**BOTSWANA RAILWAY CREW UNION v BOTSWANA RAILWAYS ORGANISATION** 2008 (3) BLR 359 (IC)

Citation 2008 (3) BLR 359 (IC)

Court Industrial Court, Gaborone

Case No IC 796 of 2007

Judge Legwaila JP

Judgment November 10, 2008

Counsel T Molefe for the applicant.

D Makati-Mpho for the respondent.

Annotations

B

[zFNz]Flynote

C Employment - Industrial relations - Union - Recognition - Unionisation not end in itself - Unions formed for protection of interests, which only achievable after recognition - Placing impossible obstacles before union seeking recognition not respect in law or fact - One third of employees requirement explained in context of particular employer - Trade Unions and Employers' Organizations Act (Cap 48:01), s 48.

[zHNz]Headnote

D Employees of the respondent formed the applicant union, which was lawfully registered. After registration, the applicant applied for recognition by the respondent. The respondent declined to recognise the applicant on the ground that its members did not form one third of the employees of the respondent. The respondent contended that the one third referred to in s 48 of the Trade Unions and Employers' Organizations Act (Cap 48:01) (the Act) E meant one third of all the employees of the respondent, whereas the applicant contended that it meant one third of the employees of the respondent who were members of the train crew staff. The court was called upon to determine the proper interpretation of the term.

Held: (1) Unionisation is not an end in itself. Registration is pursued as a prerequisite to an application for recognition at the workplace and with the F object of eventually realising the enjoyment of full access to the employer. Unions are formed for the protection of interests, which can only be achieved after recognition.

(2) The relevant rights in question will only be fully realised if they are fully established and respected in law and in fact. Placing impossible obstacles before a union seeking recognition is not respect in law or in fact. The Act has set a minimum that is feasible and not too difficult to attain.

G (3) 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. For the purpose of the recognition of the applicant, the one third must be read as one third of the employees of the H respondent engaged in the same trade as the members of the applicant.

[zCIz]Case Information

Cases referred to:

Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench)

Birds Galore Ltd v Attorney-General [1989] LRC (Const) 928

Botswana Breweries Distribution Staff v Botswana Breweries (Pty) Ltd [1997] B.L.R. 312, IC

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Botswana Power Corporation v Moaneng and Others [2005] 2 B.L.R. 312, CA A

Botswana Power Corporation Workers' Union v Botswana Power Corporation [1998] B.L.R. 159, IC

Botswana Railways' Organisation v Setsogo and Others [1996] B.L.R. 763, CA (Full Bench)

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Desert Palace Hotel Resort (Pty) Ltd v Northern Cape Gambling Board 2007 (3) SA 187 (SCA) B

Feldman v Migdin, NO 2006 (6) SA 12 (SCA)

Grey v Pearson (1857) 6 HL Cas 61; [1843-1860] All ER Rep 21; (1857) 10 ER 1216

Jaga v Do«nges, NO and Another; Bhana v Do«nges, NO and Another 1950 (4) 653 (A) C

Napier v Barkhuizen 2006 (4) SA 1 (SCA)

National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A)

National Union of Mineworkers v Marievale Consolidated Mines Ltd (1986) 7 ILJ 123 (IC)

Re Bidie [1949] Ch 121 (CA) D

Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another 1962 (1) SA 458 (A)

Wellworths Bazaars Ltd v Chandler's Ltd and Another 1947 (2) SA 37 (A)

APPLICATION for a declaratory order. The facts are sufficiently stated in the judgment. E

T Molefe for the applicant.

D Makati-Mpho for the respondent.

[zJDz]Judgment

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Introduction

Members of the applicant are employees of the respondent. They formed F a union called the Botswana Railways Crew Union which was lawfully registered on 24 March 2004. After registration of their union they applied for recognition by the employer, the Botswana Railways Organisation, in terms of s 48 of the Trade Unions and Employers' Organizations Act (Cap 48:01) (the Act). The respondent declined to recognise the applicant on the ground that its members did not form one third of the employees of G the respondent. The applicant does not dispute the fact that its members do not form one third of all the employees of the respondent. It contends however that s 48 should, in the present context, be understood to mean one third of the employees of the respondent who are members of the train crew staff. The respondent contends that the one third refers to all the employees of the respondent. H

After failing to solve the dispute internally, the applicant brought the matter to court. The matter was set down for hearing on 17 June 2008. On reading the respective submissions and hearing parties, it became clear that there was no dispute of fact but that the matter simply turned on the meaning of s 48 of the Trade Unions and Employers' Organizations Act. The parties were therefore requested to sit together and agree in stating the

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A question of law arising from the dispute between them and submit a stated case for the opinion of the court.

In giving the instruction the court was fully alive to the fact that the applicants were unrepresented. But from their pleadings and confirmation to the court was clear that they understood where the disagreement lay. The respondent also offered to assist in explaining any other matter that may need B such clarification. The result was not only a precise statement of what the dispute is about but the applicant's members expressed full satisfaction with the way the respondent's attorneys assisted them. To that end I am indebted to the respondent's attorneys who produced the agreed document. In any case the bone of contention had been clear from the outset and the court had no doubt as to what the cause of dispute was and could have dealt C with the matter even in the absence of the said stated case.

It is common cause that employees of the respondent formed a trade union alled the Botswana Railways Amalgamated Workers' Union (BRAWU). It is also common cause that a Memorandum of Agreement was entered into between the respondent and the union in terms of which -

D '4.1 The Organisation acknowledges the Union as the sole representative and negotiating body for members subject to the Union maintaining membership of at least 25% of the bargaining unit and subject to the provisions of this Agreement;

4.2 The organisation agrees that during the currency of this Agreement, it will not recognise any other union, association or organisation of E employees as purporting to represent employees who are eligible for representation by the Union in accordance with this clause.'

It is noted, not without interest, that these quoted provisions have not been relied on to deny the applicant recognition. The refusal was based solely on the ground that members of the applicant did not constitute one F third of the employees of the respondent in terms of s 48. It must be assumed therefore that if the applicant had satisfied the one third condition there would have been no objection to recognition. It has also not been averred that any members of the applicant or all of them are members of BRAWU. However submissions by the respondent are clearly predicated on the assumption that their interests could be catered for by BRAWU.

G Matter for the opinion of the court

For clarity and convenience I reproduce below the full document on the stated questions of law in the form of a special case for the opinion of the court which was signed by the parties.

H 'BOTSWANA RAILWAY TRAIN CREW UNION APPLICANT

AND

BOTSWANA RAILWAYS RESPONDENT

STATED CASE

1. The Applicant is Botswana Railways Train Crew Union, registered with the Registrar of Trade Unions on 24 March 2004, of P.O. Box 356, Lobatse.

