1995 and any continuation or repetition thereof, to constitute a strike as defined in the Trade Disputes Act (Cap 48:02) (hereinafter referred to as "the Act") and unlawful industrial action in terms of that Act;
 - 2.2 declaring that the aforesaid industrial action embarked upon by the Respondents is unprocedural and in breach of the provisions of each Respondent's individual contract of employment with the Applicant;
 - 2.3 interdicting and restraining the Respondents from participating in or continuing any industrial action as aforesaid;
 - 2.4 ordering the Respondents to report for work forthwith and to comply with their contracts of employment;
 - 2.5 ordering that the costs of this application be paid by such of the Respondents as oppose it, jointly and severally, the one paying the other to be absolved.
3. That paragraph 2.3 and 2.4 operate as an interim

interdict with immediate effect.

4. That the Applicant be granted leave to serve this order and the application upon the Respondents by publishing same in the Botswana Railways weekly notice and affixing same to all train crew notice boards at all train stations."

(C) THE DISCHARGE OF THE RULE NISI AND THE REFERRAL OF QUESTIONS BY THE INDUSTRIAL COURT TO THE HIGH COURT

In the result all the prayers sought by the applicant were granted on 14 April 1995 when the Industrial Court granted a rule nisi returnable on 25 April 1995. The respondents filed an answering affidavit and the rule nisi was extended to 27 April 1995.

On 27 April 1995 the Industrial Court Judge discharged the rule nisi. At the same time he ordered that two questions be referred to the High Court for determination by it. He framed those questions thus:

- "1. In terms of Section 18(3) of the Constitution of Botswana the following question is hereby referred to the High Court for a determination in terms of section 18 (2) (b) of the Constitution;
Was the interim order of the Industrial Court, dated 14 April 1995, ordering the Respondents to report for work forthwith and

to comply with their contracts of employment, in any event not later than Saturday, 15 April 1995 at 07:00, a contravention of the provisions of Section 6(2) of the Constitution of Botswana, which prohibits forced labour.

2. The question as to the interpretation of the words "forced labour" in Section 6(2) and the "court" in Section 6(3) (a) of the Constitution of Botswana is hereby referred to the High Court in terms of Section 105(1) of the Constitution for a decision in terms of Section 105(2) of the Constitution."

(D) THE RELEVANT CONSTITUTIONAL PROVISIONS

The provisions of Section 18 of the Constitution relevant to this case are:

- "18(2) The High Court shall have original jurisdiction -
- (b) to determine any question arising, in the case of any person which is referred to it in pursuance of subsection (3) of this section,
- and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.

18(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

(E) WERE THE QUESTIONS WHICH THE INDUSTRIAL COURT REFERRED TO THE HIGH COURT JUSTICIABLE BY THE HIGH COURT ?

For the purpose of testing the propriety of the Industrial Court's referral of the two aforementioned questions to the High Court, I shall assume, for the purposes of argument, that under the laws of Botswana the Industrial Court has the status of a subordinate court.

Two pertinent questions suggest themselves. In my view they should have been considered by the High Court at the very outset. First, was the purported referral proper in all the circumstances? Second, what effect would any answer to the questions given by the High Court have on the proceedings in the Industrial Court?

The fact of the matter was, of course, that at the time of the order for referral the Industrial Court had already discharged

the rule nisi earlier granted by it, and in so doing the Industrial Court rendered itself functus officio in respect of those particular proceedings. Subsection (3) of section 18 of the Constitution makes reference to -

"any proceedings in any subordinate court....."

However, at the time when the High Court was being asked to determine the questions, there were no longer any proceedings before the Industrial Court.

The above view of the matter is reinforced by section 105(2) of the Constitution. Its provisions contemplate a situation in which answers given by the High Court on questions referred to it have to be transmitted to the Court which made the referral for the guidance of such Court in deciding the case which is before it and in which the point of law arose. Subsection (2) of section 105 of the Constitution says -

"Where any question is referred to the High Court in pursuance of this section, the High Court shall give its decision upon the question and the court in which the question arose shall, subject to any appeal, dispose of the case in accordance with that decision."

It is quite clear that at the time of the referral in the instant matter there was not before the Industrial Court any case

susceptible of disposal by it in accordance with any decision of the High Court. Mr. Motswagole suggested that a decision on the questions referred might have been of interest to the public at large and might also have served as a guide for future litigation in this sphere. I do not accept that the High Court has any such advisory function, either at common law or by statute.

For these reasons I conclude that the referral by the Industrial Court to the High Court had no basis in law; and that the High Court should have declined to embark upon what was no more than a futile academic exercise.

(F) THE PROPRIETY OR OTHERWISE OF THE HIGH COURT'S RESERVATION OF QUESTIONS FOR CONSIDERATION BY THE COURT OF APPEAL

The High Court nevertheless considered itself competent to entertain the referral purported to have been made to it. As has been noted the two questions referred to the High Court by the Industrial Court were in summary (1) whether the Order of that Court that the respondents should return to work by a certain date was inconsistent with the provision of the Constitution which prohibits forced labour; and (2) the proper interpretation of the word "court" in section 6(3) of the Constitution. Having heard argument on the matter Gaefeke Ag.J. held, in effect, that the Industrial Court's order to the respondents to return to work by April 15, 1995 was not ultra vires the Constitution since it did not amount to forced labour.

