

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

**COURT OF APPEAL CIVIL APPEAL NO. CACLB-042-09
INDUSTRIAL COURT CASE NO. IC 796-07**

In the Matter between:

BOTSWANA RAILWAYS

APPELLANT

and

**BOTSWANA RAILWAYS TRAIN
CREW UNION**

RESPONDENT

**Advocate S.C. Vivian with Attorneys Makati-Mpho and T. Semere for
the Appellant**

Mr. Attorney T. Rubadiri for the Respondent

J U D G M E N T

**CORAM: McNALLY A.J.P.
MOORE J.A.
TWUM J.A.
HOWIE J.A.
LORD ABERNETHY J.A.**

LORD ABERNETHY J.A.:

Introduction

1.The issue raised in this appeal is of considerable importance not only for the present parties but also more generally in the field of labour relations in this country. It concerns the proper interpretation of the provisions of

section 48(1) of the Trade Unions and Employers' Organizations Act (Cap.48:01) as amended by section 14 of the Trade Unions and Employers' Organizations (Amendment) Act, 2003 (No.16 of 2004). I shall refer to the Act as amended as "the Act".

2. Section 48(1) of the Act provides as follows:-

“If a trade union represents at least one third of the employees of an employer, that trade union may apply for recognition under 32 of the Trade Disputes Act”

3. It is common cause that the respondent registered as a trade union in terms of the Act on 24 March 2004. Its members are all employees of the appellant, which is a statutory organization established in terms of Botswana Railways Act (Cap. 70:01).

4. The history of the matter, briefly, is as follows:-

By letter dated 13 July 2004 the respondent's Secretary General sought recognition by the appellant in terms of section 48(1) of the Act. By letter dated 26 October 2004 the appellant's Assistant General Manager

refused the request for recognition on the ground, inter alia, that the respondent was not eligible for recognition because it did not represent at least one third of the appellant's employees. Further correspondence followed and on 27 August 2007 the matter was mediated upon.

However, the parties failed to reach a settlement of their dispute. A certificate of failure to settle was issued on 28 August 2007. Ultimately the matter was referred to the Industrial Court for determination in terms of section 7 of the Trade Disputes Act. The respondent filed a Statement of Case and the appellant a Statement of Defence.

5. On 17 June 2008 the Court directed that, as there were no disputes of fact, the parties should proceed by way of stated case for the determination by the Court of the point of law that was in dispute.

6. The points of law for determination as set out in the Stated Case were as follows, with the explanation that the applicant therein is the present respondent and the respondent therein is the present appellant.

“MATTERS OF LAW FOR DETERMINATION

The dispute rests upon a matter of law being interpretation of Section 48(1) of the Act as follows:

whether “*one third of employees of the employer*” should be read as one third of employees of the same trade in the employer’s business (as contended for by the Applicant); or

whether one third of employees of the employer” should be read as ‘one third of all employees of the employer’ (as contended for by the Respondent); and;

if the Respondent’s interpretation is correct, whether Section 48 (1) conflicts with the provisions of Section 3 (b) and/or Section 13 of the Constitution of Botswana (Chapter 1).”

7. The judgment of the Court was delivered by the Judge President (Legwaila JP) on 10 November 2008. Its decision was as follows:-

“The decision of the court is as follows:

a) The question ‘whether “one third of the employees of the

employer” should be read as “one third of employees of

the same trade in the employer’s business (as contended for by the applicant)” is answered in the affirmative for the purpose of the applicant’s case and for all similar cases;

- b) To that extent, the applicant is bound by the terms of Section 48(1) of the Act as interpreted by this judgment;
- c) That interpretation is consistent with the provisions of Section 3 of the Constitution in as far as it seeks to protect fundamental rights and freedoms of the individual to assemble and associate with other employees sharing common interests, and as also provided for in Convention 87 of the ILO and the Interpretative pronouncements of the Committee of Experts of the ILO;
- d) The word **industry** as originally used in Section 48(1) with respect to recognition had no relevance to this dispute and its removal did not favour one party or another;

e) No order is made as to costs.”