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2. The Respondent is Botswana Railways, a statutory organisation A established in terms of Chapter 70:01 of the Laws of Botswana whose address for the purposes hereof is c/o Collins Newman & Co. Plot 4863, Dinatla Court, Gaborone.

3. The Applicant launched the current application to the above Honourable Court seeking interpretation of Section 48(1) of the Trade Union and Employer's Organisations Act [Cap. 48:01] ("the Act"). B

4. On 17 June 2008, the above Honourable Court directed that the parties proceed on the basis of a stated case as there are no disputes of fact.

A. SUMMARY OF AGREED FACTS

5. On 13 July 2004 and after registration with the Registrar of the C Trade Unions, the Applicant applied to the Respondent for recognition in terms of Section 48(1) of the Act.

6. Meetings were held by the parties where the application for recognition was considered on 30 August 2004 and 15 October 2004 ... The Respondent declined to recognise the Applicant on the basis that: D

6.1 it does not constitute one third of the employees of the Respondent; and

6.2 the applicant's members are eligible for Botswana Railways Amalgamated Union ("BRAWU") membership. The Respondent has a recognition agreement with BRAWU.

7. By letter dated 26 October 2004, addressed to the Applicant, the Respondent confirmed its position. E

8. By letter dated 8 November 2004, the Applicant requested the Respondent to deduct 1% of their members' salaries in a check-off arrangement.

9. The Respondent declined to accept such arrangement on the basis that the Applicant was not recognised in terms of Section 48(1) of the Act. F

10. On 18 May 2007, the Applicant addressed a letter to the Minister of Labour & Home Affairs ("the Minister") ... and it was to the effect that:

10.1 the Respondent was refusing to recognise it as a trade union; and G

10.2 the Applicant contended in that letter that a proper interpretation of the words "one third of the employees of the employer" as contained in S 48(1) of the Act should be one third of employees in a particular trade. It pointed out that the Act is a trade union act and not an industrial act.

11. On 8 June 2007, the Minister addressed a letter to the Respondent to H provide answers to the letter received by the Minister from the Applicant.

12. By a letter dated 22 June 2007, ... the Respondent proffered a response to the Minister to the effect that Respondent refused to recognise the Applicant as they do not meet the one third criterion under Section 48(1) of the Act.

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A 13. On 31 July 2007, the Minister addressed a letter to the Applicant to the effect that:

13.1 there is a dispute between the parties regarding the interpretation of Section 48(1) of the Act;

13.2 the matter is not the sort for the Minister's intervention;

BH 13.3 the Applicant was advised to refer the dispute in terms of Section 7 of the Trade Disputes Act, No. 5 of 2004. [sic]

14. On 27 August 2007 the matter was mediated upon and the parties failed to reach a settlement of the dispute, and a certificate of failure to settle was issued on 28 August 2007.

15. A notice of referral of the matter to the above Honourable Court in terms of Section 7 of the Trade Disputes Act was issued.

C 16. The Applicant has filed a Statement of Case and the Respondent, a statement of Defence.

B. APPLICANT'S CLAIM

17. The Applicant contends that a proper interpretation of the "one third" requirement in Section 48(1) of the Act is one third of employees within a particular trade and not one third of all D employees on the basis that the Act is a trade union act. An organisation such as the Respondent has employees within a variety of trades and as such it cannot recognise only one trade union. In this regard:

17.1 On 23 April 2007 at Oasis Motel, Tlokweng, members of the Applicant interpreted the Act as stated above. (The Respondent E did not participate in this meeting and has no knowledge as to these discussions);

17.2 The Act defines trade union as an organisation consisting, wholly or in part, of more than 30 employees the principal object of which include the regulation of relations between employees and employers or employers' organisation or F between employees and employers and this definition perfectly fits in with Applicant's interpretation;

17.3 Section 48(1) must be read with the rest of the subsections under Section 48 and if so read it becomes clear that the interpretation of the Section by the Respondent offends the G Constitution of Botswana (Chapter 1);

17.4 If subsection 48(1) of the Act is interpreted to mean one third of employees and not one third of employees in the same trade then that would mean that employees at management level can never qualify to be recognised as a Trade Union in terms of sub sections 48(2) and (3) as they will not form one third of all the H employees where there is a union of general employees already recognised and as such they are discriminated against as they will be held not to qualify in forming a recognisable Trade Union;

17.5 The failure to recognise the Applicant by Respondent is in violation of Section 3(b) of the Constitution of Botswana and forces members of the Applicant to join a Union which the

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Respondent has chosen to recognise and not one which they A want to freely join;

17.6 This is also supported by Section 13 of the Constitution which is to the effect that no person shall be hindered in the enjoyment of his freedom of assembly and association with other persons and in particular to form or belong to a Trade Union or other association for the protection of his interests B except with his own consent.

17.7 The Botswana Government being the largest employer, has a multiple of Trade Unions and as Government is an employer, holding that one third under Section 48(1) of the Act means one third of the employees and not employees of the particular trade suggests that each Union of the employees of Government C forms one third of the employees of the employer. This is obviously not correct.

17.8 Parliament in promulgating the laws of Botswana operates within the framework of the Constitution of Botswana and parliament cannot pass any law contrary to any of the provisions of the Constitution. Adopting the interpretation D suggested by Respondent suggests that parliament has deliberately acted contrary to the Constitution. However, should there be any such contradictions the above Honourable Court is hereby requested to clarify the position to prevent future disputes.

17.9 The prejudice that the Applicant is suffering by the refusal of E Respondent to recognise it in terms of Section 48(1) is that:

17.9.1 Applicant is unable to hold meetings within the premises of the Respondent;

17.9.2 Applicant is not allowed to comment at any meeting called by the Respondent;

17.9.3 Applicant is unable to bargain as a Trade Union on F behalf of its members; and

17.9.4 Applicant's members concerns and grievances are not being specifically addressed as they work in a specialised type of trade.

C. RESPONDENT'S CASE

18. The Respondent has admitted that it has refused to recognise the G Applicant, but contends that this refusal is lawful as the Applicant does not represent one third of all the employees of the Respondent and as such it does not meet the requirements of Section 48(1) of the Act.

18.1 The Respondent contends that, properly construed, Section 48(1) of the Act provides that the Respondent is only obligated to recognise a Trade Union that represents at least one third of H the Respondent's entire workforce and that the Respondent is accordingly not obligated to recognise the Applicant; (my emphasis).

18.2 As recorded above, the Respondent does not dispute the Applicant's allegations as to what occurred at the alleged meeting at the Oasis Motel, Tlokweng. The Respondent

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A contends, however that it is for this Honourable Court, and not the Applicant's members, to interpret the provisions of the Act, and

18.3 The Respondent has already recognised a Trade Union being Botswana Railways Amalgamated Union ("BRAWU") whose members constitute one third of the Respondent's employees B and the members of the Applicant are free to join this Union.

