



# A critique of Botswana's Trade Disputes Act, 2016: the case for reform

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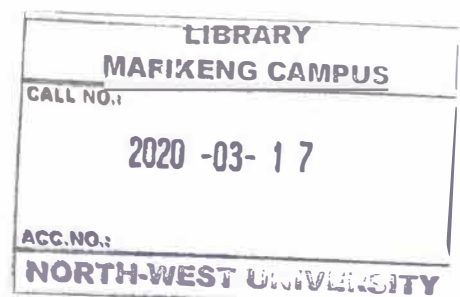
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**Ndulamo Morima**

**May 2019**

## DEDICATION

I dedicate this dissertation to all the men and women who were dismissed following the 2011 public sector strike, for though some of them were later re-employed, hundreds remain in the streets.

I hope they, together with other thousands of dismissed men and women, take solace in the following words;

I didn't see it then, but it turned out that getting fired from Apple was the best thing that could have happened to me. The heaviness of success was replaced by the lightness of being a beginner again, less sure about everything. It freed me to enter one of the most creative periods of my life.

**Steve Jobs**

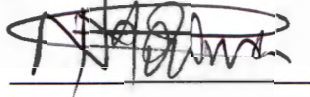


## CANDIDATE' S DECLARATION

I, Ndulamo Morima, hereby declare that this dissertation is my original work and has never been presented to any other institution. I further declare that any secondary information in this dissertation has been duly acknowledged.

Student: Ndulamo Morima

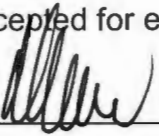
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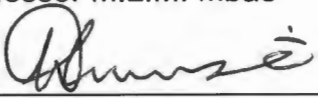
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## DECLARATION BY SUPERVISOR

We, Professors Melvin M.L.M. Mbaao and Mr. W.R Nkhumise, hereby declare that this dissertation by Mr. Ndulamo Morima for the degree of Master of Laws (LLM) entitled 'A critique of Botswana's Trade Disputes Act, 2016: the case for reform' be accepted for examination.

  
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Professor M.L.M. Mbaao

  
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Mr. W.R Nkhumise

May 2019

## LIST OF ABBREVIATIONS

ABOTEL	Association of Botswana Tertiary Education Lecturers
ACSA	African Civil Service Association
ADR	Alternative Dispute Resolution
AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
AJPSIR	African Journal of Political Science and International Relations
BCEA	Basic Conditions of Employment Act
BCSA	Botswana Civil Service Association
BDP	Botswana Democratic Party
BGWO	Bechuanaland General Workers Organisation
BFTU	Botswana Federation of Trade Unions
BLLAHWU	Botswana Land boards, Local Authorities and Health Workers Union
BOFEPUSU	Botswana Federation of Public Sector Unions
BOBEU	Botswana Bank Employees Union
BOFESETE	Botswana Federation of Secondary School Teachers
BMWU	Botswana Mine Workers Union
BOPEU	Botswana Public Employees Union
BOSETU	Botswana Sectors of Educators Teachers Union

BOTEMAPAWU	Botswana Textile Manufacturing and Packaging Workers Union
BOTEU	Botswana Telecommunications Employees Union
BPATA	Bechuanaland Protectorate African Teachers' Association
BPCWU	Botswana Power Corporation Workers Union
BPWU	Bechuanaland Protectorate Workers' Union
BRAWU	Botswana Railways and Allied Workers Union
BSBEU	Botswana Savings Bank Employees Union
BTU	Botswana Teachers Union
BTUC	Bechuanaland Trade Union Congress
BULGASA	Botswana Unified Local Government Service Association
BWF&RWU	Botswana Wholesalers Furniture and Retail Workers Union
BVISU	Botswana Vaccine Institute Staff Union
CLA	Collective Labour Agreements
CBU	Central Bank Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAEU	Citizen Entrepreneurial Development Agency Employees Union

CKGR	Central Kgalagadi Game Reserve
CLB	Commonwealth Law Bulletin
DCEC	Directorate on Corruption and Economic Crime
DDPR	Directorate of Dispute Prevention and Resolution
DLSS	Department of Labour and Social Security
EEA	Employment Equity Act
EEMCS	Emerald Emerging Markets Case Studies
EP	Economic Policy
FEU	Francistown Employees Union
FUB	Football Union of Botswana
FUB	Footballers Union of Botswana
GJHSS	Global Journal of Human-Social Science
GB	Governing Body of the International Labour Organisation
HC	High Court
HR	Human Relations
IATBI	Industrial Arbitration Tribunal and Board of Inquiry
IC	Industrial Court
IEC	Independent Electoral Commission
IGIG	IGI Global

IRC	Industrial Relations Council
ILO	International Labour Organization
ILC	International Labour Council
ILR	International Labour Review
JAL	Journal of African Law
JCLLE	Journal of Commonwealth Law and Legal Education
JIR	Journal of Industrial Relations
JPAG	Journal of Public Administration and Governance
JPIEEP	Journal of Professional Issues in Engineering Education and Practice
JSC	Judicial Service Commission
LAB	Labour Advisory Board
LRA	Labour Relations Act
NDBEU	National Development Bank Employees Union
NALCGPWU	National Amalgamated Local and Central Government and Parastatal Workers Union
NEDLAC	National Economic Development and Labour Council
OUC LJ	Oxford University Commonwealth Law Journal
PELJ	Potchefstroom Electronic Law Journal
PR	Potchefstroom Regsblad
PSA	Public Service Act
PSBC	Public Service Bargaining Council

SADC	Southern Africa Development Community
SALB	South African Law Bulletin
SN	Springer Nature
SWU	Serowe Workers Union
TDA	Trade Disputes Act
TDAА	Trade Disputes Amendment Act
TAWU	Trainers and Allied Workers Union
TI	Transparency International
TUEO	Trade Unions and Employers' Organizations Act
TUTDP	Trade Unions and Trade Dispute Proclamation
UDC	Umbrella for Democratic Change
UBLJ	University of Botswana Law Journal
UBSU	University of Botswana Staff Union
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization



## ABSTRACT

Effective trade dispute resolution can only be attained if there is an effective and efficient trade dispute resolution framework. In Botswana, the pillars for this framework, which are found in the TDA, 2016 ('the Act'), are mediation, arbitration, industrial action and litigation. This study critiques the Act with a view to finding out whether or not the framework enables effective trade dispute resolution. The results of this critique are in the form of recommendations for the Act's reform.

Conciliation, mediation and arbitration can only be effective if done by an independent entity, an equivalent of South Africa's CCMA. Conciliators, mediators and arbitrators' independence can only be attained if their appointment and removal is not done by the Minister alone, but with advice from the Labour Advisory Board (the Board). Providing for their security of tenure will also enhance their independence. Con-arb and the pre-dismissal Arbitration procedure are requisites for effective and expedient resolution of trade disputes. The same applies to making adequate provision for execution of settlement agreements, default awards, arbitral awards and Industrial Court judgments or orders as per the guidance provided by the *Veronica Moroka* case.

Industrial action is invaluable for the attainment and maintenance of good labour relations. Adequate provisions for protest action; picketing and 'go-slows' can go a long way in promoting good labour relations. If the list of essential services is too extensive as it has been in Botswana until 8<sup>th</sup> August 2019, the right to strike is negated. The call for the establishment of an Essential Services Committee to deal with, *inter alia*, the classification of essential services is, therefore, justified. The same applies to the call to establish an equivalent of South Africa's NEDLAC to deal with policy formulation; economic development; social justice and labour peace.

Litigation of trade disputes requires an independent Industrial Court. For that to be possible, the institutional autonomy of the Industrial Court must be without question, hence the need to ensure the individual independence of the Industrial Court judges by providing that their appointment should be by the President acting in accordance with the advice of the JSC. Besides their appointment, the

provisions which allow judges to serve on renewable contracts, which renewals are done by the President acting alone, as well as the provision which empowers the President, acting alone, to extend a judge's contract undermines judicial independence. That nominated members of the Industrial Court are appointed by a judge, acting alone, brings their independence into question. There is, therefore, the need to establish a Committee and Tribunal that will deal with their appointment, discipline and removal. That an Industrial Court judge may, alone, exercise the court's jurisdiction in the absence of the nominated members is disconcerting. The same applies to the provision that absent a majority decision on matters of fact the judges' decision prevails. Finally, Botswana needs an Industrial Court of Appeal where lay persons would be allowed to represent parties just like at the Industrial Court.

**Keywords:**

**Mediation; conciliation; arbitration; industrial action; action short of a strike; essential services; litigation; trade dispute; trade dispute resolution framework; labour relations.**

## CHAPTER ONE: INTRODUCTION

### *1.1 Background to the study*

Botswana prides itself as a beacon of democracy which upholds such tenets of democracy as good governance, respect for the rule of law and judicial independence. She has, since independence in 1966, held regular, free and fair elections. She has such institutions supporting democracy as the Independent Electoral Commission (IEC), the Directorate on Corruption and Economic Crime (DCEC) and the Ombudsman though their independence is, it is submitted, not beyond reproach. Botswana's adherence to the democratic ideal has been measured through such democracy indices as the Ibrahim Index of African Governance (IIAG) and the Legatum Prosperity Index. The latter has consistently ranked Botswana highly, ranking her 1st in Africa and 41st in the world on good governance and 32nd out of 162 countries in the most peaceful index in 2015.<sup>1</sup> Botswana is without a doubt an African success story.

According to the 2017 IIAG report, Botswana registered a mere 0.6%, ranking position 53 from 54 countries in diversification of exports, meaning she scored very low in that regard.<sup>2</sup> Transparency International (TI) has, in several of its reports, rated her as the least corrupt country in Africa. In 2017, TI ranked Botswana at position 34 out of 180 countries, scoring 61 percent.<sup>3</sup> According to the 2016 Corruption Perceptions Index, Botswana's corruption ranking averaged 30.68 from 1998 until 2016, reaching an all-time high of 38 in 2007 and a record low of 23 in 1998.<sup>4</sup> So, Botswana fell from position 28 in 2015 to position 35 in 2016. Therefore, in a period of only one year she fell by seven points, indicating increasing incidents of corruption.

Botswana's success is not only in the area of governance. She has also thrived economically. She has made good use of her income from diamonds, beef and tourism though she has failed to diversify her economy through diamond

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<sup>1</sup> <https://prosperity.com> accessed 13 November 2017.

<sup>2</sup> Mo Ibrahim Foundation 2018 *Ibrahim Index of African Governance* 75.

<sup>3</sup> [www.transparency.org](http://www.transparency.org) accessed 13 November 2017.