Thereafter the learned judge went on to say -

"It is convenient to now deal with the objection raised by

the Applicant's counsel at the commencement of argument. In the respondents' heads of argument there were additional constitutional questions. The respondents' counsel sought to argue the questions whether or not the "Industrial Court" is a court of law having jurisdiction in Botswana and secondly whether the Industrial court was properly, lawfully and constitutionally established.

In a nutshell this court was being invited to decide on the status of the Industrial Court. This I declined to do because the Applicants were not fully prepared and ready to argue such additional questions. The other reason was that there are only two questions referred to this court by the Industrial Court. It was therefore, not necessary for the court to deal with the matter not properly before it and decide on questions not relevant to the issue it is asked to decide."

Finally the learned Judge a quo concluded his judgment thus:

"Having said all that, the following questions are hereby reserved under Section 15 of the Court of Appeal Act, for consideration by the Court of Appeal namely:

1. Is the Industrial Court a Subordinate Court in terms of Section 105 of the Constitution or a specialised division of the High Court in terms of sections 17 and 18 of the Trade Disputes Act [as amended] and if so, is it competent to adjudicate on constitutional issues brought

before it, or

2. Does the Trade Disputes Act [as amended] offend against the provisions of Section 10(a), 95 and 104 of the Constitution.

I have broadly set out the questions in view of the arguments appearing in both the Respondents' and Attorney General's heads of argument."

The objections which I have raised against the referral of the questions by the Industrial Court to the High Court apply with even greater force to the purported reservation of questions by the High Court for consideration by the Court of Appeal. In my view such reservation is nothing more than an invitation to this Court to provide answers to purely academic questions which are wholly unrelated to the determination of any litigation pending before the High Court. It seems to me, with all due respect, that we should decline to embark upon a procedure lacking any constitutional or statutory legal foundation.

What I have said above should conclude the matter. It is nevertheless necessary, in my opinion, to consider whether the procedure adopted in this case was in accord with our law.

(G) WHAT QUESTIONS OF LAW MAY BE RESERVED
FOR CONSIDERATION BY THE COURT OF APPEAL ?

The learned judge a quo said that he was reserving certain points

of law under the Court of Appeal Act, Section 15. In my view the Act does not contemplate the sort of proceedings which were before him at the time he made the order of reference. The section 15 provides -

"A judge of the High Court may reserve for consideration by the Court of Appeal any question of law which may arise during any civil or criminal proceedings before him."

In my view this will not apply to questions of law which have been referred to the High Court by a subordinate court. There is adequate and clear provision as to what should happen in a situation of that nature. Section 105(1) of the Constitution says in very clear language that when any question is referred to the High Court in pursuance of that section, the High Court shall (emphasis mine) give its decision upon the question. Thereafter whosoever is aggrieved by such a decision is given power under Section 106 to appeal as of right to the Court of Appeal. For clarity of presentation I wish to quote the main provision of section 106. It reads:

"An appeal shall lie as of right to the Court of Appeal from any decision of the High Court which involves the interpretation of this Constitution, other than a decision of the High court under section 69 (1) of this Constitution."

Section 69(1) of the Constitution deals with the determination

of questions as to membership of the National Assembly and therefore has no application to this case.

I take it that if the Constitution had intended to permit the High Court to make a further reservation to the Court of Appeal in a matter in which reference has been made to the High Court by a subordinate court, the Constitution would have said so in clear terms. One can cite the similar provisions of the Nigerian Constitution of 1979 in support. Section 259 of that Constitution provides that -

"Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, the Federal Court of Appeal or a High Court) and the Court is of opinion that the question involves a substantial question of law, the Court may, and shall if any of the parties to the proceedings so requests, refer the question to a High Court having jurisdiction in that part of Nigeria, and the High Court shall -

(a) if it is of the opinion that the question involves a substantial question of law refer the question to the Federal Court of Appeal."

Subsection (2) then goes to make provision for the situation where the question arises in the High Court and says that - if

the court is of the opinion that the question involves a substantial question of law -

"the Court may, and shall if any party to the proceedings so requests refer the question to the Federal Court of Appeal; and where any question is referred in pursuance of this subsection, the Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with the decision."

And finally subsection (3) of the Section provides that in case where the question arises in the Federal Court of Appeal, -

"the Court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Federal Court of Appeal as it deems appropriate."