D. ISSUES FOR DETERMINATION

19. There are no disputes of fact.

E. MATTERS OF LAW FOR DETERMINATION

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

C 20.1 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

20.2 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); (my emphasis) and

D 20.3 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).

21. In respect of the latter issue, this Honourable Court has jurisdiction to determine the same in terms of Section 127 of the Constitution as amended, which declares this Honourable Court no longer a E subordinate Court.

DATED AT GABORONE THIS 19 DAY OF JUNE 2008.

Signed

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THAPELO MOTUBE MOLEFE

(for and on behalf of Applicant)

F DATED AT GABORONE THIS 19 DAY OF JUNE 2008.

Signed

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D MAKATI-MPHO

(for and on behalf of Respondent)'

G The arguments

(a) The applicant

The applicant raised only a few basic arguments. The first is:

'We interpret the same section 48(1) of the Trade Unions and Employers' Organizations Act ... to be saying, one third of a trade since the Act is a H trade union Act.' (My emphasis)

The matter was apparently discussed at a meeting at the Oasis Motel on 23 April 2007 where 'all present interpreted the Act as suggesting one third of a particular trade.' (my emphasis)

The second leg of the applicant's argument invoked s 3(b) of the Constitution guaranteeing to 'every person in Botswana':

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'(b) freedom of conscience, of expression and of assembly and A association.'

Then follows the question 'why should we be forced to join management union by denying us recognition?' Reference was also made to s 13 of the Constitution which states:

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

Reference has also been made to the Botswana Government as the largest C employer which allegedly 'has so many Trade Unions.'

(b) The respondent

The respondent's arguments are well set out. The first part deals with the interpretation of s 48(1) of the Act. It is argued that: D

'Section 48(1) of the Trade Unions and Employer's Organisations Act ... is plain and clear in its terms - the trade union must represent one third of employees of the employer.' (my emphasis)

The respondent also makes reference to the amendment of the Act by Act 16 of 2004. The old Act made recognition subject to the condition: E

'Where at least one-quarter of the employees of an employer or in an industry who are or appear to be qualified to be members of a particular registered trade union, are in fact members of that trade union the employer or industry shall be bound to deal with the trade union... .'

The amended version removed reference to 'industry' from s 48(1) and F therefore recognition is to be by the employer only instead of employer or industry. The respondent argues therefore that:

'Parliament must be presumed to have known the previous wording and to have deliberately changed the wording to result in a different interpretation. G

... [P]arliament clearly did not intend that the requirement be one third of employees in a trade or sector.' (my emphasis)

The respondent continues at para 11 of its heads of argument:

'Prior to the amendment, the threshold for recognition of a trade union H was a quarter of employees of the employer or industry. Now it is a third of employees of the employer with no provision for industry'. (my emphasis)

I need to pause to explain what is in issue here. The applicant's members belong to a section of the respondent's employees. For some unexplained

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A reason they call that section an industry. They further argue that when the Act originally referred to recognition by the employer or industry, it meant that employees of a section could form their own union and therefore 'one third' would mean one third of the employees of a section (industry).

It appears the respondent has also bought into this argument or interpretation, hence the argument that now that the new Act has removed B industry, parliament 'deliberately changed the wording in order to result in a different interpretation.' This allegedly implies that any advantage the applicant had has been removed by the amendment. All these arguments by the applicant and the respondent on the word industry, appear to me with great respect to be so far-fetched they do not belong to the issues in this case. I shall deal fully with the meaning of industry later.

C Turning back to the respondent's heads of argument, the respondent contends that the applicant having admitted that it did not represent one third of the employees of the respondent, the respondent was entitled, in terms of s 32 of the Trade Disputes Act (Cap 48:02), not to recognise the applicant. Then the respondent makes an interesting argument at para 15:

D 'The basis of the threshold is to minimise the multiplicity of trade unions in one workplace and to minimise the financial and administrative burden of requiring an employer to grant organizational rights to such multiple unions. The employer therefore has rights to be protected.'

In partly answering the Constitutional issue, the respondent contends that E the Constitution of Botswana provides for limitations to the employee's right to assemble and associate and that the threshold for recognition is part of that limitation. I should however point out here that the provision of a threshold is really not in issue here. The applicants have not argued that the threshold should be lowered or removed. They have an issue with the application of that threshold. In other words, as clearly stated at para 10.2 F of the agreed stated case:

'The Applicant contended in that letter that a proper interpretation of the words "one third of the employees of the employer" as contained in Section 48(1) of the Act should be one third of employees in a particular trade.'

G Paragraph 16 of the heads of argument simply repeats what was said at para 15, multiplicity of trade unions, financial administrative costs, inconvenience to the employer etc.

Returning to the constitutional argument the respondent takes the matter a little too far by postulating that the threshold represents:

H '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.' (Para 16)

I have to point out here that the limitations to the freedoms listed under s 3 of the Constitution are not in issue as far as the applicant is concerned. The applicant's attempt to take cover under s 3 is because it is happy with

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what it believes the Constitution offers, protection of rights. The applicant's A contention is that the constitutional guarantees give its members the freedom of association. The issue therefore is not whether the constitutional limitations are justified, but whether the applicant is right in saying that because of the constitutional guarantees it should be recognised. As already explained the applicant is not even challenging the threshold under s 48(1) but rather its interpretation. Even assuming that the limitations are relevant B to the respondent's answer to the applicant's case, it has not been shown how the recognition of the applicant would prejudice the respondent or 'the public interest'. Even if the prejudice relates to 'financial and administrative burden' it has not been shown how the said financial and administrative burden would arise. The applicant is not asking for subsidy nor does recognition automatically impose costs on the employer. In any case constitutional C liberties cannot be subjugated to the respondent's convenience whether financial or administrative.

At para 19 the respondent relying on the case of Botswana Power Corporation Workers' Union v Botswana Power Corporation [1998] B.L.R. 159, IC gives an example that s 48(1) does not take away the right of managers to assemble and associate. That is a fair comment. The respondent goes on to D assert s 13 of the Constitution:

'... has not only been created for the protection of employees alone. It is also for the protection of the employers. The provisions of s 48(1) are therefore not unconstitutional.' E

The applicants have not gone as far as arguing that s 48(1) is unconstitutional. Their argument is that it is not being properly interpreted.

I shall deal with the arguments on interpretation by the respondent in its earlier heads of argument when I come to comment on the respective arguments.