<sup>4</sup> [www.transparency.org](http://www.transparency.org) accessed 13 November 2017.

beneficiation, for instance.<sup>5</sup> Since independence in 1966, Botswana has been one of the world's fastest growing economies, averaging about 5% per annum over the past decade.<sup>6</sup> Growth in private sector employment averaged 10% per annum during the first 30 years of independence.<sup>7</sup> Despite stagnation during the world economic recession in 2008, Botswana's economy started registering strong levels of growth, with its Gross Domestic Product (GDP) growth exceeding 6-7% targets. Its GDP currently stands at \$18.62 billion USD, making it a middle-income country.<sup>8</sup>

However, it is submitted that beneath that facade and behind the diamond sparkle,<sup>9</sup> there are mounting concerns about political intolerance, intrusion into press freedom, economic inequality, growing unemployment, especially among the youth and rising levels of corruption. Unemployment currently stands at 19.5 % and has averaged 19.23 % between 1991 and 2017, reaching an all-time high of 26.20 % in 2008 and a record low of 13.90 % in 1991.<sup>10</sup>

In his book, Good<sup>11</sup> attempts to answer the question whether Botswana is still 'an African miracle'? He admits that because of diamonds the country's growth rate has been the highest in the world until the 1990s.<sup>12</sup> He also admits that Botswana has held regular and free elections since independence in 1966 though he contends that the elections are only free on polling day.<sup>13</sup> In a scathing remark about Botswana's democracy, Good argues that a duopoly of presidentialism and one party domination has given rise to arrogance, complacency and corruption within the country's leadership.<sup>14</sup> In what he calls 'perpetual democracy', he takes issue with the fact that the Botswana Democratic Party (BDP) has remained in power because of the 'first-past-the post' electoral system.<sup>15</sup>

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<sup>5</sup> Mo Ibrahim Foundation 2018 Ibrahim Index of African Governance 75.

<sup>6</sup> Tradingeconomics.com accessed 13 November 2017.

<sup>7</sup> Tradingeconomics.com accessed 13 November 2017.

<sup>8</sup> Tradingeconomics.com accessed 13 November 2017.

<sup>9</sup> Marobela 2014 EEMCS 67-87.

<sup>10</sup> Tradingeconomics.com accessed 13 November 2017.

<sup>11</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>12</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>13</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>14</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>15</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

According to Good, the President is empowered to do as he pleases, giving an example of former President Sir Ketumile Masire's amendment of the Constitution to ensure the automatic succession of his then deputy, Festus Mogae. He decries what he refers to as the confinement of the Khoisan to 'a gulag of special settlements'.<sup>16</sup> He laments the expulsion of the San from Central Kalahari Game Reserve (CKGR) which he says Government relentlessly enforced in 1997 and 2002. This resulted in a highly publicised court case commonly known as the *Sesana* case.<sup>17</sup> This was followed by another case the basis of which was Government's refusal for applicants to recommission a borehole formerly used to provide water to residents of the CKGR.<sup>18</sup> Good blames this on what he calls 'a philosophy of cultural genocide' conducted by Government against non-Tswana speaking tribes. The Wayeyi tribe, led by Chief Kamanakao, took Government to court in this regard, arguing that sections 77, 78 and 79 of the Constitution were inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution. They also argued that the said sections were discriminatory on the basis of tribalism contrary to sections 3 and 15. Their other contention was that the sections were unjustifiably discriminatory on the basis of tribalism as they afforded preferential treatment to *ex-officio* members of *Ntlo ya Dikgosi*.<sup>19</sup> With that ruling, Good asks: How can the gift of diamonds be turned to reform? He asserts the need to democratise the electoral system. He urges Government to use the mineral wealth that Botswana is endowed with to reduce the gap between the rich and the poor, claiming that half the population lives in poverty despite the fact that Botswana is awash with wealth.<sup>20</sup>

Good was deported from Botswana in May 2005. His deportation, which he argued was politically motivated because of his criticism of the president of Botswana,<sup>21</sup> lowered Botswana's esteem in the eyes of the world.<sup>22</sup> The 2016 deportation of anti-gay Pastor, Steven Anderson<sup>23</sup> and twenty Nigerians in 2012 did not help the

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<sup>16</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>17</sup> *Sesana and Others v The Attorney General* [2006] (2) BLR 633 HC.

<sup>18</sup> *Matsipane Mosetlhanyane & Others vs the Attorney General of Botswana* CALB 074 2010.

<sup>19</sup> *Kamanakao I and Others v. The Attorney-General and Another* 2001 (2) BLR 654 (HC).

<sup>20</sup> Good K *Diamonds Dispossession and Democracy in Botswana* 1-8.

<sup>21</sup> <https://ipi.media> accessed on 30 November 2018.

<sup>22</sup> <https://ipi.media> accessed on 30 November 2018.

<sup>23</sup> [www.bbc.com](http://www.bbc.com) accessed on 30 November 2018.

situation. Neither did the extra-judicial killing of John Kalafatis by members of the military intelligence unit<sup>24</sup> help in cementing the country's claim to a liberal democracy, moreover one with an unblemished human right record.

The Botswana labour movement predates independence, though there was no organized labour in the form of vibrant trade unions which could effectively articulate the workers' interests until 1948.<sup>25</sup> Thereafter, the labour movement became very robust and active.<sup>26</sup> In fact, it is incontrovertible that the labour movement contributed significantly to Botswana's attainment of independence.<sup>27</sup> Though regional in nature, the Francistown Employees Union (FEU) and Serowe Workers Union (SWU) contributed immensely to Botswana's independence.<sup>28</sup> The same applies to the Bechuanaland Protectorate Workers' Union (BPWU), Bechuanaland Trade Union Congress (BTUC), Bechuanaland General Workers Organisation (BGWO), Botswana Civil Service Association (BCSA), Botswana Teachers Union (BTU), Bechuanaland Protectorate African Teachers' Association (BPATA) and African Civil Service Association (ACSA). BCSA and BTU were formed in 1937 and 1949 respectively. BCSA, now Botswana Public Employees Union (BOPEU), fought for the improvement of workers' conditions of service from time immemorial.<sup>29</sup> It teamed up with the African Advisory Council (AAC) in its campaigns against the ill-treatment of Africans by the colonial government.<sup>30</sup> The AAC, whose leadership was dominated by Chiefs and a few educated Batswana, was the people's torch-bearer in as far as political emancipation was concerned.<sup>31</sup>

During the colonial era, when Botswana, then Bechuanaland Protectorate, was under British protection, which the researcher submits was colonisation disguised as protection, labour legislation was premised on two labour statutes which applied in the Cape Colony.<sup>32</sup> These statutes were the *Masters and Servants Act*,<sup>33</sup>

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<sup>24</sup> [www.mmegi.bw](http://www.mmegi.bw) 30 November 2018.

<sup>25</sup> Friedrich Ebert Stiftung *Trade union in Botswana: Country Report* 2003.

<sup>26</sup> Hunyepa 2008 [www.mmegi.bw](http://www.mmegi.bw).

<sup>27</sup> Kodzo and Ntuny 2015 AJPSIR 255-267.

<sup>28</sup> Hunyepa 2008 [www.mmegi.bw](http://www.mmegi.bw).

<sup>29</sup> Hunyepa 2008 [www.mmegi.bw](http://www.mmegi.bw).

<sup>30</sup> Hunyepa 2008 [www.mmegi.bw](http://www.mmegi.bw).

<sup>31</sup> Hunyepa 2008 [www.mmegi.bw](http://www.mmegi.bw).

<sup>32</sup> Proclamation 36 of 1909.

<sup>33</sup> *Masters and Servants Act* of 1856.

and the *Protection of African Labourers Proclamation*.<sup>34</sup> The basis for applying these colonial statutes, which were applied *mutatis mutandis* in the Protectorate as they were in the Cape Colony,<sup>35</sup> was the British Order in Council,<sup>36</sup> decreed by Her Majesty the Queen in pursuance of the powers bestowed upon her by the *Foreign Jurisdictions Act*.<sup>37</sup>

The *Masters and Servants Act* applied to Bechuanaland from 1909 to 1963. The *Protection of African Labourers Proclamation*, which provided employees with very limited protection of their rights and employment security, also applied to Bechuanaland until 1963. These Acts were infamous especially because the colonial government was believed to be insensitive to the plight of Africans and employees' rights.<sup>38</sup> These labour laws were untimely repealed in 1963 when Bechuanaland promulgated her first employment statute, the *Employment Law*.<sup>39</sup> This was done in an effort to improve labour relations in the country as well as to secure cordial industrial relations and workplace peace. The Government of Botswana did this by enacting relatively worker-friendly labour legislation immediately after independence in 1966.<sup>40</sup>

Consequently, Botswana's labour relations have, until 2011, been cordial, with only one major strike led by the Manual Workers Union in 1995.<sup>41</sup> Botswana has ratified and domesticated all the fundamental International Labour Organisation (ILO)'s Conventions.<sup>42</sup> Consequently, her labour legislation developed to give effect to the ILO Conventions. First, was the *Trade Union and Trade Dispute Proclamation, 1942* which, *inter alia*, legalised trade unions.<sup>43</sup> In 1969, the Trade

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<sup>34</sup> *Protection of African Labourers Proclamation* 14 of 1936.

<sup>35</sup> Fombad *The Botswana Legal System* 57.

<sup>36</sup> *Bechuanaland and Protectorate General Administration Order in Council* of 1891; Fombad *The Botswana Legal System* 51.

<sup>37</sup> Fombad *The Botswana Legal System* 57.

<sup>38</sup> Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

<sup>39</sup> Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

<sup>40</sup> Kalonda *The Industrial Court in Botswana: An assessment of its contribution to Labour Relations* 37.

<sup>41</sup> *National Amalgamated Local Central Government Workers Union v Attorney General* 1995 BLR 48 (CA).

<sup>42</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>43</sup> Friedrich Ebert Stiftung *Trade Unions in Botswana, Country Report* Gaborone, Friedrich Ebert Stiftung, 2008, 12-13.

Unions and Trade Dispute Proclamation (TUTDP) was repealed and replaced with the Trade Dispute Act.<sup>44</sup> This Act, *inter alia*, provided for the establishment of the Industrial Arbitration Tribunal and a Board of Inquiry (IATBI). It also made provision for settlement of trade disputes and control and regulation of strikes and lockouts. In 1992, the Trade Disputes Amendment Act (TDAA)<sup>45</sup> was passed. It replaced the Office of the Permanent Arbitrator with the Industrial Court. It also provided for the appointment of judges of the Industrial Court.<sup>46</sup> This amendment was followed by another in 2004 which resulted in the enactment of a comprehensive TDA which made provision for employer organisations. For many years, only industrial class workers were permitted to unionise in the Public Service. In 2004, significant amendments were made to the Trade Union and Employers' Organisation Act<sup>47</sup> which enabled public servants who were not industrial class workers to unionise for the first time in the country's history. Previously, public servants could only form staff associations as was the case with Botswana Civil Servants Association (BCSA), Botswana Federation of Secondary School Teachers (BOFESETE), Botswana Unified Local Government Service Association (BULGASA), Botswana Teachers Union (BTU), Association of Botswana Tertiary Education Lecturers (ABOTEL) all of which were staff associations registered in terms of the Societies Act.