It seems quite clear that in all these cases where the court to which reference has been made makes a decision, such decision is to be communicated to the lower Court so that the lower Court may dispose of the case then pending before it. The decision based upon the outcome of the reference will be subject to appeal as of right since it will be on a point of law. The Supreme Court of Nigeria in the case of ABRAM ADESANYA v. THE PRESIDENT SC 1/81, sitting in full bench of seven, held that when a reference is to be made to the Supreme Court for a decision under Section

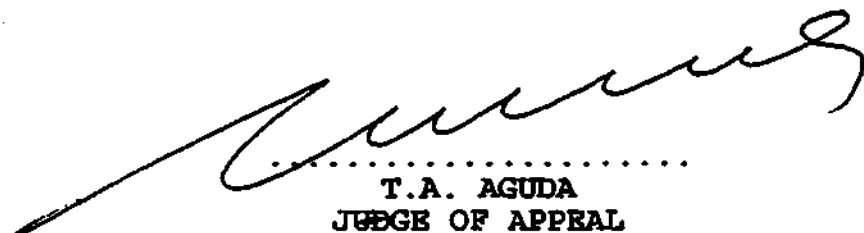
259 (3), the Federal Court of Appeal would be wrong first to give decision on the substantial question to be referred before doing so. According to the Supreme Court reference under the provision does not contemplate a reference on any answer to the question which might have been given the lower court, but one which would guide the lower court in the determination of the case before it. Twenty years earlier the Supreme Court had held under a similar provision of the 1960 Constitution that the court to which reference is made is limited in its answer to the question referred to it: OLAWOYIN & OTHERS v. COMMISSIONER OF POLICE (NO. 2) [1961] All NLR 622. In that case the Court went on to hold that it would not allow a question to be reframed so as to transform it into a different or additional question.

It seems clear that, just as in the case of Nigeria, so also in the case of this country a reference can be made to a higher court in appropriate cases solely with a view to using the result of such reference in resolving issues actually pending before the court that has made the reference. Otherwise such reference will be for purely academic purposes which is not part of our common law inheritance.

(H) CONCLUSION ON THE VALIDITY OF THE OBJECTION IN LIMINE

Having due regard to what is provided both in our Constitution and in the Court of Appeal Act, and further in the light of the authorities from elsewhere cited above, I am persuaded that the reservation of questions for consideration of this Court by the

ruling made by Gaefele Ag.J. on 9 November 1995 was legally defective both procedurally and in substance; and that this Court should have declined to entertain it.


.....
T.A. AGUDA
JUDGE OF APPEAL

STEYN JA.

There are several issues that fall to be decided in this matter. It is perhaps advisable to deal first of all with the question as to whether the legislature in enacting the provisions of the Trades Dispute Amendment Act, 1992, established a "Court." More particularly is it a Court as envisaged by Section 6 (3) of the Constitution? If the answer were to be in the affirmative, is it a "Subordinate Court" as defined by Section 105 of the Act?

I have had the opportunity to read the reasons for judgment of my learned brethren Amissah JP and Tebbutt JA. For those reasons I have also concluded that the Industrial Court is a "Court" as envisaged by the Constitution and that it is a Subordinate Court as defined.

However, I would in support of this finding wish to add a few comments of my own.

In the first place the debate on this issue has also been conducted in neighbouring jurisdictions. This is certainly so both in the Republic of South Africa and in the Kingdom of

Lerotho.

Before amendments to the legislation governing industrial relations, the South African Court of Appeal held that an Industrial Court, when making determinations under the relevant legislative provisions then in force, did not sit as a Court of law even when it discharged functions of a judicial nature. See SOUTH AFRICAN TECHNICAL OFFICIALS ASSOCIATION V. PRESIDENT OF THE INDUSTRIAL COURT AND OTHERS 1985 (1) SA 597 (A) at 612 I to 613 D. However, in 1988 far-reaching amendments were introduced into the then operative legislative frame-work. What these were appear from the decision of the South African Court of Appeal in PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION v. PIENAAR NO 1993 (4) SA 621 (A) at 634. The relevant passage in the judgment setting out the nature of these provisions reads as follows:

"A prime importance in the amendments are the provision of the new ss 17A, and 17B and 17C. Section 17(a)(1) establishes a Labour Appeal Court consisting of a number of separate Divisions. Subsection (3) provides, *inter alia*, that every Labour Appeal Court in session shall consist of a Judge of the Supreme Court, who is the Chairman of the Court, and two assessors appointed by him; that the assessors are to be persons who, in the opinion of the Chairman, have experience in the administration of justice skill in any matter which may be considered by the Court; and that the decision of the majority of the members of the Court shall be the decision of the Court, except in respect of a question of law, which shall be decided on by Chairman alone (paras (a), (b) and (e)). Section 17B reads as follows:

- '17B(1) A Labour Appeal Court shall have the power-
- (a) to decide any question of law reserved in terms of s 17(21)(a);
 - (b) to decide any appeal referred to in s 17(21A).
- (2) (a) The proceedings of the industrial court may be brought under review before a Labour Appeal Court on the grounds *mutatis mutandis* referred to in s 24(1) of the Supreme Court Act 59 of 1959.
- (b) For the purposes of para (a), Rule 53 of the Rules of Court made under s43(2) of the Supreme Court Act 1959, in respect of the review procedure in the Supreme Court, shall *mutatis mutandis* apply.'

Section 17C provides that any party to any proceedings before a Labour Appeal Court may appeal to the Appellate Division against a decision or order of the Labour Appeal Court (except a decision on a question of fact), with the leave of the Labour Appeal Court or the Appellate Division."