Employer or industry - meaning of terms F

To pave the way for the interpretation of s 48(1) we have to remove the distraction caused by giving the word industry a wrong meaning equating it to trade or part of the employer. The word in the Act does not mean a part or section or branch of the employer. In the case of the applicants the train crew section is not an industry but simply a department of the Botswana Railways. G

In terms of the Act, a trade union may be recognised either at the level of the employer or at the level of industry. What the Act 16 of 2004 amendment did was to separate recognition at the level of an employer from recognition at the level of the industry. The Botswana Railways is an employer. Industry is an all-encompassing term wider than Botswana Railways. For example the transport industry includes the Railways. H

The factual situation is that you have employers like the Botswana Railways which deal with unions formed by their employees. In the absence of an umbrella body such as the transport industry to which its components may by agreement delegate the authority to recognise on behalf of all members of that industry, there is not and was never a section of the Botswana

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A Railways called industry capable of recognising any union formed by employees of the Railways. Only the Botswana Railways Organisation as the employer had that power. But the words employer or industry were intended to provide for alternatives in situations where the recognition was by the umbrella body called the industry.

The Concise Oxford Dictionary (10th edn), defines industry as 'an economic B activity; a particular branch of economic or commercial activity.' It then gives the example 'the tourist industry.' Obviously the tourist industry is made up of many traders. The individual traders may decide that for them recognition of trade unions will be done at the industry level or they may individually do recognition as employers for their own employees.

The amendment of 2004 (Act 16 of 2004) did not remove the word industry C from the Act. It simply removed recognition by industry from s 48(1) and placed it under s 48A(2).

'(2) 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 Commissioner for the establishment of a joint industrial council under section 36 of the D Trade Disputes Act.'

The Trade Disputes Act provides for recognition of a trade union at the employer level at s 32. At s 34 it provides for recognition at industry level. The attention of the parties is also drawn to the fact that rather than get rid of reference to industry, the Act has retained all such references to industry E in ss 6, 21, 35, 48A(2) and (3) of the Trade Unions and Employers' Organizations Act. There are corresponding references in the Trade Disputes Act (ss 32 and 34).

In conclusion, the removal of the word industry from s 48(1) neither disadvantaged the sectoral trade union seeking recognition nor helped the employer to refuse recognition. The parties misread the Act and ended up F arguing on a matter that had no relevance to their dispute. For the purposes of recognition at the level of employer, the respondent has always been the sole authority to decide the issue of recognition and there was no part of the respondent which could recognise a trade union of the employees of the respondent.

G Section 48(1): interpretation

The issue is whether:

'20.1 "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

H 20.2 "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).' (my emphasis)

In its heads of argument at para 6, the respondent emphatically argues:

'Section 48(1) ... is plain and clear.'

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That obviously means that it needs no interpretation but must be given A the ordinary meaning of the language used. But it is interesting that the respondent's attorneys state their case as:

'4.2 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).' (my emphasis) B

Is it correct that the respondent's contention is that 'one third of employees of the employer' means 'one third of all employees of the employed'? Section 48(1) does not say 'all employees'. It says simply, 'employees'. At para 18(1) of the stated case the respondent also refers to entire workforce of the respondent instead of simply 'workforce'. C

We have been referred to the golden rule stated by Lord Wensleydale in ***Grey v Pearson*** (1843-1860) All ER Rep 21 at p 36 that:

'[I]n 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 D ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further.'

This is an age old rule that is beyond dispute. But it should be noted that the rule is qualified. But when the respondent finds it necessary to preface the word employees by the word 'all' or work force by entire that is E tantamount to modifying the words of the statute. Clearly the respondent found the wording inadequate. That is the problem in this case. The Act simply refers to the employees of the employer. In the context of this case there is clearly doubt as to whether 'employees' is synonymous with 'all employees' or 'entire workforce.'

There are two contexts in which the expression, 'one third of the F employees of an employer' may be considered. If the general trade union of the employees of an employer applies for recognition the expression will undoubtedly need no interpretation the reason being that no dispute arises. But when, like in the present case, the employer is approached by a section of the employees representing workers in a particular trade, should that context be ignored and the general rules be applied? For the reasons I G shall deal with below, I do not think that intention can be attributed to the legislature. The case of ***Feldman v Migdin, NO*** 2006 (6) SA 12 (SCA) at p 17 (quoting from ***Stellenbosch Farmer's Winery Ltd v Distillers Corporation (SA) Ltd and Another*** 1962 (1) SA 458 (A) at p 476E) repeats the golden rule with another qualification: H

'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

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A 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.'

B Section 48(1) speaks of a third of the employees of the employer. It did not say all, forcing the respondent's attorneys to sneak in the words 'all' and 'entire'. The context of the issues involved here will be found in the Act, an Act to regulate the relations between the trade unions and employers' organisations. Part III of the Act provides for the registration of trade unions. It specifies the requirements for qualifying for registration including 'particulars C of every negotiating body, whether the parent trade union or branch thereof.' The Act therefore recognises that the trade union applying for registration may be 'a parent trade union or a branch thereof.' The Act does not forbid registration where there is already a parent trade union. That is how the applicant got registered. It would be a strange legislature that permits the registration of a trade union knowing fully well that it will D not be allowed to enjoy all the fruits of unionisation.

Section 10 of the Act gives the registrar the power to refuse to register a trade union if certain conditions have not been satisfied. The existence of a parent union is not one of those conditions. At ss 48A and 48B the Act gives a list of the rights and privileges accruing to a recognised trade union. A trade union not recognised would not enjoy those rights and privileges. E There is no doubt that a trade union applying to the Registrar for registration does not regard registration as an end in itself. The ultimate aim is to be able to make a difference at the workplace. It cannot be disputed that when the legislature made it possible for trade unions to be registered, it intended to avail to them all the benefits of unionisation including 'access to an employer's premises for purposes of recruiting members, holding meetings F and representing members', raising funds by deduction of trade union dues from the employees wages; recognition of trade union representatives appointed by the union for purposes of representing members in dealing with grievances, discipline and termination of employment (see s 48B). The other rights flowing from employer recognition are listed at s 48A(3). These are rights which a non-recognised union cannot enjoy. Can we attribute G denial of recognition due to unattainable conditions to the intention of the legislature which facilitated the registration?

We have been referred to a plethora of authorities allegedly supporting the interpretation of s 48(1) of the Act urged on us by the respondent that one third of the employees of an employer needs no interpretation.

H 1. ***Wellworths Bazaars Ltd v Chandler's Ltd and Another*** 1947 (2) SA 37 (A) at p 43.

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset

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inclined to suppose every word intended to have some effect or be of A some use.'

As a statement of law one does not have any problem with the formulation. However it has only some peripheral relevance to the present case as there is no suggestion of tautology in the words in dispute. However the underlying principle that words should be given their ordinary grammatical meaning is correct. B

2. Botswana Power Corporation Workers' Union v Botswana Power Corporation (supra) at p 169 repeats the golden rule as enunciated by Wensleydale LJ in Grey v Pearson (supra).