Today, Botswana has many registered trade unions within the public service, most of which are affiliates of BOFEPUSU which was formed in 2009 when most of its founding members defected from Botswana Federation of Trade Unions (BFTU). BOFEPUSU's founding members were BOPEU and the National Amalgamated Local and Central Government and Parastatal Workers Union (NALCGPWU), formerly Botswana Manual Workers Union. BFTU's members are mainly private sector trade unions except for BOPEU, which disaffiliated from BOFEPUSU in 2015 and Botswana Government Workers Union (BOGOWU).

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<sup>44</sup> No. 28 of 1969.

<sup>45</sup> of 1992.

<sup>46</sup> *Veronica Moroka & 2 Others v The Attorney General and Another, Court of Appeal Civil Appeal No. CACGB-121-17 para 11.*

<sup>47</sup> Cap 48:01.

**Table 1: List of trade unions affiliated to BFTU**

<b>Trade Union</b>	<b>Sector</b>
Air Botswana Employees Union (ABEU)	Aviation
Botswana Housing Corporation Workers Union (BHCWU)	Public housing
Botswana Diamond Workers Union (BDWU)	Diamond mining
Botswana Government Workers Union (BOGOWU)	Government Workers
Botswana Meat Industry Workers Union (BMIWU)	Meat production and processing
Botswana National Productivity Centre Support Staff Union (BNPCSSU)	Productivity
Botswana Postal Services Workers Union (BPSWU)	Postal services
Botswana Private Medical and Health Services Workers Union (BPM&HSWU)	Medical and health services
Botswana Railways and Allied Workers Union (BRAWU)	Railways
Botswana Savings Bank Employees Union (BSBEU)	Banking
Botswana Telecommunications Employees Union (BOTEU)	Telecommunications
Botswana Vaccine Institute Staff Union (BVISU)	Vaccine development
Botswana Wholesalers Furniture and Retail Workers Union (BWF&RWU)	Wholesale and retail
Botswana Power Corporation Workers Union (BPCWU)	Power
Central Bank Union (CBU)	Banking
National Development Bank Employees (NDBEU)	Banking

Trainers and Allied Workers Union (TAWU)	Training
Football Union of Botswana (FUB)	Football
University of Botswana Staff Union (UBSU)	Tertiary education
Citizen Entrepreneurial Development Agency Employees Union (CEDAEU)	Entrepreneurial development
Botswana Textile Manufacturing and Packaging Workers Union (BOTEMAPAWU)	Textile, Manufacturing and Packaging
Botswana Mine Workers Union (BMWU)	Mining
Botswana Bank Employees Union (BOBEU)	Banking
Footballers Union of Botswana (FUB)	Football
Botswana Public Employees Union (BOPEU)	Public employees

(Source: [www.bftu.org.bw](http://www.bftu.org.bw) accessed on 17 December 2018)

**Table 2: List of trade unions affiliated to BOFEPUSU**

<b>Trade Union</b>	<b>Sector</b>
Botswana Teachers Union (BTU)	Education
Botswana Sectors of Educators Trade Union (BOSETU)	Education
Botswana Land boards, Local Authorities and Health Workers Union (BLLAHWU)	Land boards, local authorities and health workers
National Amalgamated Local and Central Government and Parastatal Workers Union (NALCGPWU)	Local, central Government and parastatals

(Source: [www.bofepusu.org.bw](http://www.bofepusu.org.bw) accessed on 17 December 2018)

In 2016, there was yet another amendment to the TDA whose principal object was:

to provide for the settlement of trade disputes by the Commissioner of Labour, mediators and arbitrators; for the establishment of the Industrial Court as a court of law and equity; for the recognition of trade unions at the workplace and industry level; for the determination of industrial action, protection of essential services, life and property during industrial action; and for matters incidental or connected therewith.<sup>48</sup>

The year 2011 was a turning point in Botswana's labour relations history. BOFEPUSU, following Government's rejection of its 16% wage increase demand, embarked on countrywide public sector strike. A total of 2 934 employees, who were deemed to be essential service employees and therefore had no right to strike,<sup>49</sup> lost their jobs.<sup>50</sup> Government responded to the strike by widening the categorisation of essential services.<sup>51</sup> It used a Statutory Instrument,<sup>52</sup> made under section 49 of the TDA, to declare certain professions, including teaching, as essential services. BOFEPUSU referred the matter to the Courts which struck down section 49 of the TDA as unconstitutional in the *Essential Service* case.<sup>53</sup> In July 2016, BOFEPUSU reported Botswana to the ILO, accusing it of violating two core ILO Conventions, namely Conventions 87 (Freedom of Association and Protection of the Right to Organize) and 98 (The Right to Organize and Collective Bargaining) and having acted contrary to the ILO framework definition of essential services. Following the report, Botswana made the short list of top aggressors and violators out of 24 countries.<sup>54</sup>

In 2017, following protracted court battles relating to Government's unilateral salary increases outside the Public Service Bargaining Council (PSBC), which resulted in the *Salary Increment* cases,<sup>55</sup> Government did the unthinkable - derecognising the PSBC. In what the trade Unions characterised as victimisation of its leaders, Government attempted to transfer certain trade Union leaders,

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<sup>48</sup> Long title of the *Trade Disputes Act*, 2016.

<sup>49</sup> *The Attorney General v Botswana Land Boards & Local Authorities Workers Union and 3 Others*, Case No. CACGB-053-12.

<sup>50</sup> *Botswana Land Boards & Local Authorities Workers Union v The Attorney General*, Case No. MAHLB-000631-11; *The Attorney General v Botswana Land Boards & Local Authorities Workers Union*, Case No. CACGB-053-12.

<sup>51</sup> Statutory Instrument No. 57 of 2011.

<sup>52</sup> No. 57 of 2011.

<sup>53</sup> *Botswana Land Boards & Local Authorities Workers Union v The Attorney General*, Case No. MAHLB-000631-11; *The Attorney General v Botswana Land Boards & Local Authorities Workers Union*, Case No. CACGB-053-12.

<sup>54</sup> Correspondent 2017 <http://www.mmegi.bw>.

<sup>55</sup> *Botswana Landboards, Local Authorities & Health Workers Union v Director of Public Service Management*, Case No MAHGB-000343/16.

resulting in *Public Officers Transfer cases*.<sup>56</sup> As late as 2018, while in the middle of negotiations with BOFEPUSU to revive the PSBC, Government wrote a letter to all public service trade unions threatening to derecognise them if they did not regularise their registration in terms of section 46 of the Public Service Act. BOFEPUSU went to court and interdicted the intended action, arguing that they had always had recognition agreements with Government, long before the inception of the *Public Service Act* in 2010. The unions argued that this issue was put to rest after Government conceded that public service unions recognised in terms of the *Trade Unions and Employers Organizations Act* did not need to apply for fresh recognition under the Public Service Act in the case of *Botswana Land boards and Local Authorities Workers' Union and Ors vs. Director, Public Service Management & Anor*<sup>57</sup> per Tshosa J (as he then was). In this case, applicants wanted the joining of other recognised public service trade unions in the settlement of the constitution for the PSBC. In 2018, relations between government and labour changed for the better, almost going back to the pre-2011 era. The 2019/20 and 2020/21 salary negotiations were conducted in harmony resulting in a 10% and 6% salary increase for scales A and B and C and D respectively; government has committed to the reconstitution of the PSBC; and through the Trade Disputes (Amendment) Bill,<sup>58</sup> Botswana Vaccine Laboratory Services, Bank of Botswana, Diamond sorting, cutting and selling services, Operational and Maintenance Services of the railways, Sewage services, Veterinary services in the public service, Teaching services, Government Broadcasting services as well as the Immigration and Customs services have been removed from the list of essential services.

## **1.2 Problem statement**

In Botswana, the period between 2011 and 2016 was marred by multiple trade disputes which resulted in a series of court cases, including the *Essential Service*

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<sup>56</sup> *Johannes Phalaagae Tshukudu v The Director of Public Service Management & the Attorney General* Case No. ICUR 11/16; *Koketso Joshua Ntopolelang v K. K Moepeng, High Court* Case No. MAHGB-000628-14 and *Koketso Joshua Ntopolelang v K. K Moepeng, Civil Appeal* Case No. CACGB-106-16.

<sup>57</sup> 2010(3) BLR 351.

<sup>58</sup> Bill No. 17 of 2019.

cases,<sup>59</sup> *Salary Increment* cases,<sup>60</sup> and the *Public Officers Transfer* cases.<sup>61</sup> In response to some of these judgments, BOFEPUSU, through its Secretary General, Tobokani Rari, decried that some aspects of the *Trade Disputes Act, 2016* were inimical to trade dispute resolution and good labour relations.<sup>62</sup> BOFEPUSU has cited such issues as the appointment of Industrial Court judges by the state President acting alone,<sup>63</sup> lengthy, bureaucratic and ineffective collective bargaining procedures,<sup>64</sup> the 'no work no pay' principle<sup>65</sup>, arbitrators' lack of jurisdiction over disputes of right, the non-appealability of arbitrators' decisions on the merits,<sup>66</sup> the Industrial Court's lack of jurisdiction over disputes of interest, independence of the Industrial Court's nominated members, Industrial Court judges' power in relation to nominated members and the broadening of the definition of 'essential services'.<sup>67</sup> It is these concerns, among others, that have brought to the fore the need to critique the TDA, 2016 with a view to make a case for legislative reform, hence this study.

The question investigated by this study is whether the TDA, 2016 enables effective trade dispute resolution and good labour relations?

### **1.3 Aims and objectives of the study**

#### **1.3.1 Aim of the study**

The aim of this study is to critique the TDA, 2016 with a view to make proposals for law reform. Consequently, recommendations are made by way of amendments

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<sup>59</sup> *Botswana Land Boards & Local Authorities Workers Union v The Attorney General*, Case No. MAHLB-000631-11; *The Attorney General v Botswana Land Boards & Local Authorities Workers Union*, Case No. CACGB-053-12.

<sup>60</sup> *Botswana Landboards, Local Authorities & Health Workers Union v Director of Public Service Management*, Case No MAHGB-000343/16.