Botha JA, who delivered the judgment of the Court, motivated his finding that the legislature in South Africa did create a "Court" in the following manner:

"In the present case the Legislature has created a special judicial forum in which persons aggrieved by decisions of the industrial court can seek redress. It cannot be doubted, in my opinion, that the Labour Appeal Court, when exercising the power of review conferred upon it by s 17B(2), functions as a court of law. Moreover, it functions as such on the same level in the hierarchy of Courts as does the Supreme Court in its Provincial and Local Divisions. It hears appeals and reviews; it is presided over by a Judge; and appeals against its decision lie to the Appellate Division. That being so, the question of concurrent jurisdiction in the present case poses a problem of a kind which, as far as I know, has not called for consideration before.

It is true, of course, that the Labour Appeal Court cannot in all respects be equated with a Provincial or Local Division of the supreme Court. In the present context, however, the differences are of no real consequence. For example, attorneys have a right of audience in the Labour Appeal Court (s 17A(8)), and an appeal

to the Appellate Division does not lie against a decision on a question of fact (s 17C(1)(a); of Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A)). Such details do not, I consider, detract from the substantial equivalence in rank of the Labour Appeal Court and the ordinary Provincial and Local Divisions of the Supreme Court in the judicial hierarchy."

The South African legislation has a great number of similarities with the legislation under consideration in the instant case. The reasoning of the learned Judge is in my view of some persuasive force when determining whether the Industrial Court for Botswana created under the provisions of the Trade Disputes Act is a Court as defined. See also in this regard the judgments of the Court of Appeal in South Africa in MINISTER OF THE INTERIOR & ANOTHER v. HARRIS & OTHERS 1952 (4) SA 769 (A) and particularly the judgment of Schreiner JA at 787 - 789 where he says:

"It is not easy to draw a clear line of demarcation between tribunals which are and those which are not Courts of Law. The latter expression may be used with different shades of meaning. That there may be a meaning of the word "court" which is describable as "strict" derives support from what was said by LORD SANKEY in giving the judgment of the Privy Council in Shell Company of Australia Ltd. V. Federal Commissioner of Taxation, 1931 A.C. 275 at p. 296. The LORD CHANCELLOR said:

"The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power ... In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide.

4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

It must be observed that the LORD CHANCELLOR does not provide any positive definition of a Court "in the strict sense", but I take it that what is intended is what is ordinarily called a Court of Law.

Although the line between such Courts and other tribunals is not easy to define this does not, of course, mean that there must always be serious difficulty in deciding whether any particular

tribunal that has been given the title of Court or Court of Law should or should not be held to be such. And indeed I do not in the least degree dissent from the view that, assuming that one has to decide whether the High Court of Parliament as set up by Act 35 of 1952 is or is not a Court of Law, the proper conclusion is that it is not, but is only Parliament wearing some of the trappings of a Court. If that is so, and Parliament has simply itself assumed the role of watchman over its own actions, Act 35 of 1952 constitutes an encroachment on the judicial power, which in the narrow field covered by the provisos to sec. 152 is fully separate from the legislative power."

A different conclusion was reached in a judgment in Lesotho in ATTORNEY GENERAL v. LESOTHO TEACHERS TRADE UNION AND OTHERS COURT OF APPEAL CIVIL APPEAL NO. 29 OF 1995.

In its decision the Lesotho Court of Appeal held that the Labour Court did not have power to adjudicate upon civil proceedings brought before it by way of an application for an interdict. It analysed the provisions prescribing the jurisdictional limitations of the Industrial Court *in casu* and

found as follows on page 22 of the judgment.

"In essence, the Labour Court is a Court of equity enjoined to keep the scales of justice in balance between the conflicting demands of employer and employee. Disputes that come before it are not "civil proceedings" as provided for in either section 2 of the High Court Act or The Constitution. Therefore, great care must be taken to ensure that the ambit of its jurisdiction is not extended to matters which would require it to decide issues which are not compatible with the purpose for which such tribunal was created. In this respect, section 24 of the Code and definition of "trade dispute" have been enacted to circumscribe the limitations on its jurisdiction. Such matters are "matter(s) provided for under the Code, including but not limited to trade disputes" and when formalised are not converted into "civil proceedings" as defined in the Constitution and in the High Court Act. It must be stressed, however, that our Courts should be astute to ensure that the powers of the Labour Court to adjudicate upon such matters are strictly confined to matters that are either "trade disputes" *stricto sensu*, or are clearly identifiable as issues contemplated by the legislature as defined in section 24."

It held that the Labour Court in Lesotho accordingly had limitations imposed on it, which confined its capacity to adjudicate, to "trade disputes" as defined and "matters, provided for under the Code". This accordingly did not empower the Court to try conventional civil proceedings.

The Lesotho Court of Appeal then proceeded to record the following:

"It is clear from the reasoning recorded above, that the application brought by the appellant cannot be regarded as a matter falling within the purview of the exclusive jurisdiction of the Labour Court as defined in the Code. In fact, that Court would not have had jurisdiction to try the civil proceedings instituted by the Appellant. It was clearly not a matter "provided for under the Code" and not a "trade dispute" as

defined.

The Court a quo was in my view correct when it described the conduct of the Respondents as "unlawful". On the admitted facts, the Respondents violated the rights of the Ministry to conduct its affairs free of violent disturbance or illegal occupation of its premises.

Moreover the intimidation and harassment to which its officers were subjected were in clear contravention of the provisions of the Labour Code itself. Any person is entitled to approach the conventional courts of law for protection against such conduct. It could never have been intended that a Labour Court - let alone only a Labour Court - should be the forum for the adjudication of proceedings brought to protect such rights."