3. Stellenbosch Farmers' Winery Ltd v Distillers Corporation and Another (supra) at p 474E: C

'Certainly no less important than the oft repeated statement that the words and expressions 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 D "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.'

At p 476, Wessels AJA made the statement quoted in Feldman's case E (supra). I need not go on with these quotations of the various expressions of the same principle of interpretation. Please see ***Botswana Railways' Organisation v Setsogo and Others*** [1996] B.L.R. 763, CA (Full Bench) at p 820, ***Botswana Power Corporation v Moaneng and Others*** [2005] 2 B.L.R. 312, CA at p 316; ***Desert Palace Hotel Resort (Pty) Ltd v Northern Cape Gambling Board*** 2007 (3) SA 187 (SCA) at p 190. F

As a general comment on the authorities cited, the rules of interpretation repeatedly referred to are no more than tools to assist in the interpretation of statutes. They do not themselves answer the point in dispute but simply suggest ways of arriving at the correct interpretation. Although the statements were made in dealing with other disputes under different contexts, they may be applied in any issue of interpretation. Because they are guides G their respective relevance in any particular context have to be explained or established. For example, where parties are disputing the meaning of a particular word or expression, one contending that the grammatical wording requires no interpretation while the other party urges that a different meaning be imputed, the starting point must be that there is disagreement as to the meaning. It is from that point that the parties can proceed to employ H the tools of interpretation, each party showing why its interpretation should be the acceptable interpretation. It does not help to quote authorities on the assumption that the quoted authorities speak for themselves or that they are self-executing.

The second point is that all the formulations start with a general statement followed by either statement of qualifications or exceptions. Therefore

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A in each argument where a particular rule of interpretation is cited as governing the interpretation of a particular expression, an explanation must be offered why the exception or qualification of a rule should not apply.

The context

In the case of Botswana Power Corporation v Moaneng and Others (supra) B at p 316A McNally JA made it clear that an expression ordinarily regarded as having an ordinary meaning may in its context acquire a less than ordinary meaning:

'But ... clearly their Lordships were dealing with a situation in which to give the phrase its normal or ordinary meaning would have made C nonsense of the provision under consideration.'

The applicant's case is that to give the expression 'one third of the employees of an employer' the meaning urged by the respondent, that is presumed to be the ordinary meaning, would deny trade unions lawfully registered by the registrar the right to consummate their unionisation. The D applicant argues therefore that the legislature could not have intended to give them the right to unionise only to take away the prospects of realising the fruits of unionisation - the recognition by their employer. In multifaceted industries, employees of different professions are recruited and employed. The holders of a certain profession who feel that their peculiar interests cannot adequately be catered for by the general trade union should E surely be permitted to form a union specifically to cater for their peculiar interests, and to be recognised by the employer subject to meeting a proper threshold.

All employees aspire for higher wages. To that extent a general trade union may represent everybody. But what if the engineers, for example, feel that because of their special training or qualifications they should be F paid higher than their colleagues? Would that not cause conflict of interests? Would the general union consider that a proper case to argue on behalf of the engineers? An example is the case of Botswana Railways Organisation v Setsogo (supra) where the train crew had to fend for themselves at the workplace through a strike and through the courts up to the Court of Appeal without their main union in sight. They had gone on strike, clearly G unsupported by the main union. These differences and conflicts find expression in the repeated statements by the authorities that the golden rule should not necessarily be the end of the rules of construction because in some cases that may make nonsense of the provision under consideration.

Mr Justice Schreiner JA in ***Jaga v DÎnges, NO and Another; Bhana v DÎnges, NO and Another*** 1950 (4) 653 (A) at p 662G lays down at length H the various considerations to take into account in the interpretation of legal instruments:

'Certainly no less important than the oft repeated statement that the words and expressions 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.'

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First the golden rule of interpretation is not necessarily more important A than the contextual rule. The judgment continues:

'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 B the matter of the statute, its apparent scope and purpose, and, within limits, its background.'

As already pointed out the context in the interpretation of s 48(1) is that the Act as a whole was enacted not to restrict the freedom of assembly and association with respect to employees to but to enact 'the law relating to C trade unions to make better provision therefor.' Better provision for the employees, but not in a one sided manner. Employers' organisations are similarly catered for. The rest of the Act testifies to that. The 'matter of the statute' I believe refers to the subject matter of the statute and the underlying policy considerations. That must be, therefore, that in addition to looking at the wording of the statute, the context, that is the rest of the D statute, the scope and purpose as well as its background are 'no less important.' It is submitted that the purpose and scope of the legislation could not have been restricted to registration by the registrar without due regard as to whether the registered union will progress its aims and objectives beyond registration. Worse still the legislature cannot be assumed to have deliberately placed insurmountable obstacles to the union's realisation of the full E benefits of unionisation as provided at ss 48(3) and 48A(3) of the Act. Otherwise that approach would make 'nonsense of the provision under consideration'.

De Villiers J in ***Botswana Power Corporation Workers' Union v Botswana Power Corporation*** (supra) quotes from Kellaway Principles of Legal Interpre-tation - Statutes, Contracts and Wills (Butterworths Durban 1995) at p 57: F

'Implicit in this so-called golden rule, it is submitted, is the idea that "words" must be read within their context. Indeed there would be no knowing whether there is "absurdity" or "repugnance" unless the context of the enactment was studied.' G

Mr Justice Schreiner at p 663 (***Jaga/Bhana v Do«nges*** (supra)) takes the matter further:

'It is true that, even where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to "modify" or "cut down" or "vary" the words used by the Legislature.' H

The court is however not urged to go that far.

Mr Justice Schreiner in the Jaga/Bhana v Do«nges case (supra) then quotes with approval a passage from Lord Greene's judgment in Re Bidie [1949] Ch 121 (CA) at p129:

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A 'The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometime called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not B to take out particular words and attribute to them a sort of prima facie meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: "In this statute, in this context, relating to this subject matter, what is the true meaning of that word?" In the present case, if I might respectfully make a criticism of the learned Judge's method of approach, I think he attributed too much force C to the abstract or unconditional meaning of the word "representation". No doubt in certain contexts the word "representation" would be sufficient to cover not merely probate, not merely letters of administration with the will annexed, but administration simpliciter. The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the subsection in which D the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy.' (my emphasis)

Schreiner JA then continues at p 664C:

E 'No doubt the result should always be the same, whichever of the two lines of approach is adopted since, in the end, the object to be attained is unquestionably the ascertainment of the meaning of the language in its context.' (my emphasis)

What I find sadly lacking is the total absence of reference by the respondent to the context of the words whose meaning is being disputed. In a F layman's language the applicant has in fact adopted the contextual approach. The respondent has on the other hand stuck to its stand that the words can only have one meaning even as the cases cited by the respondent, all caution that the context is not less relevant, (Botswana Power Corporation Workers' Union (supra) at p 169; Grey v Pearson (supra) at p 36 ('unless that would lead to some absurdity etc') G Botswana Power Corporation v Moaneng (supra) at p 316; Stellenbosch Farmers' Winery (supra) at p 474 and p 476; Desert Palace Hotel (supra) at p 190, etc.