8. By Notice of Appeal dated 5 December 2008 the appellant appealed against that decision to this Court. In the grounds of appeal it is said that the Judge *a quo* fell into error in a large number of respects but essentially the complaint is that the learned Judge erred

“by failing to find that... section 48 (1) does not, on its plain meaning, refer to ‘one third of employees who are employed in a particular trade’ (as contended for by the Respondent), but rather to ‘one third of all employees of an employer’ (as contended for by the Appellant).”

Principles of Statutory Interpretation

9. It is convenient at this stage to discuss the principles which are to be applied in the proper interpretation of section 48(1) of the Act. It is trite to say that the primary rule of statutory interpretation or construction is to

ascertain the intention of the Legislature. The difficulty is in how to do that. In numerous cases over the years judges have laid down rules and guidelines designed to assist in the task. Thus, for example, in **GREY V**

PEARSON (1857)1843-60 ALL ER 21 Lord Wensleydale set out what

has sometimes been said to be the “golden rule” when he said (at p.36):-

“...in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.”

10. That, however, was more than a hundred and fifty years ago. In that time the world has moved on and become more complex and the law relating to statutory interpretation has done likewise. Another way of putting it, which appealed to the Judge in the Court *a quo*, is that the “golden rule” requires to be qualified. In **STELLENBOSCH FARMERS’ WINERY v DISTILLERS CORP. & ANOTHER 1962 (1) SA 458 (AD)** WESSELS AJA (at p474) quoted with approval the words of Schreiner JA in **JAGA V DONGES, N.O. AND ANOTHER 1950 (4) SA 655 (AD)** at p 622:-

“Certainly no less important than the oft repeated statement that the words and expression used in a statute must be interpreted according to

their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the “context”, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.”

11. Later in his judgment Wessels AJA, in a passage which was quoted with approval by Streicher J.A. in **FELDMAN V MIGDIN NO 2006(6) SA 12 (SCA)** at p17, said this (at p476):-

“In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question, and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute, as well as “the matter of the statute, its apparent scope and purpose, and, within limits, its background.” In the ultimate result the Court

strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.”

12. Having regard to the constitutional issues which are raised in the Applicant’s (the present respondent’s) claim in the Stated Case, it is appropriate also to note what Aguda JA said in this Court in the full bench case of **ATTORNEY GENERAL V. DOW (1992) BLR 119**, at p.170:-

“I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in chapter II of our Constitution which deal with fundamental rights and freedoms of [the]individual, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties, and obligations binding upon this country save upon clear and unambiguous language.”

13. It is true that there are many *dicta* in the cases, even in modern times, which might be said to favour a narrower view of statutory interpretation.

For example, in **MANYASHA v MINISTER OF LAW AND ORDER**
1999 (2) SA 179 (SCA), on which appellant placed reliance, Smalberger JA
 said this (at p185):-

“It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature ... One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the (Legislature) could not have contemplated it.”

14. In my opinion, however, the broader statements that I have quoted above are to be preferred as more accurately reflecting the present state of the law in this country. These broader statements are in my opinion more consistent with the provisions of the Interpretation Act (Cap.01:04). Under the heading ‘Rules of construction’ that Act provides as follows:-

“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 text-book or other work of reference, to the report of any commission of inquiry into the state of the

law, to any memorandum published authority in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention 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.

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

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

Section 48(1) of the Act

15. Against that background I turn to consider the words of section 48(1) of the Act. I quoted it at the outset of this judgment but it is convenient to set it out again here. The section provides as follows:-

“If a trade union represents at least one third of the

employees of an employer, that trade union may apply for recognition under Section 32 of the Trade Disputes Act.”

16. It is the meaning of the words “at least one third of the employees of an employer” which is in dispute. The appellant contends that they are clear and unambiguous and mean one third of all the employees of an employer. The respondent, on the other hand, contends that they mean one third of employees of the same trade who are employees of an employer

17. In the Court *a quo* the learned Judge said that since the appellant found it necessary to preface the word “employees” by the word “all”, that was tantamount to modifying the words of the statute. With respect I disagree. The appellant was not in my opinion introducing any words into the section; it was merely giving its interpretation of the section. Taking the words of the section at face value and giving them their ordinary meaning, their meaning seems to me to be clear and unambiguous and is the one for which the appellant contends. If one did want to introduce the word “all” it would in my view be tautologous and would add nothing. The introduction of that word is in my view quite unnecessary to determine the meaning of the words used in the section, at least on the face of it.