It also held in casu that the "Labour Court" was not a "Subordinate Court" created in terms of the relevant enabling legislation. This provision reads as follows:

"3. (1) The Minister may, with the concurrence of the Chief Justice, by notice in the Gazette, constitute such courts subordinate to the High Court as he may think fit."

These provision were not of application to the Labour Court and it could therefore not be classified as such in terms of the relevant legislation in force in the Kingdom of Lesotho.

In the instant case however the intention of the legislature is sufficiently clear to enable us to conclude that the Industrial Court is a Court as defined.

I come now to deal with the question of what the powers of the Industrial Court are in terms of the legislation presently under consideration.

After the conclusion of argument before us, it appeared that

it was a sustainable contention that, read as a whole, the Trade Disputes legislation could be so construed as to have pertinently prescribed a process and defined a procedure which is designed as the long title suggests - "to provide for the settlement of trade disputes". Save for the provisions of section 9(1) and 29(1) there are no other provisions which authorise the Court to adjudicate upon disputes properly brought before it. If this were so, and if the legislature intended to limit the powers of the Court, its authority to adjudicate could only be invoked as part of this process and pursuant to the procedures prescribed.

As a result, therefore, because of what appeared to us to be an arguable construction of the legislation involved, we felt it appropriate to raise certain further questions with Counsel.

The preamble to the questions we posed read as follows:

- "a) WHEREAS the provision of a statute should be so construed without doing any violence to the language involved) as to render their interpretation to be in harmony with rather than in conflict with the terms of the constitution;
- b) AND WHEREAS the expressed object of the Trade Disputes Act ("the Act") is to provide conciliatory mechanisms and procedures to facilitate the non-adversarial settlement of trade disputes;
- (c) AND WHEREAS the exclusive jurisdiction entrusted to the Industrial Court in terms of section 7 of the Act is specifically confined to those matters -

 'Properly before it under this Act',
- d) AND DUE REGARD BEING HAD to the procedures and successive steps required by the express provisions of sections 5 and 7 of the Act."

We then articulated the following three questions:

- (1) has the Industrial Court any original jurisdiction to hear and determine civil proceedings?
- (2) Was the urgent application launched in the Industrial Court on 14 April 1995 justiciable at all by the Industrial Court as a matter

"Properly before it under this Act"?

- (3) Is the proper conclusion not that the entire proceedings before the Industrial Court which culminated in the rulings on 25 April 1995 legally ineffective and a complete nullity?"

We received most helpful responses from both Counsel in this matter. On due consideration of these and the whole scheme and purpose of the Act, I conclude that the application for an interdict was "not properly" before the Industrial Court. I do so for the reasons set out in the principal judgment of the Judge President as supported by those of Tebbutt JA in his comments. See also the reasoning in the Lesotho Court of Appeal judgment cited above, particularly the need to confine the delegation of powers to this "specialist" Court strictly to matters that are "trade disputes stricto sensu or are clearly identifiable as issues contemplated by the legislature."

A different approach could well place the constitutionality of the Industrial Court in serious jeopardy because of what would prima facie appear to be conflicting provisions of the Constitution on the one hand, when it confers unlimited original jurisdiction on the High Court to those of the Trade Disputes Act on the other, when it confers exclusive jurisdiction on the

Industrial Court. That this is a result which the legislature is unlikely to have sought to achieve is clear.

Indeed there is abundant authority for the proposition that a legislature does not intend to pass legislation which exceeds its constitutional limits. Thus, eg, in The Federal Commissioner of Taxation v Munro 38 Commonwealth Law Reports Isaacs J said at p.180

"Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that the Parliament did not intend to pass beyond constitutional bounds; if the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail."

In Tuckers Ltd v Ceylon Mercantile Union (1970) 73 NLR (Ceylon) the Court per Sirimane J at p. 316 reasoned as follows:

"The first question that arises therefore is whether in the provisions of the impugned Act No. 37 of 1968, there is a usurpation of judicial power by the legislature?"

The learned Judge goes on to say:

"In dealing with this question one must bear in mind that a Court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere. In order to ascertain whether there has been such an encroachment one should, I think, look at the Act as a whole and not at a particular Section

isolated from other provision of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act."

The learned Judge goes on to cite the dictum of Lord Pearce in Livanaie v The queen 1965 (68) NLR 265 where Lord Pearce says;

"But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor or they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

Whilst these judgment are particularly relevant in relation to the determination of whether a particular statute infringes against the doctrine of the separation of powers - where such separation exists - they are instructive also as to the general approach to be adopted by the Court when testing the constitutionality of the legislation involved.

In the Tuckers Ltd judgment cited above Weeramatry J at p.332 says the following in this regard:

"All these considerations, not one of which is conclusive but all of which cumulatively are of considerable weight, tend to create doubt in regard to the view indicated earlier relating to

the effect of the impugned provision taken in isolation. Viewing the legislation in this broader way, one is thus left at least in a state of doubt as to whether this particular enactment was not aimed at conserving the jurisdiction of the courts rather than at nullifying court decrees. It seems reasonably possible to view the legislation as being aimed at preserving to the citizen the right to obtain relief from the courts, of which right he was in consequence of a prevailing view of the law, deprived. One cannot say with assurance that the only view reasonably possible is that the impugned legislation encroaches on the judicial power.