<sup>61</sup> *Johannes Phalaagae Tshukudu v The Director of Public Service Management & the Attorney General* Case No. ICUR 11/16; *Koketso Joshua Ntopolelang v K. K Moepeng*, High Court Case No. MAHGB-000628-14 and *Koketso Joshua Ntopolelang v K. K Moepeng*, Civil Appeal Case No CACGB-106-16.

<sup>62</sup> Ganetsang 2017 <http://www.sundaystandard.info>.

<sup>63</sup> Ganetsang 2017 <http://www.sundaystandard.info>.

<sup>64</sup> Kodzo and Ntumy Emerging Trends in Employment Relations 2015 GJSS 1-17.

<sup>65</sup> Rari 2017 <http://www.mmegi.bw>.

<sup>66</sup> Section 8(14) of the *Trade Disputes Act, 2016*.

<sup>67</sup> Correspondent 2017 <http://www.mmegi.bw>.

to make the TDA, 2016 more enabling for effective resolution of trade disputes and promotion of good labour relations.

### *1.3.2 Objectives of the study*

The specific objectives of this study are:

- a) To critique the TDA, 2016 by assessing its effectiveness in enabling effective resolution of trade disputes and promotion of good labour relations.
- b) To make recommendations for the amendment of the sections of the TDA, 2016 which are a hindrance to effective resolution of trade disputes and promotion of good labour relations.

### **1.4 Rational and justification of the study**

In the researcher's view, the effective resolution of trade disputes is of cardinal importance in the maintenance and promotion of good labour relations in any country. It is submitted that this can only be achieved if a country has legislation whose provisions in relation to such trade dispute resolution mechanisms as mediation, arbitration, industrial action and litigation promote good labour relations. In Botswana, such legislation is the TDA, 2016. It is submitted that despite its amendments in 1969, 1992, 2004 and 2016, the Act still has provisions which are inimical to effective trade dispute resolution and promotion of good labour relations. It is because of this that a study such as this is required to critique the TDA, 2016 with a view to make recommendations for its amendment. In this way, the study is not only an academic exercise but hopefully contributes to the on-going search for solutions to what the researcher regards as one of the most pressing socio-economic problems in Botswana: conflict resolution and promotion of industrial peace.

## 1.5 Literature review

Very little has been written about Botswana's TDA, let alone critiquing it. The little that has in fact been written is by newspaper reporters.<sup>68</sup> Though lacking in depth and scholarly approach, the areas that have been written on include the categorisation of essential services, independence of Industrial Court judges, collective bargaining procedures and the 'no work no pay' principle.<sup>69</sup> On the contrary, such equally important areas as arbitrators' jurisdiction, the appealability of arbitrators' awards, the Industrial Court's jurisdiction, independence of the Industrial Court's nominated members and the Industrial Court judges' power in relation to nominated members have very little written about them. This study is, therefore, a torch bearer in that regard.

Ntумы<sup>70</sup> missed the opportunity to critique the TDA. Under the chapter entitled 'The Botswana Perspective', he only dealt with such aspects as the Constitution and fundamental rights, formation and registration of trade unions, contextualising "essential service", labour dispute resolution and the role of the Industrial Court, but failed to critique the TDA even though he devoted a significant part of the chapter to labour dispute resolution in Botswana. Kodzo and Ntумы,<sup>71</sup> in their study on "Essential Services" in Botswana, also failed to critique the TDA. Dingake<sup>72</sup> also omitted to critique the TDA. Regarding his book on *Individual Labour Law in Botswana*, despite having a full chapter, namely Chapter 9, on 'Dispute Resolution Procedures and Institutions', he does not provide a critique of the TDA or at least make mention of its limitations. The same applies to Dingake's book on *Collective Labour Law in Botswana*, despite having a full chapter, namely Chapter 7, on 'Dispute Resolution'.<sup>73</sup>

Stefan and Boraïne did not do any better. While their chapter, entitled "A plea for the Development of Coherent Labour and Insolvency Principles on a Regional

<sup>68</sup> Ganetsang 2017 <http://www.sundaystandard.info>.

<sup>69</sup> Rari 2017 <http://www.mmegi.bw>.

<sup>70</sup> Ntумы *Labour Dispute Resolution in Southern Africa* 113-164.

<sup>71</sup> Kodzo and Ntумы *Emerging Trends in Employment Relations* 2015 GJSS 1-17.

<sup>72</sup> Dingake *Collective Labour Law in Botswana*; Dingake *Individual Labour Law in Botswana*.

<sup>73</sup> Dingake *Collective Labour Law in Botswana* 122-125.

*Basis in SADC Countries*”,<sup>74</sup> provides an insightful discussion on the SADC campaign through its Protocol on Employment and Labour,<sup>75</sup> it does not adequately consider the TDA, let alone critique it. This SADC protocol seeks to provide member states with guidance for the harmonisation of employment and labour legislation, as well as social security policies and legislation.<sup>76</sup> The chapter is relevant to Botswana which, though bound by this protocol, has not yet fulfilled her obligations under the Protocol by harmonising employment and labour legislation.

There is, therefore, a *lacuna* in the body of literature in Botswana regarding the critique of the TDA. It is this gap in the existing literature that this study attempts to fill.

### **1.6 Data collection and research methodology**

A qualitative research method was used in the prosecution of this study. The qualitative research model belongs to what Paton refers to as the “naturalistic inquiry” which falls under the broad term ‘phenomenological research’,<sup>77</sup> a term often loosely used to refer to a research method whose findings are not subject to quantitative analysis.<sup>78</sup> This study is, therefore, non-numeric and relies on what is often referred to as “desktop research”.<sup>79</sup> Through a desktop study, primary sources and secondary sources were analysed and critiqued, with lessons drawn from them. Though this is not a comparative study *per se*, as a basis for critiquing the Act, a discussion is provided regarding Botswana’s compliance with ILO Conventions. A comparison is also made between the Act and comparable legislation as well as case law in South Africa, Lesotho and Eswathini (formerly Swaziland). This is done with a view to draw lessons and make recommendations for the TDA, 2016’s reform. The researcher used such primary law sources as legislation, Rules of Court and case law to collect data for the study. Secondary

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<sup>74</sup> Stefan and Borraine “A Plea for the Development of Coherent Labour and Insolvency Principles on a Regional basis in SADC Countries” 267.

<sup>75</sup> SADC Protocol on Employment and Labour (2017).

<sup>76</sup> SADC Protocol on Employment and Labour (2017).

<sup>77</sup> Patton *Qualitative Research and Evaluation Methods* 28.

<sup>78</sup> Patton *Qualitative Research and Evaluation Methods* 28.

<sup>79</sup> Patton *Qualitative Research and Evaluation Methods* 28.

law sources such as books, conference contributions, theses and dissertations, journal articles, newspaper articles and internet sources were also used.

## **1.7 Scope and limitations of the study**

### *1.7.1 Scope of the Study*

It is trite that a country's Constitution and all labour legislation, both substantive and procedural, should promote effective resolution of trade disputes and good labour relations. Therefore, ideally, the Constitution and all labour legislation in Botswana should be critiqued in that regard. However, because of constraints of time and space limitations, the scope of this study is limited to the TDA, 2016.

### *1.7.2 Limitations of the Study*

Unlike the Constitution of South African which provides for the right to fair labour practices,<sup>80</sup> Botswana's Constitution has no such provision. This study is, therefore, limited to the extent that, in critiquing the TDA, 2016, Botswana's Constitution cannot be used as a yardstick. There is also limited literature and case law in this area domestically. This too is a limitation.

## **1.8 Technical terms defined**

### *1.8.1 Trade dispute*

Simply put, a trade dispute is a conflict between employers and employees or trade unions and employers' organisations. Trade unions and employers' organisations become involved in their capacity as representatives of the main parties to the dispute - employers and employees.<sup>81</sup> According to Motshegwa and Tshukudu, trade disputes, which are a form of conflict, "can be categorised into three areas; union to union conflict; and union – management conflict and union - government conflict".<sup>82</sup>

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<sup>80</sup> Section 23 of the *Constitution of South Africa*, 1996.

<sup>81</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 137.

<sup>82</sup> Motshegwa et al 2012 JPAG 118-133.

The TDA, 2016 defines a trade dispute as:

trade dispute includes-(a) an alleged dispute; (b) a dispute between unions; (c) a grievance; or (d) any dispute over (i) the application or the interpretation of any law relating to employment, (ii) the terms and conditions of employment of any employees or any class of employees, or the physical conditions under which such employee or class of employees may be required to work, (iii) the entitlement of any person or group of persons to any benefit under an existing collective agreement, (iv) the existence or non-existence of any collective agreement, (v) the dismissal, employment, suspension from employment, retrenchment, re-employment or reinstatement of any person or group of persons, (vi) the recognition or non- recognition of an organisation seeking to represent employees in the determination of their terms and condition of employment, or (vii) whether or not a dispute does exist.<sup>83</sup>

Globally, most labour legislation, including Botswana's TDA, 2016, distinguishes between two types of trade disputes. These are disputes of rights and disputes of interest which are defined below.

### 1.8.2 *Dispute of right*

Put simply, a dispute of right is a trade dispute whose basis is a substantive right arising from the law, an agreement, an employment contract or a benefit to which the claimant is entitled by law. According to the TDA, 2016:

a dispute of right means a dispute concerning an alleged infringement of a right flowing from any written law, collective agreements or individual employment contracts, or the conferment of a benefit to which the claimant is legally entitled.<sup>84</sup>

Collective agreements and individual employment contracts are self-explanatory. Written law includes law written in statutes, for instance the Employment Act, the Trade Disputes Act, *etcetera*. For example, if an employer denies an expectant female employee the right to go on maternity leave when she is due to give birth, in Botswana that gives rise to a dispute of right because such right is enshrined in the Employment Act.<sup>85</sup> The conferment of a benefit to which the claimant is legally entitled relates to cases where the right arises from conferment by some legal event or principle, e.g. through such legal principles as the doctrine of legitimate expectation.

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<sup>83</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>84</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>85</sup> Section 113 of the *Employment Act*, Cap.47:01.

### 1.8.3 *Dispute of interest*

Simply defined, a dispute of interest is a trade dispute whose basis is anything arising from a labour relationship other than substantive rights whose examples are given at paragraph 1.8.2 above. A dispute over a wage increase, for instance, is a dispute of interest. According to the TDA, 2016, a dispute of interest means:

a dispute concerning the creation of new terms and conditions of employment or the variation of existing terms and conditions of employment".<sup>86</sup>

### 1.8.4 *Mediation*

Just like arbitration, mediation is also an ADR system. In mediation, a neutral third party called a mediator assists the disputing parties in resolving their dispute through facilitation. Unlike in arbitration, a mediator does not make a binding decision.