18. As I understand the respondent's case, it does not claim otherwise by reference solely to the words of the section. The interpretation contended for by the respondent, which plainly involves the introduction of words into the section which are not there already, depends on looking at the context of the provision by reference to the other provisions of the Act, to what they say is its purpose, to the provisions of the Constitution of Botswana and to the provisions of the International Labour Organisation ("ILO") Convention No. 87 of 1948.

19. I am prepared to accept that for the purposes of the interpretation of section 48(1) of the Act each of the above is a part of the context. It is necessary now to examine that context.

Context

(1) The Act

20. First, what is the matter of the statute, its apparent scope and purpose and background? The preamble to the Act states that it is -

“an Act to re-enact with amendments the law relating to trade unions to make better provision therefor and for federations of trade unions

and employers' organizations and for matters connected therewith and incidental thereto."

21. Section 2(1), the interpretation section, provides that, unless the context otherwise requires, "trade union" means "an organization the principal objects of which include the regulation of relations between employees and employers or employers' organizations or between employees and employees" and "registered trade union" means "a trade union for the time being registered as such under this Act or an amalgamation of registered trade unions deemed, by virtue of section 46(6), to be registered as a trade union in accordance with this Act."

22. Section 5 provides that every trade union shall be registered in accordance with the Act and the succeeding sections in Part III of the Act make provisions in relation to registration.

23. Part IV is headed 'Rights and Liabilities of Trade Unions, Federations of Trade Unions and Employer's Organizations'. Section 17 provides as follows:

"17 On the registration of a trade union in accordance with

this Act, the registered trade union and its officers and members shall enjoy the following rights immunities and privileges –

(a) no suit or other legal proceedings shall be maintainable in any civil court against the registered trade union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the trade union is a party on the grounds only that such act induces some other person to break a contract of employment or that it is in interference with the trade, business or employment of some other person or with the rights of some other person to dispose of his capital or labour as he will;

(b) no suit against the registered trade union or any officer or member thereof on behalf of himself and all other members of the trade union in respect of any delictual act alleged to have been committed by or on behalf of the trade union shall be entertained by any court; and

(c) the objects of the registered trade union shall not, by reason only that they are in restraint of trade, be unlawful so as to render –

i) any member of the trade union liable to criminal prosecution; or

ii) void or voidable any agreement or trust.”

24. Parts V – X do not in my view assist so far as the issues in this case are concerned.

25. Part XI is headed “Recognition of Registered Trade Unions as Negotiating Bodies”. The only provisions in this Part are Sections 48, 48A, 48B and 48C.

26. Section 48(1), already quoted, has a marginal note beside it:

“Recognition at the workplace.” Section 48(2), reading short, provides for negotiating bodies which represent members of management, whether registered trade unions or not, to be separate from such bodies representing other employees. Section 48(3) defines who is a member of management for the purposes of the section.

27. The remaining sub-sections of section 48 should be quoted in full:-

“4) an employer who has granted recognition to a trade union, in terms of section 32 of the Trade Disputes Act, shall bargain in good faith with the union on the following matters -

a) remuneration and other terms and conditions of employment, including the physical conditions under which employees are required to work;

b) employment benefits;

c) employment policies concerning, inter alia, the recruitment, appointment, training, transfer, promotion, suspension, discipline and dismissal of employees;

d) the collective bargaining relationship including -

i) organizational rights,

- ii) *negotiation and disputes procedures, and*
 - iii) *grievance, disciplinary and termination of
employment procedures; and*
 - e) *any other agreed matter.*
- 5) *A trade union that has been granted recognition shall bargain
in good faith with the employer who recognizes it in respect of
any of the matters referred to in subsection (2).*
- 6) *Any dispute concerning the duty to bargain in good faith shall
be referred to the
Commissioner for mediation in accordance
with section 7 of the Trade Disputes Act.*
- 7) *If the dispute is not settled, the dispute may be referred to the
Industrial Court for
determination.*

- 8) *An employer may apply to the Industrial Court for an order withdrawing recognition on the following grounds, that:*
- a) *the trade union no longer represents one third of the employer's employees;*
 - b) *the trade union refuses to negotiate in good faith with the employer;*
 - c) *the trade union refuses or fails to comply with an arbitration award or an order of the Industrial Court; or*
 - d) *the trade union has materially breached a collective agreement concluded with the employer."*

28. I pause to observe that the wording of sub-section 8(a) is in my opinion clear and unambiguous in its meaning and is entirely consistent with the wording in dispute in section 48(1).