In this resulting position of doubt there comes into play another principle of accepted authority in constitutional matters, where the constitutional validity of statutes is attacked. This principle has perhaps been best set out by Isaacs J in Federal Commissioner of Taxation v. Munroe. Isaacs, J there gave expression to the very great responsibility lying upon a court of law examining the validity of legislation impugned as offending the fundamental law of the Constitution. Isaacs, J went on to observe: 'It is always a serious and

responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency - as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us - the question is: 'Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers?' It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res valeat quam pereat.*"

The fact that in sec. 95 of the legislation under review the principle of "unlimited original jurisdiction" by the High Court "to hear and determine any civil or criminal proceedings under any law" is enshrined, does not in my view necessarily preclude the legislature from establishing specialist Courts with the requisite expertise to adjudicate upon matters which fall within the defined ambit of such expertise and within the procedural constraints prescribed. In this regard Courts that deal with specialist issues such as Patents, Water, Tax or Admiralty Law are well-known. The technological revolution has brought with it the need for greater specialization both in the field of the practice and the administration of the law. Provided that the value base which underpins the Constitution is not infringed, I do not see that the creation of Courts of expertise with appropriate powers of adjudication diminishes the right of access to the conventional Courts of law. This is the more so because of the fact that the right of appeal to this Court and the right of review by the High Court have been either specifically or by necessary implication preserved. Moreover, the limitations on the powers of the Industrial Court as expounded both by the learned Judge President and by Tebbutt JA bring about an effective reconciliation of the two legislative provisions referred to above.

It is my view that the "value base", which as I interpret the Constitution, is access to an independent, impartial tribunal to adjudicate upon disputes, - is not per se impugned by

conferring "exclusive" jurisdiction on the Industrial Court, but only in respect of matters properly brought before it in accordance with the provisions of the Trade Disputes Act.

I would add two notes of caution. One is that the power to create specialist courts and man them - even pursuant to a recommendation of the Judicial Services Commission - is a power which must always be exercised with great care. When the appointment of the presiding officer is made by the Executive, acting without the benefit of the advice of the Judicial Services Commission, such an appointee - even though he is appointed because of his expertise - walks a tightrope from the very moment of his assumption of office. I say this because the area of resolution of industrial disputes is a minefield, in which fairness, objectivity and manifest independence are prerequisites for confidence and acceptance of decisions - more specifically as these impact upon emotive, volatile - indeed explosive - issues. Great care must therefore be taken to ensure that in its composition and the procedures through which its deliberations are conducted, the objectivity, representativeness and impartiality of the Court are beyond legitimate question.

The second note of caution is that the views articulated above must not be construed as an "open sesame" for the creation of Courts of a specialist nature which indeed do challenge or offend against the value base underpinning the Botswana Constitution. There are many odious examples of the creation of Courts of this kind. Such examples loudly proclaim the need for

vigilance to ensure that such powers are not abused. In this regard, see Minister of the Interior & Ano v Harris and Ano cited above. In that case the attempt by the South African legislature to create a "High Court of Parliament" in order to "legalize" the removal of voters of colour from the common voters roll was invalidated by the Court.

The last question to be considered is the issue as to whether there has been an infringement of the principle that where a separation of powers exists the process through which the Presiding Officer of the Industrial Court is appointed infringes against this principle. My brother Amissah JP has dealt fully with the contentions advanced in this respect and for the reasons set out in his judgment I am of the view that the contrary arguments cannot be sustained. However, I trust that the caveat expressed above about the method of appointment of the President of the Industrial Court which vests the power of appointment in the Executive rather than in the Judicial Service Commission, will receive the attention of the relevant authorities.

For these reasons I conclude that the answers to the questions posed are the same as those formulated by the learned Judge President.

In conclusion I would only add that having heard all the able argument presented to us, it would be unfortunate not to give the guidance to the parties they seek. I say this in spite of the fact that, as is apparent from our reasoning, the points raised before us, should never have arisen had the provisions of

the Trades Disputes Act been observed by the Industrial Court.


p.b. J.H. STEYN
JUDGE OF APPEAL

TEBBUTT, J.A.:

I have read what I might describe as the main judgments in this matter of Amissah, J.P. and Steyn, J.A. but would wish to add certain observations of my own both in regard to those judgments and to the matter as a whole.

In order to do so it is not necessary for me to repeat again the factual background to the matter nor, save where it may be necessary for my purposes, to set out in detail the relevant sections of the Constitution or the Statutes concerned in this matter viz Section 15 of the Court of Appeal Act [Cap 04:01] or those sections of the Trades Dispute Act [Cap 48:02], either in its original form or as it was amended in 1992, which may be germane to this case.

As will appear from the judgments of Amissah, J.P. and Steyn, J.A., the issues became crystallised during the arguments in this Court. As I see them they are the following:

1. Did the Legislature in enacting Sections 17 and 18 of the Trades Dispute Amendment Act of 1992 to which the Industrial Court owes its existence, create a "Court" which would be a sufficient Court for the purposes of Section 6(3) of the Constitution?