Dingake<sup>87</sup> puts it aptly when he says:

the crux of the mediatory process is that it is the disputing parties themselves who, with the guidance of the mediator, find a solution to their dispute. The mediator facilitates resolution of disputes and does not impose a solution. He is not an advocate of either party and neither is he or she a judge.<sup>88</sup>

South Africa's Court Annexed Mediation Rules have a similar definition.<sup>89</sup> Mediation is, therefore, by its nature voluntary and non-confrontational since it is not adversarial. The mediator, who is impartial and independent, helps the parties to settle their dispute.<sup>90</sup> According to the TDA, 2016:

mediation includes facilitation, conducting a fact-finding exercise, and the making of an advisory award.<sup>91</sup>

### 1.8.5 *Conciliation*

Like mediation, conciliation is a voluntary, flexible, confidential, and interest-based process. The parties seek to reach an amicable dispute settlement with the

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<sup>86</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>87</sup> Dingake *Individual Labour Law in Botswana* 121.

<sup>88</sup> Dingake *Individual Labour Law in Botswana* 121.

<sup>89</sup> Reg 73 in GN R183 in GG 37448 of 18 March 2014.

<sup>90</sup> Chau 2007 *JPIEE* 43.

<sup>91</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

assistance of the conciliator, who acts as a neutral third party. While in mediation, the mediator generally sets out alternatives for the parties to reach out an agreement, conciliation involves the assistance of a neutral third party who plays an advisory role in reaching an agreement.

### 1.8.6 Arbitration

Arbitration is generally defined as a form of Alternative Dispute Resolution (ADR) in terms of which disputes are resolved outside the courts. The dispute is decided by an arbitrator who renders an arbitration award which is legally binding on both parties and is enforceable in the same manner that a court order is.

According to the TDA, 2016, Arbitration means:

dispute resolution involving one or more neutral third parties agreed to by the disputing parties and whose decision is binding on such parties.<sup>92</sup>

Dingake defines arbitration as:

the process in which a third party acceptable to the parties in dispute presides over a dispute and hands down a binding decision.<sup>93</sup>

### 1.8.7 Industrial action

Industrial action is generally defined as a situation where the employer and employees use their bargaining power to exert pressure on the other to achieve a particular result. While on a strike, employees use their numbers to inflict economic pain on the employer by withdrawing their labour. In a lock-out, the employer uses its power by not providing employees with work, thereby inflicting economic harm on them in terms of the 'no-work, no pay' principle. According to the TDA, 2016, Industrial action means "a strike, lockout or action short of a strike, in furtherance of a trade dispute".<sup>94</sup>

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<sup>92</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>93</sup> Dingake *Individual Labour Law in Botswana* 123.

<sup>94</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

### 1.8.8 Strike

A strike is generally defined as a situation where employees stop working and refuse to work because of a dispute they have with the employer. According to the TDA, 2016:

a strike means the cessation of work by a body of employees in any trade or industry acting in combination or under a common understanding or a concerted refusal or a refusal under a common understanding by such body of employees to continue work.<sup>95</sup>

### 1.8.9 Lock-out

A lock-out is the employees' equivalent of a strike. It is generally defined as a situation where employers deny employees the right to work by closing them out of the workplace. Employers usually use a lock-out to counter a strike. According to the TDA, 2016, a lock-out is defined as:

the closing of a place of employment by an employer in any trade or industry or the suspension of work by such an employer or the refusal by such an employer to continue to employ any number of his or her employees in that trade or industry.<sup>96</sup>

### 1.8.10 Action short of a strike

Action short of a strike is any form of industrial action by employees other than a strike as defined above. An example is a 'go-slow' or 'slow down'. According to the TDA, 2016:

action short of a strike means any method of working (other than the method of working commonly known as working to rule) undertaken by a body of employees in any trade or industry acting in combination or under a common understanding, which method of working slows down normal production or the execution of the normal function under their contracts of employment, of the employees undertaking such method of working.<sup>97</sup>

### 1.8.11 Litigation

The TDA, 2016 does not define the term litigation. Litigation is generally understood to mean a situation where parties to a trade dispute take their dispute

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<sup>95</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>96</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

<sup>97</sup> Section 2(1) of the *Trade Disputes Act*, 2016.

to a court, in this case the Industrial Court, for determination by a judge. Just like an arbitrator, a judge's decision is binding on the parties though they can, of course, appeal it. However, while an arbitrator must be acceptable to both parties, a judge does not have to be acceptable to the parties. A party can, however, apply for the judges' recusal from the case for such reasons as reasonable apprehension of bias.

#### *1.8.12 Trade dispute resolution framework*

The TDA, 2016 does not define the phrase 'trade dispute resolution framework'. A 'trade dispute resolution framework' is generally understood to mean a system which entails trade dispute resolution bodies, laws, rules and regulations, the use of which results in the resolution or settlement of trade disputes. This framework, which, in Botswana, is found in the TDA, 2016, entails mediation, arbitration, industrial action and litigation. It is the efficacy of this framework and by extension, the efficacy of the TDA, 2016, which is the subject of this study.

#### *1.8.13 Labour Relations*

The TDA, 2016 does not define the phrase Labour Relations. Labour Relations is generally understood to mean a relationship between an employer and employee which results from the contract in terms of which the employer provides work and the employee provides services for which the employer remunerates him or her as agreed. Good labour relations are where the relations between the employer and employee are cordial because each party respects the other's rights and performs its obligations satisfactorily in terms of the applicable labour relations laws, standards and agreements.

#### *1.8.14 Effective trade dispute resolution*

This is where trade disputes are settled and/or resolved fairly and speedily at the most minimum cost possible. This is only attainable if the trade dispute resolution institutions and functionaries are effective in the execution of their mandates. The trade dispute resolution institutions and functionaries can only be effective in the execution of their mandates if the relevant legislative framework is supportive in that regard.

### 1.8.15 Essential services

In 1983, the Committee of Experts defined essential services as:

those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.<sup>98</sup>

In Botswana, essential services are those designated as such under section 46 of the TDA, 2016.

## 1.9 Summary

In this chapter, the basis for the study was laid down by discussing the background to the study, stating the problem under investigation, identifying the aims and objectives of the study, describing the rationale and justification of the study and explaining the research methodology and structure of the study. In Chapter two, Botswana's trade dispute resolution framework is discussed.

### 1.10 Framework of the study

The framework of the study consists of five chapters as follows:

**Chapter 1:** will be the introduction.

**Chapter 2:** will discuss Botswana's trade dispute resolution framework.

**Chapter 3:** will discuss Botswana's ratification and compliance with International Labour Organisation (ILO)'s Conventions.

**Chapter 4:** will be a cursory comparative analysis between the TDA, 2016 on the one hand and South Africa's Labour Relations Act 55 of 1995 and the labour relations legislation of Lesotho and Eswathini (formerly Swaziland).

**Chapter 5:** will critique the TDA, 2016.

**Chapter 6:** will be the conclusions and recommendations.

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<sup>98</sup> Gernigon B et al *ILO Principles concerning the right to strike* 17.

## **CHAPTER TWO: BOTSWANA'S TRADE DISPUTE RESOLUTION FRAMEWORK**

### **2.1 Introduction**

In Chapter one, the basis for the study was laid down by discussing the background to the study; stating the problem under investigation; aims and objectives of the study; rationale and justification of the study; research methodology and structure of the study. In this chapter, Botswana's trade dispute resolution framework is discussed.

The settlement and/or resolution of trade disputes occurs within the ambit of a trade dispute resolution framework which in this case is the TDA. This framework hinges on four legs, namely mediation, arbitration, industrial action and litigation at the Industrial Court. Therefore, in order to make an informed critique of the Act, as is the subject of this study, it is apposite that an exposition of this framework first be made, hence this chapter. The four legs of the framework are thus discussed next.

### **2.2 Mediation**

The TDA, 2016 provides for mediation of disputes between employees and employers in the workplace. For instance, a party may refer such a dispute to the Commissioner of Labour or a Labour Officer delegated by the Commissioner<sup>99</sup> and such referral has to be within thirty days if the dispute concerns termination of contract.<sup>100</sup> In terms of the TDA, 2016, a mediator is then required to mediate the trade dispute within thirty days of its referral<sup>101</sup> though such period may be extended if the parties agree or if that is provided for in a Collective Labour Agreement entered into by the parties.<sup>102</sup> If the trade dispute concerns the payment of an entitlement, the referral should be made within thirty days or a reasonable period from the date when the non-payment of the entitlement first came to the party's knowledge or from the date when the party's right to payment

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<sup>99</sup> Section 6(1) of the *Trade Disputes Act*, 2016.

<sup>100</sup> Section 6(2) of the *Trade Disputes Act*, 2016.

<sup>101</sup> Section 7(1) of the *Trade Disputes Act*, 2016.

<sup>102</sup> Section 7(2) of the *Trade Disputes Act*, 2016.

of the entitlement accrued, whichever is the earlier date.<sup>103</sup> Where a mediator fails to mediate the dispute within the stipulated period, the parties to the trade dispute may refer it to arbitration or to the Industrial Court<sup>104</sup> and if they so choose, the mediator is required to explain the implications of the referral in detail to the parties before referring the trade dispute.<sup>105</sup> The mediator is empowered to determine how the mediation should be concluded and may require further hearings to be held within the period referred to in section 7 (1).<sup>106</sup>

Any statement made and any information divulged by a party to a trade dispute during mediation is regarded as confidential and without prejudice to the party unless the party states otherwise.<sup>107</sup> Therefore, subject to section 7 (6), a party to a mediation process or any other person concerned in or present during the mediation, is prohibited from disclosing any statement made or any information divulged, to any person.<sup>108</sup> A person who contravenes section 7 (7) commits an offence and is liable to a fine of P 2 000 or to imprisonment for 12 months or to both.<sup>109</sup>

Notwithstanding the time lines for referral and mediation of trade disputes, in terms of section 7(9) of the TDA, 2016, a mediator may allow an application for the condonation of a late referral provided that the applicant shows good cause for such late referral.<sup>110</sup> In addition to this power, the mediator, still in terms of section 7(9) of the TDA, 2016, has the power to dismiss a referral if the referring party fails to attend a mediation hearing.<sup>111</sup> He or she also has the power to give a default award on any matter, except an award for reinstatement, if a party upon whom a referral has been served in terms of section 6(3) of the Act fails to attend a mediation hearing.<sup>112</sup> He or she can also reverse, on good cause shown, any dismissal of a referral, or default award, contemplated under paragraphs (c) and

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<sup>103</sup> Section 6(7) of the *Trade Disputes Act*, 2016.

<sup>104</sup> Section 7(3) of the *Trade Disputes Act*, 2016.

<sup>105</sup> Section 7(4) of the *Trade Disputes Act*, 2016.

<sup>106</sup> Section 7(5) of the *Trade Disputes Act*, 2016.