29. Section 48A makes provision for the recognition of a trade union at industry level. Section 48A (2) provides:-

“If a trade union has, as its members, at least one third of the employees in an industry, the trade union may apply to the Commission for the establishment of a joint industrial council under section 36 of the Trade Disputes Act.”

30. Section 48A(3) and (4) provide that if a trade union has been granted recognition in an industry in terms of section 34 of the Trade Disputes Act, it has certain bargaining rights with employers or employers’ organizations in relation to, for example, remuneration and other terms and conditions of employment, employment benefits and employment policies concerning the recruitment and dismissal of employees.

31. Section 48B gives certain organizational rights to trade unions that have been granted recognition. These include access to an employer’s premises for the purposes of recruiting or representing members and holding meetings, having trade union dues deducted, with their consent, from employees’ wages and having trade union representatives appointed by the

union from among its employees to represent the union in respect of grievances, discipline and termination of employment.

32. Section 48C is concerned with the disclosure of relevant information by the employer to a recognized trade union that is reasonably required to allow the union to consult or bargain collectively.

33. The remaining Parts of the Act, Parts XII – XV, in my opinion do not assist so far as the issues in this case are concerned.

34. From all of this it appears to me that the Legislature intended that there should be a distinction between registered trade unions and trade unions granted recognition in terms of section 48. The former have certain rights in terms of section 17 of the Act but the latter have many more rights, and much more important ones, in terms of section 48. While every registered trade union might aspire to achieve recognition, the Act does not, in my opinion, assume that it will do so and it will only do so if it qualifies in terms of section 48. Even if it achieves recognition, that recognition may later be withdrawn on any of the grounds listed in section 48(8). In particular, in terms of section 48(8)(a) a trade union may have recognition withdrawn if it

“no longer represents one third of the employers’ employees.”

35. Having examined the Act as a whole with the principles of statutory interpretation discussed earlier in this judgment and the provisions of the Interpretation Act in mind, I can find nothing in it to indicate that in enacting section 48 the Legislature intended the words in issue to have the meaning contended for by the respondent.

(2) Constitution of Botswana

36. I turn now to consider whether the provisions of the Constitution might throw any light on the interpretation of section 48(1) of the Act.

37. The respondent’s contention is that the interpretation of that section favoured by the appellant offends sections 3(b) and 13 of the Constitution. It does not go on to say that section 48(1) should be struck down as unconstitutional. Nor does it suggest that the court should modify or vary the words used in the section, as has sometimes been envisaged in exceptional cases, for example by Schreiner JA in **JAGA V DONGES, N.O.** *op.cit* at p.663. Its point is that if the interpretation favoured by the appellant offends the Constitution, that suggests it is not the correct interpretation.

38. These sections so far as relevant to the present issue, provide as follows:-

“3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely –

.....

b) freedom of conscience, of expression and assembly and association...

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

13 (1) Except with his or her own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

....

(d) for the registration of trade unions and associations of trade unions in register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration) and conditions whereby registration may be refused on the grounds that any other trade union already registered, or association of trade unions already registered, as the case may be, is sufficiently

representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought.”

39. It is said in the respondent’s claim in the Stated Case that the appellant’s failure to recognize the respondent is in violation of section 3(b) of the Constitution in that it forces members of the respondent to join a union which the respondent has chosen to recognize and not one which they want to join.

40. In the judgment of the Court *a quo* sections 3(b) and 13 of the Constitution are not discussed in any detail. In paragraph (73) of the judgment, however, the learned Judge expresses the view that “the Legislature could not have intended that a small section of employees who have formed and registered a trade union to protect their peculiar interest should still show a proportion of membership as large as the union representing the whole workforce. That would be an indirect way of enforcing union monopoly... effectively denying the members of the (respondent) the rights guaranteed by section 3 of the Constitution.”