2. If so, is such Court a "Subordinate Court" as defined in Section 105 of the Constitution?
3. Even if the Industrial Court is a Court and a subordinate one, was its creation unconstitutional as (i) offending against the provisions of the Constitution and notably Section 95 thereof or as (ii) being in conflict with the doctrine of the separation of powers by reason of the manner of appointment of the Judge or Judges of the Industrial Court?
4. If the creation of the Industrial Court was not unconstitutional were the referrals by the Industrial Court Judge of the questions formulated by him to the High Court and the High Court's referral of the matter and the questions posed by it to this Court, having regard to the provisions of the Trade Disputes Act, as amended, competent?

As to the first two issues, I am satisfied for the cogent and compelling reasons set out by Amissah, J.P., with which I respectfully entirely agree, that the Industrial Court is a "Court" and that having regard to the definition of a "Subordinate Court" in Section 127 of the Constitution, set out by Amissah, J.P. in his judgment, it is such a "Subordinate Court".

The third issue is, was the creation of the Industrial Court unconstitutional? The first contention advanced on behalf of the respondents that it was unconstitutional was that by reason of there being conferred on it exclusive jurisdiction in all industrial disputes, it offended against Section 95 of the Constitution by thereby depriving the High Court of part of its original general jurisdiction in all matters. Section 18(I) of the Trades Dispute Act provides that the Industrial Court -

"..... shall have exclusive jurisdiction in every matter properly brought before it under this Act."

Section 95(I) of the Constitution in turn provides that -

"There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Section 17 of the Trades Dispute Act, as amended, established the Industrial Court -

"..... for the purpose of settling disputes and the furtherance, securing and maintenance of good industrial relations in Botswana."

It is in my view clear from the preamble to the original Act and the Memorandum to the Bill preceding the amending Act in 1992, both of which are quoted in the judgment of Amissah, J.P., that the only disputes justiciable by the Industrial Court are industrial or trade disputes and that its jurisdiction in such matters, exclusive as it is said to be in Section 18(I) of the Act, is confined only to those matters "properly brought before it under this Act." (My emphasis). The jurisdiction enjoyed by the Industrial Court is therefore an extremely limited one. What

matters can be said to have been "properly brought before it under this Act"? In his comprehensive judgment Amissah, J.P. has set out how industrial disputes were originally required to be dealt with under the Trades Disputes Act and how the amending Act changed that so that now only two methods exist under the Act for the settlement of disputes viz mediation by the Commissioner of Labour or reference to the Industrial Court.

In so far as reference to the Industrial Court is concerned, this can come about in two ways, (i) when the mediation process in which the Commissioner for Labour is concerned has failed or (ii) when the Minister refers a dispute to it. Section 5 of the Act provides that any trade dispute, whether existing or apprehended, may be reported to the Commissioner by each party or by an organisation acting on behalf of such party. Where this has happened and there is a failure within a reasonable time to reach a settlement of the dispute, Section 7 of the Act, as amended, provides that -

"..... the Commissioner shall issue a certificate, notice of which, in writing, shall be served on each party, to the effect that either party or both parties may refer the dispute to the Industrial Court."

Section 9 of the Act provides that the Minister, if satisfied that a trade dispute exists or is apprehended and where any industrial action has been declared by him to be unlawful or the dispute involves an essential service or that it has or may jeopardize the essentials of life or livelihood of the people of Botswana or a significant section thereof or the public safety or life of the community, may refer the dispute to the Industrial Court. It would therefore appear that only where the parties

have invoked the provisions of Section 7 or the Minister those of Section 9 of the Act that a matter can be said to be "properly before" the Industrial Court.

It will be seen, however, that in both instances, either the parties may refer their dispute to the Industrial Court or the Minister may refer a dispute of the sort referred to in Section 9 to the Court. It is not mandatory in either case that this be done. The ability of parties or the Minister to approach the High Court is, therefore, not diminished nor its jurisdiction as set out in Section 95 of the Constitution disturbed. It is only in those cases where the procedures laid down by Sections 7 and 9 have been followed that the Industrial Court obtains exclusive jurisdiction to adjudicate. I therefore agree with the cogent reasoning of Amissah, J.P. that the jurisdiction of the High Court has neither been excluded nor eroded by the creation of the Industrial Court or that the Constitution has been offended against thereby.

I am, of course, not unmindful of the decision in this Court of Botswana Bank Employees Union and Another v Barclays Bank of Botswana Limited C.A. No. 1/95 (unreported), having prepared the written reasons for judgment in that case. In that case I said this:

"Section 7, however, does not preclude a party to a trade dispute from approaching the Industrial Court directly. In the first place, Section 5(1) provides that the parties may report their dispute to the Commissioner. They, or any of them, do not have to do so. In such event, the machinery for a referral by the Commissioner to the Court does not come into operation at all. It could never have been the intention of the Legislature, in my view, that in such event the Industrial Court would be

precluded from adjudicating upon the dispute should the parties or one of them bring the dispute before it.