Mr Justice Schreiner continues at p 664E:

'Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other H language; the clearer the language the more it dominates over the context, and vice versa, the less clear it is the greater the part that is likely to be played by the context.

Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation that the legislator had some other intention... . But the

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legitimate field of interpretation should not be restricted as a result of A excessive peering at the language to be interpreted without sufficient attention to the contextual scene.'

This is the approach the respondent has ignored preferring to excessively peer at the language to be interpreted.

Another aspect of the contextual scene is that the labour movement B belongs to one global village with directions as to the treatment of workers, the interpretation not only of conventions but also of domestic statutes all emanating from Geneva, the International Labour Organisation (ILO) Headquarters. It is necessary therefore to examine their conventions, the guidelines and the interpretative digests of the committee of experts tasked with the interpretation of various instruments and the provisions of domestic C legislation when trade union members refer their disputes to the ILO. These are now matters that form part of the context in the interpretation of domestic labour statutes. The conventions and opinions of the ILO are the standard by which the application and interpretation of domestic labour statutes are to be judged. Botswana is a member of the ILO and is bound by the provisions of its constitution. D

The Court of Appeal in the case of ***Attorney General v Dow*** [1992] B.L.R. 119, CA (Full Bench) at pp 170-171 pronounced itself on the relevance of international conventions, agreements, treaties, protocols or obligations.

'[A] court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched E in Chapter II of our Constitution which deal with fundamental rights and freedoms of 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. F

In my view this must be so whether or not such international conventions, agreements, treaties, protocols or obligations have been specifically incorporated into our domestic law.'

The learned judge went on to quote with approval a New Zealand court decision in the case of Birds Galore Ltd v Attorney General [1989] LRC G (Const) 928 at p 939F-G.

'An international treaty, even one not acceded to by New Zealand, can be looked at by the court on the basis that in the absence of express words Parliament would not have wanted a decision maker to act contrary to such a treaty.' H

The learned judge continues:

'In my view it is the clear duty of this court when faced with the difficult task of the construction of provisions of the constitution to keep in mind the international obligation. If the constitutional provisions are such as

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A can be construed to ensure the compliance of the State with its international obligations then they must be so construed.'

I must emphasise that the applicant is not arguing that s 48(1) the Act violates the Constitution. Its contention is that the section can be construed to ensure compliance of the state with its international obligations and that B it must be so construed. To that extent the members of the applicant contend that 'one third of the employees of an employer' must for their application for recognition be interpreted to mean a third of the birds of a feather, so to speak, that is, one third of the employees belonging to the trade of the employees who formed the trade union. Surely it is nonsensical, and I wouldn't attribute that absurdity to the legislature, that a group from the C 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.

**International Labour Organisation Convention 87 of 1948 provides at art 2**:

D 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organizations of their own choosing without previous authorization.'

E **At art 8 the Convention provides**:

'1. In exercising the rights provided for in the convention workers and employers and their respective organizations, like other persons and organised 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.' F (my emphasis)

This is an old convention preceding the birth of current Botswana by 18 years. There is no doubt therefore that by now the convention has 'metamorphosed' into customary international law. In his book Collective Labour Law in Botswana (2008 Bay Publishing) at p 47 Mr Justice Dingake makes G the point:

'The courts also play a significant role through interpretation of the Constitution, statutes or the common law, in incorporating international conventions into the national legal system. Botswana courts occasionally use international law to resolve disputes that come before them. There is H nothing wrong with this approach; in fact there is a case to be made for the courts to use international law more than they have done before, especially in the area of human rights. After all, customary international law has always been part of our common law, with the result that it is always open to the courts of Botswana to apply those norms of human rights law that have crystallised into custom, unless such norms are in conflict with legislative provisions.'

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The provisions of Convention 87 accord respect to the law of the land, A subject to the caveat that '[t]he 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'. In other words the right of workers and employers 'to establish and, subject to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation' shall not be impaired by the law of the land. Secondly the convention in question is now part of B customary international law whose provisions we have to take cognisance of. But above all, as I shall revert to later, our Constitution has from its inception protected freedoms of association and assembly (s 3(b)).

Let us now turn to the ILO's interpretation of the provisions of Convention 87. The starting point is the ILO booklet, Freedom of Association and Collective Bargaining (1994) which provides the background to the interpretations C of art 87 by the committee of experts of the ILO. At para 6 of the booklet the following general statement is found:

'Freedom of association having thus been proclaimed from the outset as one of the fundamental principles of the Organisation, the need was rapidly felt to adopt provisions aimed at defining this general concept D more precisely and to set forth its essential elements in a formal ILO instrument in order that its general application could be effectively promoted and supervised.'

Paragraph 7 adds:

'In 1944, the Constitution of the ILO was supplemented by the inclusion E of the Declaration of Philadelphia, which I reaffirmed "the fundamental principles on which the Organisation is based, and in particular, that freedom of expression and of association are essential to sustained progress.'

Paragraph 7 concludes: F

'The principles thus enunciated in the Constitution are applicable to all the member States of the Organisation.'

Botswana is one such member and in the application of its domestic laws, it has to ensure that the rights accorded workers and employers by the ILO G are not impaired.

Specifically on freedom of choice (art 2 of the Convention), the committee had this to say at para 98:

'However, the workers' freedom of choice would be jeopardised if the distinction between most representative and minority unions results, in H law or practice, in the prohibition of other trade unions which workers would like to join, or in the granting of privileges such as to influence unduly the choice of organization by workers. Therefore, this distinction should not have the effect of depriving those trade unions that are not recognised as being amongst the most representative of the essential means of defending the occupational interests of their members, (for

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A instance, making representations on behalf, including representing them in case of individual grievances), for organising their administration and activities and formulating their programmes, as provided for in Convention No. 87.'

In terms of the Act, a trade union that has been denied recognition cannot B enjoy the rights and privileges of recognition as provided in ss 48(4) and 48A(3). Therefore the union that has not been recognised will not enjoy the privilege and indeed the right of defending the occupational interests of its members or of representing them in cases of grievances. That, in terms of the ILO should not happen. The only way of preventing breach is by granting recognition in which case the statutory rights and privileges automatically C follow. We are not talking here of automatic recognition but recognition subject to satisfying the provisions of s 48(1) as interpreted.

I list below, extracts of specific rulings of the ILO Committee of Experts on freedom of association, contained in the ILO Document.