<sup>107</sup> Section 7(6) of the *Trade Disputes Act*, 2016.

<sup>108</sup> Section 7(7) of the *Trade Disputes Act*, 2016.

<sup>109</sup> Section 7(8) of the *Trade Disputes Act*, 2016.

<sup>110</sup> Section 7(9) (b) of the *Trade Disputes Act*, 2016.

<sup>111</sup> Section 7(9) (c) of the *Trade Disputes Act*, 2016.

<sup>112</sup> Section 7(9) (d) of the *Trade Disputes Act*, 2016.

(d) respectively.<sup>113</sup> The mediator can also recommend a settlement<sup>114</sup> or make an advisory award if the parties request so, or if it is in the interests of settlement to do so.<sup>115</sup>

It is mandatory that a default award made pursuant to section 7 (9) (d) of the Act should be confirmed or varied by the Commissioner after the expiry of the period referred to in section 7 (12).<sup>116</sup> The requirements for the Commissioner to exercise this function are that there should be an ambiguity, error or omission in the default award.<sup>117</sup> Any party affected by a dismissal of a referral or by a default award may, within 30 days of the date of the dismissal of the referral or the default award, apply to the mediator for the reversal, on good cause, or the dismissal of referral or the default award. The party is of course required to give notice to the other party in whose favour the dismissal of the referral or the default award was made.<sup>118</sup>

Where a settlement has been recommended to the parties by a mediator, in accordance with section 7 (9) (f), the terms of the settlement agreement have the same force and effect as a judgment or order of the Industrial Court and can be enforceable in the same manner as such judgment or order.<sup>119</sup> Just like a settlement agreement, a default award by a mediator and confirmed by the Commissioner has the same force and effect as a judgment or order of the Industrial Court and is enforceable in like manner as such judgment or order.<sup>120</sup> This has been confirmed by the Court of Appeal, with Kirby J.P writing for the unanimous court, in the case of *Veronica Moroka and 2 Others v The Attorney General and Another*.<sup>121</sup> In giving effect to the judgment, the Judge President of the Industrial Court, in terms of section 15(9) of the Act, issued Practice Directive No.1 of 2018 on Execution of Awards and Settlement Agreements under section

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<sup>113</sup> Section 7(9) (e) of the *Trade Disputes Act*, 2016.

<sup>114</sup> Section 7(9) (f) of the *Trade Disputes Act*, 2016.

<sup>115</sup> Section 7(9) (g) of the *Trade Disputes Act*, 2016.

<sup>116</sup> Section 7(10) of the *Trade Disputes Act*, 2016.

<sup>117</sup> Section 7(11) of the *Trade Disputes Act*, 2016.

<sup>118</sup> Section 7(12) of the *Trade Disputes Act*, 2016.

<sup>119</sup> Section 7(13) of the *Trade Disputes Act*, 2016.

<sup>120</sup> Section 7(14) of the *Trade Disputes Act*, 2016.

<sup>121</sup> Court of Appeal Civil Appeal No. CACGB-121-17.

7(3) and (15) of the Act. The Practice Directive became effective on 10 September 2018.<sup>122</sup>

A party to a dispute may appeal to the Industrial Court in respect of a decision made in terms of section 7 (9) (a) (iii), (b) or (e).<sup>123</sup> A mediator is not a compellable witness in any legal proceedings regarding anything said or information divulged during mediation. The mediator is, however, required to provide the Industrial Court with a form, prescribed by the Minister and signed by the referring party, setting out the claims that the referring party had referred for mediation and the claims that were mediated on. This is to enable the Industrial Court to establish whether or not it has jurisdiction to hear the matter.<sup>124</sup> Subject to section 7 (18), the mediator is required to issue a certificate of failure to settle if the trade dispute is not settled within the period prescribed under section 7 (1) or (2).<sup>125</sup> The mediator may issue a certificate of failure to settle before the expiry of the period prescribed under section 7 (1) or (2) if he or she is satisfied that there are no prospects of settlement at that stage of the trade dispute. Following this, either party may refer the trade dispute to the Industrial Court for adjudication.<sup>126</sup>

## **2.3 Arbitration**

### *2.3.1 Jurisdiction of arbitrators*

The TDA, 2016 enjoins the Commissioner to refer a trade dispute to arbitration where the parties agree<sup>127</sup> or where they are engaged in an essential service and the dispute concerns a dispute of interest.<sup>128</sup> The Commissioner is also compelled to refer a trade dispute to arbitration if the Industrial Court has directed him or her to refer the dispute for arbitration.<sup>129</sup> Where the trade dispute concerns a dispute of interest, the Commissioner is also enjoined to refer such a trade dispute for arbitration. Here, the exception is a case of a collective dispute of interest where

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<sup>122</sup> Practice Directive No.1 of 2018 on Execution of Awards and Settlement Agreements.

<sup>123</sup> Section 7(15) of the *Trade Disputes Act*, 2016.

<sup>124</sup> Section 7(16) of the *Trade Disputes Act*, 2016.

<sup>125</sup> Section 7(17) of the *Trade Disputes Act*, 2016.

<sup>126</sup> Section 7(18) of the *Trade Disputes Act*, 2016.

<sup>127</sup> Section 8(1) (a) of the *Trade Disputes Act*, 2016.

<sup>128</sup> Section 8(1) (b) of the *Trade Disputes Act*, 2016.

<sup>129</sup> Section 8(1) (c) of the *Trade Disputes Act*, 2016.

the employees are represented by a trade union.<sup>130</sup> The other instance where the Commissioner is obliged to refer a trade dispute for arbitration is where a mediator fails to resolve or fails to mediate a dispute of interest within the periods referred to in section 7(1) and (2) of the Act, except in the case of a collective dispute of interest where an employee is represented by a trade union.<sup>131</sup>

In an attempt to achieve speedy resolution of trade disputes, the arbitrator is empowered to attempt to resolve the dispute through mediation before commencing the arbitration hearing if he or she is of the opinion that there are prospects for settlement.<sup>132</sup> Where the trade dispute has not been mediated upon, he or she may attempt to resolve the dispute through mediation before the commencement of the arbitration hearing if he or she is of the view that there are prospects of settlement.<sup>133</sup> Subject to any prescribed codes or guidelines published in terms of section 53 of the Act, the arbitrator may conduct the arbitration in a manner that he or she considers fit. He or she is, however, compelled to deal with the substantial merits of the trade dispute with minimum legal formalities.<sup>134</sup> Also, just like the mediator, the arbitrator must settle a trade dispute referred to him or her for arbitration within 30 days of the trade dispute being referred to him or her.<sup>135</sup>

### 2.3.2 Arbitration awards

Section 8(8) of the TDA, 2016 gives arbitrators a wide range of powers. They have the power to give directions to the parties of a trade dispute provided that the object of such directions is to promote expedient and just hearing and determination of any trade dispute before them.<sup>136</sup> They are also empowered to make an award for a specific period, or such other award as they consider appropriate.<sup>137</sup> They also have the power to vary or rescind an award if it was erroneously made by a mediator in the absence of any party affected by the

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<sup>130</sup> Section 8(1) (d) of the *Trade Disputes Act*, 2016.

<sup>131</sup> Section 8(1) (e) of the *Trade Disputes Act*, 2016

<sup>132</sup> Section 8(3) of the *Trade Disputes Act*, 2016.

<sup>133</sup> Section 8(4) of the *Trade Disputes Act*, 2016.

<sup>134</sup> Section 8(5) of the *Trade Disputes Act*, 2016.

<sup>135</sup> Section 8(6) of the *Trade Disputes Act*, 2016.

<sup>136</sup> Section 8(8) (a) of the *Trade Disputes Act*, 2016.

<sup>137</sup> Section 8(8) (b) of the *Trade Disputes Act*, 2016.

award, if it is ambiguous or contains an error or omission, but only to the extent of that ambiguity, error or omission or if it was made by a mediator as a result of a mistake common to the parties of the proceedings.<sup>138</sup> Arbitrators also have the power to dismiss a referral if the referring party, after notice to the other party to attend the hearing, fails to attend an arbitration hearing.<sup>139</sup> Their other powers include giving a default award if a party upon whom a referral has been served in terms of section 6(3) of the Act fails to attend an arbitration hearing<sup>140</sup> or reverses, on good cause shown, any dismissal of a referral, or a default award, contemplated under paragraph (d) and (e) respectively.<sup>141</sup>

An arbitrator is obliged to give an award with reasons for such an award within 30 days after the arbitration hearing.<sup>142</sup> However, where he or she considers it appropriate, the Commissioner may extend the number of days within which an award is to be made under subsection (9).<sup>143</sup> In line with the decision in *Veronica Moroka & 2 Others v The Attorney General and Another supra*, just like a settlement agreement and a default award, an arbitration award has the same force and effect as a judgment or order of the Industrial Court and can be enforced in like manner as such judgment or order.<sup>144</sup>

### 2.3.3 Appeals against arbitration awards

A person aggrieved by a decision of an arbitrator under the Act may appeal against such decision to the Industrial Court within 14 days.<sup>145</sup> This appeal can only lie in respect of a decision to join a party to the arbitration proceedings and the jurisdiction of the arbitrator to make an award.<sup>146</sup> In any mediation or arbitration proceeding, a party to a trade dispute may appear personally or be represented by a member or officer of that party's organisation, a colleague, if the party is an employee, or a director or employee of that person, if the party is a juristic

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<sup>138</sup> Section 8(8) (c) (i), (ii) and (iii) of the *Trade Disputes Act*, 2016.

<sup>139</sup> Section 8(8) (d) of the *Trade Disputes Act*, 2016.

<sup>140</sup> Section 8(8) (e) of the *Trade Disputes Act*, 2016.

<sup>141</sup> Section 8(8) (f) of the *Trade Disputes Act*, 2016.

<sup>142</sup> Section 8(9) of the *Trade Disputes Act*, 2016.

<sup>143</sup> Section 8(10) of the *Trade Disputes Act*, 2016.

<sup>144</sup> Section 8(12) of the *Trade Disputes Act*, 2016.

<sup>145</sup> Section 8(13) of the *Trade Disputes Act*, 2016.