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

Amissah, J.P. has set out full reasons as to why he holds that the passage cited is not binding on this Court. I agree with those views but would add the following observation. In that case, one of Counsel's arguments as to why the decision of the Industrial Court in the matter then before it should be set aside by the Court of Appeal was that there had not been a referral of the matter to the Industrial Court by the Commissioner. It was that argument and no other that this Court dealt with in that case. The constitutionality of the Industrial Court was not at issue and although Counsel invited the Court to express its views on the status of the Industrial Court, this Court declined to do so for the reasons set out by me in the judgment and quoted by Amissah, J.P. in his judgment in this case. In regard to the argument that a referral by the Commissioner was a sine qua non to the Industrial Court's capability to hear a trade dispute, the decision that it was not is, I maintain, correct as the Commissioner does not refer disputes to the Industrial Court. He only issues a certificate, following a failure of settlement proceedings in disputes referred to him under Section 5, that either party or both parties to the dispute may then refer the dispute to the Industrial Court. It is they or one of them and not him that can

then approach the Industrial Court should they choose to do so. It is true that I said that "Section 7, however, does not preclude a party to a trade dispute from approaching the Industrial Court directly" and that it "could never have been the intention of the Legislature that the Industrial Court would be precluded from adjudicating upon the dispute should the parties or one of them bring the dispute before it". Having regard, however, to the point raised in argument, it will be appreciated that those remarks were obiter and made without the benefit of the full, comprehensive and extensive arguments now put before us in the instant case. Those arguments and an anxious and in depth consideration of them persuade me that the obiter remarks quoted were probably incorrect.

In regard to the point raised about the appointment of the Judge or Judges of the Industrial Court as affecting the constitutionality of that Court, I agree that although the Judge or Judges of the Industrial Court are appointed by the President without the prior intervention of the Judicial Service Commission, this does not offend against the doctrine of the separation of powers so as to render the creation of the Industrial Court unconstitutional. Amissah, J.P. has in his judgment dealt fully with this aspect. I find his reasons compelling and I respectfully concur completely with them.

I therefore agree that the creation of the Industrial Court was not unconstitutional.

I turn then to the last of the four issues that I set out at the start of these observations of mine. If it is correct, as I now believe it is, that a matter is only properly before the

Industrial Court if it comes before it pursuant to the procedures set out in Sections 7 and 9 of the Trades Dispute Act, it would follow that, those procedures having not been adhered to in the instant case, the matter was it would seem, not properly before the Industrial Court. All proceedings including the referrals both by the Industrial Court to the High Court and by that Court to this, would in consequence be of no force and effect. Should that then preclude this Court from expressing its views on the constitutionality of the Industrial Court and, in particular, whether it is indeed a "Court" and if so, what the nature and status of such court are? Some of my Brethren feel that this Court should not do so in this judgment. It should, they say, refuse to decide the constitutionality and status of the Industrial Court in that those issues do not in this case arise as, the matter not being properly before the Court, all proceedings herein are a nullity. Indeed, they say, this Court should have upheld the Attorney-General's point in limine and refused at that stage already to consider the merits. I cannot subscribe to or agree with those views for the following reasons.

(a) When the point in limine was raised, this Court did not have the benefit of the full and comprehensive arguments advanced by Counsel when the merits were argued and considered by this Court. Indeed it was only after they had been presented and the further arguments submitted in response to the questions posed by the Court as set out by Steyn, J.A. in his judgment, that a proper appreciation of whether or not the matter had been properly before the Industrial Court was possible. It will be recalled, as set out in the judgment of Steyn, J.A., that both Counsel

departed from the standpoint taken by them during the argument on the point in limine and took precisely the opposite stance during their arguments on the merits. This is illustrative of the fact that until a full consideration of the merits occurred, this Court could not come to a proper conclusion on the propriety or otherwise of the bringing of the matter before the Industrial Court. (b) It is only upon a consideration of the issues such as the nature, status and very existence of the Industrial Court and its constitutionality that a decision on the whole of the case becomes possible. This Court's views on those matters are accordingly pertinent to that decision and not obiter as some of my Brethren would suggest. (c) The matter was fully and ably argued before this Court and all the members of the Court have given it indepth consideration and debated it at length. This is clear from the very comprehensive, careful, extensively researched and clearly expressed judgments herein. It would, in my view, be wrong for this Court now, having had the benefit of those arguments and having researched the issues as it has, to decline to express its opinion and give its judgment on those issues. As set out by the learned Judge President in his judgment, a decision on the Industrial Court's nature, status and constitutionality is crucial having regard to industrial disputes and issues that may come before it in future in which its nature, status and existence may determine whether it can entertain such disputes and issues, the relief it can afford to parties involved in those disputes, and issues and the orders it can make in regard thereto. For this Court not to do so in this case when the whole concept of the Industrial Court has been extensively

and thoroughly considered would, apart from the costs involved which would be wasted, do a great disservice not only to employers of labour and bodies representing them to organised labour and the workers it represents and to the public at large but also to the Industrial Court and to the Legislature that created it.



P.H. TEBBUTT
Judge of Appeal

I agree with the judgment of my Brother Aguda above.


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G.G. HOEXTER
JUDGE OF APPEAL

In the result, the decision the Court is to give the answers I have given in my judgment above to the questions posed by the Court.



A.N.E. AMISSAH
JUDGE PRESIDENT