**Freedom of Association**

D The Digest of Decisions and Principles of Freedom of Association Committee of the Governing Body of the ILO (5th edn (revised) 2006) states:

'1. Distinctions based on Occupational Category

216. All workers, without distinction whatsoever, including without discrimination in occupation, should have the right to establish and E join organisations of their own choosing. (326th Report, Case No. 2113)

217. To establish a limited list of occupations with a view to recognizing the right to associate would be contrary to the principle that workers, without distinction whatsoever, should have the right to establish and join organizations of their own choosing. (1996 Digest F para 278)

Right of Workers and employer to establish and join organizations of their own choosing.

309. The right of workers to establish and join organizations of their own choosing in full freedom cannot be said to exist unless such freedom is fully established and respected in law and in fact. (302nd Report, G Case No. 1825)

Trade Union Unity and Pluralism

311. The right of workers to establish organizations of their own choosing implies, in particular, the effective possibility of forming, in a climate of full security, organizations independent both of those H which already exist and of any political party. (304th Report, Case No. 1819)

313. The existence of an organization in a specific occupation should not constitute an obstacle to the establishment of another organization, if the workers so wish. (306th Report, Case No. 1884)

315. The right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create -

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if the workers so choose - more than one worker's organization per A enterprise. (302nd Report, Case No. 1840)

317. Provisions which require a single union are not in accordance with Article 2 of Convention No. 87. (332nd Report, Case No. 2301)

321. Unity within the trade union movement should not be imposed by the state through legislation because this would be contrary to the principles of freedom of association. (320th Report, Case No. 1963) B

A short explanation of these quoted rulings will make the position clear. These were rulings in specific cases referred to the ILO by the employees/trade unions of member states of the ILO after disagreeing with their employers and possibly after being disappointed by the rulings of the domestic courts. The applicant also has a right to appeal to the ILO in C the event of dissatisfaction. These rulings are a guide as to what the reaction of the ILO would be. Such rulings would be binding both on the organisation involved and the State. That is why in addition to the rulings of our courts (to be precise the Court of Appeal), how the ILO would interpret a particular domestic statute is part of the context in the interpretation which courts of this country should take into account. The reports cited and the D case numbers show the cases that the committee of experts was dealing with. Under each quotation I cited only one case in the interest of brevity.

To sum up the message from the quoted pronouncements of the ILO Committee of Experts, there should be freedom of workers to establish organisations 'of their own choosing'. They should not be prevented from doing so on the ground that another general trade union already exists. The E freedom of workers to join organisations of their choice must be understood in the wider sense or context. The right must be understood to extend beyond just the establishing or joining of an organisation; it extends to the full enjoyment, subject to the requirements of s 48(1) (correctly interpreted) of the privileges of unionisation, especially the rights and privileges provided for under ss 48(3) and 48A(4). To be precise no unattainable F conditions should be set for their recognition.

We have been told at para 17.9 of the stated case that:

'17.9 The prejudice that the Applicant is suffering by the refusal of Respondent to recognise it in terms of Section 48(1) is that:

17.9.1 Applicant is unable to hold meetings within the premises of the Respondent; G

17.9.2 Applicant is not allowed to comment at any meeting called by the Respondent;

17.9.3 Applicant is unable to bargain as a Trade Union on behalf of its members; and

17.9.4 Applicant's members concerns and grievances are not being H specifically addressed as they work in a specialised type of trade.'

That is an obstacle to the consummation of the applicant's process of unionisation. I repeat that unionisation is not an end in itself. Registration is pursued because it is a prerequisite to an application for recognition at the

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A workplace. It is pursued with the object of eventually realising the enjoyment of full access to their employer as a union and to remove the obstacles listed at para 17.9 of the applicant's stated case. Registration as a union is made by employees who have found themselves unable to enjoy certain rights at the workplace. Section 13 of the Constitution is more precise:

B '13. No person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions ... for the protection of his interests.' (my emphasis)

Trade unions are formed not just to belong to but 'for the protection of C his interests.' The protection of the interests of a union can only be achieved after recognition. See s 48(3), 48A and 48B.

The next point is that the rights in question, will only be fully realised if they are fully established and respected in law and in fact. Placing impossible obstacles before a union seeking recognition is not respect either in law or in fact of the said rights.

D The third point is that the right to establish organisations of their own choosing implies the effective possibility of forming such organisations freely and independent of existing organs unions. The existence of an organisation in a specific employing entity should not be an obstacle to the establishment of another organisation. The denial of recognition on the ground of the existence of another organisation would breach Convention 87 because it would be an attempt to implement one union policy.

E The applicant believes that the interpretation it is urging on us, which in effect is the contextual interpretation should prevail.

Having traversed the opinions of the ILO Committee of Experts dealing with actual cases between workers and employers from member countries the court is even more convinced that the applicant's interpretation is the correct one.

F I have so far refrained from adverting to the provisions of the Interpretation Act (Cap 01:04) which however is the primary and authoritative instrument for Botswana in the interpretation of statutes. Section 24 of the Interpretation Act allows recourse to a wide range of aids for the purpose of ascertaining the meaning of statutes including text books, report of any commission of inquiry into the state of the law (see committee of experts of G the ILO tasked with enquiring into the meaning of domestic statutes), a memorandum of a bill presented to parliament and, 'international treaty, agreement or convention.'

Section 26 of the Interpretation Act provides:

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

An interpretation that would deny employees in a trade the enjoyment of the fruits of unionisation is neither for the public good, fair and liberal nor truly in accordance with the intent and spirit of the piece of legislation involved. The purpose of the Act was to enact '... the law relating to

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trade unions to make better provision therefore... .' To prevent a registered A trade union from recognition by setting obviously unattainable conditions is neither fair nor liberal.

In labour matters, especially in the adjudication of labour disputes the concepts of fairness and equity should never be far back in our minds. That should be part of the context in the interpretation of statutes. (See Goldstone JA's opinion in, National Union of Mineworkers v East Rand Gold & Uranium Co Ltd B (1991) 12 ILJ 1221 (A) at p 1237; National Union of Mineworkers v Marievale Consolidated Mines Ltd (1986) 7 ILJ 123 (IC) at p 147; Marius Oliver in The New Labour Law (Juta & Co Ltd Cape Town 1990) at pp 314-5)).

Section 27 of the Interpretation Act also urges positive interpretation: C

'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.'

If s 48(1) were to be given an interpretation that would render the employees' freedoms of assembly and association as conferred by Convention 87 D and above all guaranteed by the Constitution, nugatory, that would be negative and not positive. These are in addition to all the other arguments against denial of recognition that have been raised. Indeed such interpretation would render s 48(1) ineffective as being contrary to constitutional provisions.