<sup>146</sup> Section 8(14) of the *Trade Disputes Act*, 2016.

person.<sup>147</sup> The foregoing notwithstanding, an arbitrator may permit a legal representative to represent a party if the parties to the trade dispute agree or at the request of a party. Such permission should only be granted if the arbitrator is satisfied that the trade dispute is of such complexity that it is appropriate to allow legal representation and the other party will not be prejudiced by such legal representation.<sup>148</sup>

### *2.3.4 Referrals to the Industrial Court*

Notwithstanding the provision of sections 5, 6, 7 and 8 of the Act, the Commissioner or a Labour Officer delegated by him or her may, within 30 days, refer a trade dispute mediated upon under the Act to the Industrial Court for determination.<sup>149</sup> Where the Minister is satisfied that a trade dispute exists or is anticipated and where, subject to section 8(1) (b) of the Act, the trade dispute involves an essential service or categories of officers regarded as members of management, the Minister may refer the trade dispute for arbitration or to the Industrial Court. This may be done whether the trade dispute has or has not been referred to the Commissioner under section 6. If the Minister exercises this power, he or she is required to immediately serve written notice of his or her decision on the parties to the dispute.<sup>150</sup>

## **2.4 Industrial Action**

### *2.4.1 Protected strikes or lockouts*

In terms of the TDA, 2016 it is obligatory to refer a dispute of interest for mediation before resorting to a strike or lockout.<sup>151</sup> Also, a party must give the other party a 48 hour notice before the commencement of a strike or lockout.<sup>152</sup> Before a strike or lockout commences, the parties have to agree on the rules regulating the action, failing which the mediator must determine the rules in accordance with any

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<sup>147</sup> Section 9(1) of the *Trade Disputes Act*, 2016.

<sup>148</sup> Section 9(2) of the *Trade Disputes Act*, 2016.

<sup>149</sup> Section 12 of the *Trade Disputes Act*, 2016.

<sup>150</sup> Section 13 of the *Trade Disputes Act*, 2016.

<sup>151</sup> Section 42(1) (a) of the *Trade Disputes Act*, 2016.

<sup>152</sup> Section 42 (1) (b) of the *Trade Disputes Act*, 2016.

guidelines published in terms of section 53 of the Act.<sup>153</sup> These rules include those concerning the conduct of the strike or lockout and any conduct in contemplation or furtherance of the strike or lockout including picketing and the use of replacement labour. The latter is, however, subject to the provisions of subsection (4) of the Act.<sup>154</sup> Employers are not allowed to engage replacement labour if the parties have concluded an agreement on the provision of a minimum service. Such prohibition also applies if no minimum service agreement is concluded within 14 days of the commencement of the strike or lockout.<sup>155</sup> A trade union is allowed to picket outside the employer's premises during a strike or lockout if the parties have concluded an agreement on the provision of a minimum service or if no such agreement is concluded within 14 days of the commencement of the strike or lockout.<sup>156</sup>

#### *2.4.2 Unprotected strikes or lockouts*

The TDA, 2016 prohibits strikes and lockouts that do not comply with the aforesaid provisions or an agreed procedure. The prohibition also applies if the strike or lockout is in breach of a peace clause in a collective labour agreement. Strikes or lockouts are also regarded as unprotected if the subject matter of the strike or lockout is not a trade dispute, is regulated by a collective labour agreement, is a matter that is required by the Act to be referred for arbitration or to the Industrial Court for adjudication, or is a matter that the parties to the dispute of interest have agreed to refer for arbitration.<sup>157</sup> Employees in essential services are not allowed to take part in a strike. Similarly, employers in essential services are not allowed to take part in a lockout.<sup>158</sup> It is, however, worth noting that, although an essential service employee who engages in a strike commits an offence and is liable to a fine not exceeding P 2 000 or to imprisonment for a term not exceeding 12 months, or to both,<sup>159</sup> there is no punishment for an essential service employer who locks out its employees. The punishment applicable to an essential service

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<sup>153</sup> Section 43(1) of the *Trade Disputes Act*, 2016.

<sup>154</sup> Section 43(2) of the *Trade Disputes Act*, 2016.

<sup>155</sup> Section 43(3) of the *Trade Disputes Act*, 2016.

<sup>156</sup> Section 43(4) of the *Trade Disputes Act*, 2016.

<sup>157</sup> Section 45(1) of the *Trade Disputes Act*, 2016.

<sup>158</sup> Section 47 of the *Trade Disputes Act*, 2016.

<sup>159</sup> Section 48(1) of the *Trade Disputes Act*, 2016.

employee who engages in a strike, is also applicable for any person who causes, procures, counsels or influences any essential service employee to engage in a strike.<sup>160</sup>

Where there is a trade dispute involving parties in an essential service, it should be reported to the Commissioner by an organisation acting on behalf of the employer, employers or employees. The provisions of section 6(3) apply in respect of a report of the trade dispute made in accordance with section 6 (1). Where a trade dispute is reported in accordance with that section, it is deemed to have been reported to the Commissioner under section 6. Where there is failure to settle a trade dispute reported to the Commissioner in accordance with section 6 (2) within 30 days from the day on which the trade dispute was reported, the Commissioner may immediately refer the trade dispute to an arbitrator if the dispute is a dispute of interest, except in the case of a collective dispute of interest where the employees are represented by a trade union,<sup>161</sup> or to the Industrial Court if the trade dispute is a dispute of right.

## **2.5 Litigation at the Industrial Court**

### **2.5.1 Origins of the Industrial Court**

Before discussing litigation at the Industrial Court, it is apposite that a brief background of the origins and evolution of the Industrial Court be given. The original Trade Disputes Act<sup>162</sup> provided for disputes to be adjudicated, *inter alia*, by a Permanent Arbitrator.<sup>163</sup> The Industrial Court replaced the institution of the Permanent Arbitrator<sup>164</sup> following the enactment of the Trade Disputes Act<sup>165</sup> which came into force on 9 October 1997.<sup>166</sup> As per Kirby JP, the Industrial Court's

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<sup>160</sup> Section 48(2) of the *Trade Disputes Act*, 2016.

<sup>161</sup> Section 8(1) (d) of the *Trade Disputes Act*, 2016.

<sup>162</sup> No. 19/1982.

<sup>163</sup> *Veronica Moroka & 2 Others v The Attorney General and Another*, Court of Appeal Civil Appeal No. CACGB-121-17 para 11.

<sup>164</sup> *Dingake Collective Labour Law in Botswana* 23.

<sup>165</sup> No. 23/1997.

<sup>166</sup> *Veronica Moroka & 2 Others v The Attorney General and Another*, Court of Appeal Civil Appeal No. CACGB-121-17 para 11.

status “as a court was uncertain and no provision was made for it to be served by a Registrar, with the usual powers and duties of such office”.<sup>167</sup>

The Court of Appeal, in *Botswana Railways Organization v Setsogo and Others*,<sup>168</sup> remedied this defect. It held that the Industrial Court was not a mere statutory tribunal, but was, in line with the Constitution of Botswana,<sup>169</sup> a Subordinate Court, having limited jurisdiction. Following the change of the definition of Subordinate Court by Act 2/2002 to exclude the Industrial Court, along with the Court of Appeal, the High Court and a court martial, the Industrial Court became a superior court, albeit still with limited jurisdiction unlike the High Court, for instance, which has inherent unlimited jurisdiction. Consequently, appeals from the Industrial Court were referred to the Court of Appeal. Perhaps most significantly, Industrial Court judges were now, just like High Court judges, protected by, *inter alia*, security of tenure.<sup>170</sup>

The Trade Disputes Act was further amended and replaced by the Trade Disputes Act, 2003 which commenced on 6 April 2004 as Act No. 15 of 2004. This Act provided for the appointment of the Registrar and an Assistant Registrar,<sup>171</sup> but still had no section clothing them with specific powers. It also bestowed, in the Court, the power to hear urgent applications<sup>172</sup> and to grant interdicts,<sup>173</sup> thereby remedying the defects identified in *Botswana Railways Organization v Setsogo & Others supra*, but it still had no provision dealing with writs of execution and sales flowing therefrom.

### 2.5.2 *The Industrial Court's jurisdiction*

The Industrial Court's jurisdiction<sup>174</sup> includes the power to hear and determine all trade disputes except disputes of interest<sup>175</sup> as well as the power to interdict any

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<sup>167</sup> *Veronica Moroka & 2 Others v The Attorney General and Another*, Court of Appeal Civil Appeal No. CACGB-121-17 para 11.

<sup>168</sup> 1996 BLR 763 CA.

<sup>169</sup> Section 127(1).

<sup>170</sup> *Veronica Moroka & 2 Others v The Attorney General and Another*, Court of Appeal Civil Appeal No. CACGB-121-17 para 11.

<sup>171</sup> Section 16(8) of the *Trade Disputes Act, 2004*.

<sup>172</sup> Section 20(3) of the *Trade Disputes Act, 2004*.

<sup>173</sup> Section 18(1) of the *Trade Disputes Act, 2004*.

<sup>174</sup> Section 20(1) of the *Trade Disputes Act, 2016*.

<sup>175</sup> Section 20(1) (a) of the *Trade Disputes Act, 2016*.

unlawful industrial action and to grant general interdicts, declaratory orders or interim orders.<sup>176</sup> It is also clothed with the power to hear appeals and reviews of the decisions of mediators and arbitrators respectively.<sup>177</sup> It has the power to direct the Commissioner to assign a mediator to mediate a dispute if it is of the opinion that the matter has not been properly mediated or requires further mediation.<sup>178</sup> The Industrial Court also has the power to direct the Commissioner to refer a dispute that is before the Court for arbitration<sup>179</sup> as well as to refer any matter to an expert and, at the Court's discretion, to accept the expert's report as evidence in the proceedings.<sup>180</sup>

The Industrial Court also has the power to give such directions to parties to a trade dispute provided the object of such directions is the expedient and just hearing and determination or disposal of any dispute before it. Any matter of law and any question as to whether a matter for determination is a matter of law or a matter of fact is decided by the presiding judge.<sup>181</sup> With respect to all issues other than those referred to under section 20 (2), the decision of the majority of the Court prevails.<sup>182</sup> Where there is no majority decision under section 20 (3), the decision of the judge prevails.<sup>183</sup> Any interested party in any proceedings under the Act may appear by legal representation or may be represented by any other person so authorised by that party.<sup>184</sup>

A decision of the Industrial Court has the same force and effect as a decision of the High Court,<sup>185</sup> and because, unlike South Africa, Botswana has no Labour Appeal Court, decisions of the Industrial Court, just like those of the High Court, are appealable to the highest court in the land, that is, the Court of Appeal.<sup>186</sup>

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<sup>176</sup> Section 20(1) (b) of the *Trade Disputes Act*, 2016.

<sup>177</sup> Section 20(1) (c) of the *Trade Disputes Act*, 2016.

<sup>178</sup> Section 20(1) (d) of the *Trade Disputes Act*, 2016.

<sup>179</sup> Section 20(1) (e) of the *Trade Disputes Act*, 2016.

<sup>180</sup> Section 20(1) (f) of the *Trade Disputes Act*, 2016.

<sup>181</sup> Section 20(2) of the *Trade Disputes Act*, 2016.

<sup>182</sup> Section 20(3) of the *Trade Disputes Act*, 2016.