41. A similar conclusion may also be implied from other passages in the judgment, if I understand it correctly, since several times the learned Judge indicated that the Legislature could not have intended that a registered union would not proceed beyond registration and achieve recognition.

42. With respect to the learned judge I cannot accept his line of reasoning. It does not seem to me that the interpretation of section 48(1) of the Act contended for by the appellant in any way offends the terms of section 3(b) of the Constitution. That section secures the right of every person in Botswana to “freedom of conscience, of expression and of assembly and association.” Members of the respondent have all those rights. There is nothing in section 3(b), however, which in my opinion confers on every person in Botswana the rights and duties which come with recognition in terms of section 48 of the Act. Section 3(b) is not concerned with the bargaining rights and duties of employers and trade unions in the field of labour relations.

43. Section 13 of the Constitution is more pertinent in that regard. It carries

the right to freedom of assembly and association provided in section 3(b) a stage further so as to recognize specifically, as part of that right, the right to form or belong to trade unions or other associations for the protection of a person's interests.

44. The right is not unqualified, however. Section 13(2) qualifies it in a number of respects, one of which is contained in section 13(2)(d). That subsection makes provision for registration of trade unions and association. But none of that bears upon the issue in this case. It is not concerned with recognition of a trade union for the purposes of acquiring the rights and duties in section 48.

45. Accordingly, I am not persuaded that the interpretation of section 48(1) of the Act contended for by the appellant offends either of these sections of the Constitution and I do not find the wording of either section assists in the interpretation of section 48(1).

(3) International Treaty, Agreement or Convention

46. I turn now to consider whether the interpretation of section 48(1) offends the terms of any relevant international Treaty, Agreement or Convention.

None is mentioned in the Stated Case but in the judgment of the court *a quo* and in the respondent's Heads of Argument much reliance is placed on the provisions of the ILO Convention No. 87 of 1948 and, in particular, on Articles 1 and 8 of the Convention.

47. The long title of the Convention is the Freedom of Association and Protection of the Right to Organise Convention. In terms of Article 1 each member of the ILO undertakes to give effect to the provisions of the Convention. Botswana is a member of the ILO and has ratified the Convention.

48. Article 2 provides as follows:-

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation.”

Article 8 provides as follows:-

“1) In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons

or organized collectivities, shall respect the law of the land.

2) The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”

49. I am unable to see how these provisions are in themselves of any assistance in resolving the issue in this case. The respondent’s members are perfectly free to join a trade union of their own choosing. Indeed, by forming their own union they have done so. They are equally free to join the main rail workers’ union the Botswana Railways Amalgamated Union (“BRAWU”), if they so wish. What is in issue in this case, though, is recognition and in my view these provisions of the Convention are not concerned with recognition.

50. The judgment in the Court *a quo* also relies, in paragraph [54], on a number of extracts of specific rulings of the ILO Committee of Experts. In his book *Collective Labour Law in Botswana*, which is referred to by the learned judge, Dingake J. describes the Committee of Experts at p.30 as a quasi-judicial body. It is not suggested that its decisions are in any way

binding on this court but I am prepared to accept that they are, as Dingake J. says, a “useful source of international labour law” and are therefore entitled to be treated with respect. In my opinion, however, there is nothing in any of the decisions mentioned which is of assistance in determining which of the interpretations of section 48(1) of the Act put forward by the parties is to be preferred. They do not appear to me to bear upon the question of recognition which arises in this case.

Discussion and Decision

51. The interpretation contended for by appellant involves doing no violence to the actual words used by the Legislature in section 48(1). The words stand on their own and on the face of them mean what they say. The interpretation contended for by the respondent, however, involves doing considerable violence to those words. It involves inserting the words “of the same trade in the employer’s business” into the first clause of the section. Not only does that materially change the meaning and effect of the section, it also causes other consequential problems, none of which was noticed in the judgment of the Court *a quo*. First, there is no definition of “trade” in Section 2 of the Act, the definition section. So it is impossible to determine

what constitutes a trade in terms of the Act. That could result in considerable difficulty in determining whether some trade unions could be recognized. Secondly, Section 48(8)(a), which provides for the withdrawal of recognition by the Industrial Court on the ground that “the trade union no longer represents one third of the employers’ employees”, would also have to be interpreted as meaning employees of the same trade in the employer’s business. The same phrase also appears in section 32 of the Trade Disputes Act (Cap 48:02), which is the section in that Act concerned with recognition at the workplace. Presumably it would have to be interpreted in the same way.