The constitutional factor E

The applicant's contention in this regard is not that s 48(1) is unconstitutional but that the respondent has given it a wrong interpretation in that knowing that they are only a small section of the whole workforce it demands that they should prove that the members make one third of the entire workforce. The applicant then proceeds to argue that if that interpretation F was to be held to be correct, then rights of the members as guaranteed by s 3 of the Constitution would be infringed. As it has now been shown, art 2 of Convention 87 of the ILO also gives workers the right to 'join organisations of their choosing.' That is what freedom of association is about, freedom of choice as to who to associate with.

The respondent has raised several arguments under this heading - G

'19.1 Recognition under section 48(1) is not a requirement in order for a trade union to be registered;'

I do not know whether this is a serious argument because recognition does not apply at the point of registration. The reverse is true that recognition can only be requested by a registered trade union. H

'19.2 Whilst it is so that a recognised union has certain advantages, this does not mean that non-recognised trade union cannot represent the rights of its members. It can and does so.'

Blank statements are rarely helpful. As I said earlier registration is not an

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A end in itself. Registration is a prerequisite for, and indeed the ultimate objective of recognition. The purpose of registration is to be able to seek to enjoy the rights and privileges stipulated under ss 48A(3), 48A(4) and 48B. All these sections are clear that the rights granted thereunder are only available to '(3) a trade union (that) has been granted recognition' or 'a trade union granted recognition ... shall be entitled to ...' Where in the Act B does it say an unrecognised trade union will enjoy the same rights and privileges? The provisions cited are clearly intended to discriminate between recognised and unrecognised trade unions in terms of benefits. Hence the object of every registered union is to secure recognition by the employer. That recognition will bring to the union the rights and privileges under ss 48(4), 48A(3) and 48B.

C '19.3 However what the legislature seeks to is to allow the principals [sic] of majoritarianism to be applied where trade union represents a high percentage of the employees of a particular employer.'

I do not think anyone can extract the so-called 'principles of Majoritarianism' from the Act. The contention is no more than an act of surmising. D On the contrary the Act makes no pretence to majority representation. One third is not a majority but a minority. It is 33 per cent. The only rational inference is that the Act has set a minimum that is feasible or which will not be too difficult to attain because not every employee joins trade unions.

E Respondents supplementary arguments

'15. The basis for the threshold is to minimise the multiplicity of trade unions in one work place ... The employer has to be protected.'

One has to deplore improvised arguments which cannot be sourced from the provisions of the Act. An ideal situation would have required that all employees be members of a trade union and not only a third. The only F rational inference for the threshold of one third is the acceptance that it is the highest achievable threshold taking into account that membership of a union is not compulsory. It cannot be inferred from the Act that the one third threshold was to prevent the formation or recognition of other unions. It is also true that the multiplicity of unions is not an ideal situation. This is G recognised by the ILO at para 320 of the Digest on Freedom of Association.

'While it is generally to the advantage of workers and employers to avoid the proliferation of competing organisations, a monopoly situation imposed by law is at variance with the principle of free choice of the worker's and employer's organisations.'

H The respondent's argument is basically that s 48(1) imposes a monopoly to protect the financial and administrative resources of the employer. It is a strange argument that seeks to raise the employer's convenience whether financial or administrative, above constitutionally entrenched 'fundamental rights and freedoms of the individual.' Like the Constitution, the ILO Digest on Freedom of Association at para 312 also regards the free choice of workers to join organisations 'so fundamental that it cannot be compromised.'

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To place constitutional provisions on a proper scale reference to the A South African case of Brisley v Drotsky 2002 (4) SA 1 (SCA) at p 28D is apposite:

'In short, the constitutional state ... mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution.' B

See also Cameron JA's agreement with the above opinion in Napier v Barkhuizen 2006 (4) SA 1 (SCA) at p 8.

The case of Botswana Power Corporation Workers' Union v Botswana Power Corporation (supra) referred to us was dealing with the question of who is a member of management. In other words there was disagreement as C to whether employees on 'grades 8-17' should be classified as management. That was basically what the court was required to decide on. We are required specifically to rule on the interpretation of s 48(1) with respect to the rule regarding recognition.

The other case referred to us was Botswana Breweries Distribution Staff v Botswana Breweries (Pty) Ltd [1997] B.L.R. 312, IC. This was a case in which D the dispute was whether 53 employees of the respondent should be allowed to negotiate with the respondent in their personal capacities, bypassing the union of which they were members. On the other hand we are here dealing with rights of a registered trade union on matters of recognition in terms of s 48(1) of the Act. E

'17. These are 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.'

At para 18 the respondent argues that the denial of recognition to the applicant 'is reasonably required for the purpose of protecting the rights and F freedoms of others.' Of course we have already been informed that the 'rights and freedoms of others' referred to mean nothing other than that the employer should be enabled to 'minimise the financial and administrative burden of allowing salary deductions holding meetings, by multiple unions in the premises.' As already stated I am not aware that the need to have fewer meetings is a right greater than the individual's fundamental G constitutional freedoms. The ILO says no. We can't see it otherwise. All these are arguments to justify an interpretation that curtails rights contrary to the facilitative direction of the Act. It has not been shown what rights and freedoms of the public are involved. We can't find any.

Conclusion H

It is the view of the court that the legislature could not have intended that a small section of the 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. That attitude cannot be inferred from the wording of the Act as a whole. To give the Act that

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A nterpretation would also impair the guarantees provided for in Convention 87 of the ILO in addition to effectively denying the members of the applicant the rights guaranteed by s 3 of the Constitution. For the purpose of recognition of the applicant the one third must be read as one third of the employees of the respondent engaged in the same trade as the members of the applicant.

B This interpretation is consistent with the ILO interpretation of 'the right of workers to establish organisations of their own choosing.' The existence of an organisation in a specific occupation should not constitute an obstacle to the establishment of another organisation. The other union established should have the right to recognition in order to enjoy the full benefits of unionisation spelt out in ss 48, 48A and 48B, subject to complying with the requirements of s 48(1) as interpreted.

C The interpretation given to s 48(1) is consistent with s 27 which enjoins us to disregard 'an interpretation which would render an enactment ineffective' and instead opt for an interpretation which will enable it to have effect.

In terms of both the Constitution (s 3) and Convention 87 of the ILO, the rights and freedoms of the individual, in particular the freedoms of assembly D and association are fundamental and cannot be subjugated to an employer's convenience of enforcing a trade union monopoly or to the undefined and unspecified financial and administrative costs. Recognition of a union does not result in any financial disbursements to the union or its members.

Determination

E 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 purposes of the applicant's case and for all similar cases;

F (b) To that extent, the applicant is bound by the terms of s 48(1) of the Act as interpreted by this judgment;

(c) That interpretation is consistent with the provisions of s 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 G 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 s 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.

H We agree on the facts:

I M Motlaleng

Nominated Member (Union)

M K C Mashumba

Nominated Member (BOCCIM)

Application granted.

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A