52. None of this suggests to my mind that the Legislature intended the section to mean what the respondent says it means.

53. Giving the words of the relevant provisions their plain meaning, it seems to me that the Legislature intended an intelligible and coherent system for the operation of trade unions in this country. Consistent with the provisions of the Constitution of Botswana and ILO Convention 87 the Act provides that every person is free to join a trade union of his own choosing. Provision is made, in accordance with what is envisaged in section 13(2)(d) of the

Constitution, for registration of the union. A registered trade union has certain rights, immunities and privileges as provided for by section 17. These are not insignificant, although they are not as extensive as those accorded to a trade union which has gained recognition.

54. Where the learned judge *a quo* has erred, it respectfully seems to me, is in his inability to conceive that the Legislature would intend a structured system of this kind. This is clear from a number of passages in his judgment. I have already quoted what he said at paragraph [73]. Earlier in his judgment, at paragraph [28], he said:

“It would be a strange legislature that permits the registration of a trade union knowing fully well that it will not be allowed to enjoy all the fruits of unionization.”

At paragraph [29] he said:

“Can we attribute denial of recognition due to unattainable conditions to the intention of the legislature which facilitated the registration?”

At paragraph [38] he said that:

“the legislature cannot be assumed to have deliberately placed insurmountable obstacles to the union’s realization of the full benefits of unionization as provided at Sections 48(3) and 48(3) of the Act”

(I think the reference to section 48(3) must be a mistake and should be a reference to section 48(4).). And at paragraph [47] he said:

“Surely it is nonsensical, and I wouldn’t attribute that absurdity to the Legislature, that a group from the same trade who have been allowed by the Registrar and the laws of this country to register as a trade union should, at the recognition level at the workplace, produce a number equal to all the employees including those they felt were not sympathetic to their sectoral problems.”

55. It is often instructive to test an argument or proposition by considering what the consequences could be if it succeeded. The definition of “trade union” in the Act does not stipulate a minimum number of persons required to form a trade union. So a whole plethora of small trade unions could exist within a given business or industry. This is perhaps particularly so in the

absence of any definition of what is a trade. In its heads of argument

the appellant envisages the possibility of numerous small unions each representing, for example, train crews, train drivers, train cleaners, office cleaners, receptionists, station managers, station cleaners and so on. This may be an exaggerated view but it is easy to see that if a multiplicity of small unions were all to be given recognition in terms of section 48(1) with the rights and duties that that involves, it would be unworkable.

56. In my opinion there is nothing obviously wrong with the idea of there being one recognized union for a particular business or industry. Indeed, its size and strength can be advantageous. This is recognized by the ILO Committee of Experts, as the learned judge himself recognizes at paragraph [68] of his judgment. If, however, a section of workers represented by such a union feels that its interests are not being sufficiently protected but does not have sufficient numbers to qualify for recognition it can join with another section or sections in order to obtain sufficient numbers.

Amalgamations of this kind are not uncommon and do not necessarily result in an unacceptable inability of one sector to pursue its sectoral interests.

57. For all these reasons the interpretation of section 48(1) of the Act which

is contended for by the appellant is in my opinion the correct one.

58. The appeal is therefore allowed and the questions in paragraph 20 of the Stated Case are answered as follows:

1. No
2. Yes
3. No

59. Counsel for the appellant sought an order for costs in the event of success but, having regard to all the circumstances of the case, in my opinion it would be appropriate, as in the Court *a quo*, to make no order as to costs. Accordingly no such order is made.

LORD ABERNETHY

JUSTICE OF APPEAL

I AGREE:

N.J. McNALLY

Ag JUDGE PRESIDENT

I AGREE:

S.A. MOORE

JUSTICE OF APPEAL

I AGREE:

DR S. TWUM

JUSTICE OF APPEAL

I AGREE:

C.T. HOWIE

JUSTICE OF APPEAL

DELIVERED IN OPEN COURT THIS 29TH DAY OF JANUARY 2010