<sup>183</sup> Section 20(4) of the *Trade Disputes Act*, 2016.

<sup>184</sup> Section 24(2) of the *Trade Disputes Act*, 2016.

<sup>185</sup> Section 28(2) of the *Trade Disputes Act*, 2016.

<sup>186</sup> Section 20(5) of the *Trade Disputes Act*, 2016.

### 2.5.3 Appointment of Industrial Court judges and nominated members

The Trade Disputes Act went through another amendment in 2016. Section 14 of the TDA, 2016 ensures the continuation of the Industrial Court. It outlines its functions as the settlement of trade disputes as well as the securing and maintenance of good industrial relations in Botswana.<sup>187</sup> The judges of the Industrial Court are appointed by the state President from among persons possessing the qualifications to be judges of the High Court as prescribed under section 96 of the Constitution.<sup>188</sup> These judges are headed by the President of the Industrial Court designated by the state President from among the judges.<sup>189</sup> A judge of the Industrial Court who is not a citizen of Botswana or who is not appointed on permanent and pensionable terms may be appointed on contract basis and is eligible for reappointment.<sup>190</sup> Judges of the Industrial Court sit with two nominated members, one of whom is selected by the judge from among persons nominated by the organisation representing employees or trade unions in Botswana and the other selected by the judge from among persons nominated by the organisation representing employers in Botswana.<sup>191</sup> Where, for any reason, the nominated members are or either of them is absent for any part of the hearing of a trade dispute, the jurisdiction of the court may be exercised by the judge alone or with the remaining member of the Court, whichever the case may be, unless the judge, for good reason, decides that the hearing should be postponed.<sup>192</sup>

### 2.5.4 Tenure of office of Industrial Court judges

An Industrial Court judge vacates office on attaining the age of 70 years, provided that the state President may permit him or her to continue in office for such period as may be necessary to enable him or her to deliver judgment or to do any other thing in relation to proceedings that had commenced before him or her.<sup>193</sup> In accordance with the provisions of the proviso to section 96(6) of the Constitution, a

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<sup>187</sup> Section 14 of the *Trade Disputes Act*, 2016.

<sup>188</sup> Section 15(1) of the *Trade Disputes Act*, 2016.

<sup>189</sup> Section 15(2) of the *Trade Disputes Act*, 2016.

<sup>190</sup> Section 15(4) of the *Trade Disputes Act*, 2016.

<sup>191</sup> Section 15(5) of the *Trade Disputes Act*, 2016.

<sup>192</sup> Section 15(6) of the *Trade Disputes Act*, 2016.

<sup>193</sup> Section 18(1) of the *Trade Disputes Act*, 2016.

person appointed to act as an Industrial Court judge vacates that office on attaining the age of 75 years.<sup>194</sup>

### *2.5.5 Removal of Industrial Court judges*

An Industrial Court judge may be removed from office only for inability to perform the functions of his or her office, whether arising from infirmity of body or mind, or from any other cause or for serious misconduct.<sup>195</sup> The power to remove an Industrial Court judge from office vests in the state President acting in accordance with the procedure provided under section 97 of the Constitution for the removal of High Court judges.<sup>196</sup>

## **2.6 Summary**

In order to lay a basis for its critique, in this chapter, Botswana's trade dispute resolution framework was discussed. In the next chapter, a foundation is laid for a critique of Botswana's trade dispute resolution framework by making an exposition of Botswana's compliance with ILO Conventions.

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<sup>194</sup> Section 18(2) of the *Trade Disputes Act*, 2016.

<sup>195</sup> Section 19(1) (a) and (b) of the *Trade Disputes Act*, 2016.

<sup>196</sup> Section 19(2) of the *Trade Disputes Act*, 2016.

## **CHAPTER 3: BOTSWANA AND INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTIONS**

### **3.1 Introduction**

In chapter two, I discussed Botswana's trade dispute resolution framework (i.e. mediation, arbitration, industrial action and litigation at the Industrial Court). In this chapter, we discuss Botswana's ratification of and compliance with International Labour Organisation (ILO) Conventions.

### **3.2 The International Labour Organisation (ILO)**

The ILO was established under the Versailles Peace Treaty in 1919.<sup>197</sup> Its primary mandate is to draft Conventions on labour standards and oversee the development of international labour law. Its aims are to promote workers' rights, encourage decent employment opportunities, enhance social protection and strengthen dialogue on labour-related matters.<sup>198</sup> The ILO, the only tripartite agency of the United Nations (UN), was formed at the dawn of World War 1 to advance a mandate based on the principle that universal and long-lasting peace can only be achieved if it is anchored on social justice and fairness. In 1946, the ILO set the record of becoming the first specialised UN agency. Under the auspices of the ILO, governments, employers and workers congregate to set international labour standards and develop policies and programmes for the promotion of decent work for all.<sup>199</sup> In that regard, workers, employers and governments have an equal opportunity to influence labour standards, policies and programmes.

### **3.3 ILO Conventions and recommendations**

International labour standards are legal instruments drawn up and agreed to by the ILO's constituents, namely employees, employers and governments.<sup>200</sup> They

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<sup>197</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>198</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>199</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>200</sup> <https://www.ilo.org> accessed on 19 November 2018.

enunciate basic labour principles, rights and obligations.<sup>201</sup> These labour standards are either Conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which are non-binding and serve as guidelines.<sup>202</sup> Being treaties, in Botswana, Conventions are governed by a dualistic rather than a monolithic theory.<sup>203</sup> Consequently, for an ILO Convention to become part of Botswana's labour law, it has to be passed by the Legislature and be assented to by the state President in order to become part of national legislation.<sup>204</sup> In contradistinction, in terms of the doctrine of incorporation, customary international law becomes part of Botswana's law without any specific legislation being passed and assented to by Parliament and the President respectively.<sup>205</sup> Customary international law, therefore, has the force of law in Botswana unless expressly excluded by statutory law.<sup>206</sup> This was upheld in the case of the *Republic of Angola v Springbok Investments Pty Ltd*.<sup>207</sup>

Usually, a Convention outlines the basic principles that must be implemented by member states that have ratified it, while a related recommendation provides detailed guidelines on the Convention's application. Recommendations can, however, also be self-directed, that is, not linked or related to any Convention.<sup>208</sup>

Conventions and recommendations are adopted at the ILO's annual International Labour Conference. The ILO Constitution provides that once a Convention or recommendation is adopted, member states are required to submit them to their governments for consideration.<sup>209</sup> With regard to Conventions, the expected outcome is ratification by the member state. If it is ratified, a Convention normally comes into force one year after the date of its ratification.<sup>210</sup> By ratifying a Convention, a country commits to domesticate the Convention into domestic law

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<sup>201</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>202</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>203</sup> Tshosa "The Status and Role of International Law in the National Law of Botswana" 237.

<sup>204</sup> *Kenneth Good v Attorney General* 2005 (2) BLR 337 (CA); Fombad *Botswana Introductory Notes* 31.

<sup>205</sup> Fombad *Botswana Introductory Notes* 31.

<sup>206</sup> *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.

<sup>207</sup> *Republic of Angola v Springbok Investments Pty Ltd* 2005 (2) BLR 159.

<sup>208</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>209</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>210</sup> <https://www.ilo.org> accessed on 21 December 2018.

and practice and to periodically report on its application as required.<sup>211</sup> There are three types of Conventions, namely fundamental Conventions, governance (priority) Conventions and technical Conventions.<sup>212</sup>

### 3.3.1 *Fundamental Conventions*

The ILO's Governing Body (GB) has identified eight Conventions as fundamental. These Conventions cover areas that are regarded as fundamental labour principles and rights.<sup>213</sup> The eight fundamental Conventions are Freedom of Association and Protection of the Right to Organise;<sup>214</sup> Right to Organise and Collective Bargaining;<sup>215</sup> Forced Labour;<sup>216</sup> Abolition of Forced Labour;<sup>217</sup> Minimum Age;<sup>218</sup> Worst Forms of Child Labour;<sup>219</sup> Equal Remuneration<sup>220</sup> and Discrimination (Employment and Occupation).<sup>221</sup>

### 3.3.2 *Governance (priority) Conventions*

The GB has designated four conventions as governance (priority) Conventions.<sup>222</sup> These are regarded as important for the operation of the international labour standards system. The ILO Declaration on Social Justice for a Fair Globalization has underscored the significance of these Conventions to governance.<sup>223</sup> The four governance(priority) Conventions are the Labour Inspection;<sup>224</sup> Employment Policy;<sup>225</sup> Labour Inspection (Agriculture)<sup>226</sup> and the Tripartite Consultation (International Labour Standards).<sup>227</sup>

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<sup>211</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>212</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>213</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>214</sup> Convention, 1948 (No. 87).

<sup>215</sup> Convention, 1949 (No. 98).

<sup>216</sup> Convention, 1930 (No. 29).

<sup>217</sup> Convention, 1957 (No. 105).

<sup>218</sup> Convention, 1973 (No. 138).

<sup>219</sup> Convention, 1999 (No. 182).

<sup>220</sup> Convention, 1951 (No. 100).

<sup>221</sup> Convention, 1958 (No. 111).

<sup>222</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>223</sup> <https://www.ilo.org> accessed on 21 December 2018.

<sup>224</sup> Convention, 1947 (No. 81).

<sup>225</sup> Convention, 1964 (No. 122).

<sup>226</sup> Convention, 1969 (No. 129).

<sup>227</sup> Convention, 1976 (No. 144).

### 3.3.3 Technical Conventions

The GB has also designated 177 Conventions as technical. Compared to Fundamental Conventions and Governance (priority) Conventions, these are regarded as being of little significance for the functioning of the international labour standards system.

### 3.4 Botswana and ILO Conventions

Botswana has been a member of the ILO since 27 February 1978. As a member of the ILO, Botswana is obliged to enact laws that are consistent with her international obligations in accordance with the *pacta sunt servanda* principle.<sup>228</sup> Since joining the ILO, Botswana has ratified 15 Conventions all of which are still in force since none has been denounced. Of these 15 Conventions, Botswana has ratified all 8 fundamental conventions, 1 out of 4 governance (priority) Conventions and 6 out of 177 technical Conventions.<sup>229</sup>

#### 3.4.1 ILO Conventions ratified by Botswana

**Table 3: ILO Conventions ratified by Botswana**

Convention Code	Name of Convention	Date of ratification	Status
<b>Fundamental Conventions</b>			
<b>C029</b>	Forced Labour Convention, 1990(No.29)	5 June 1997	In Force
<b>C087</b>	Freedom of Association and Protection of the Right to Organize Convention, 1948(No. 87)	22 December 1997	In Force
<b>C098</b>	Right to Organize and Collective Bargaining Convention, 1949(No. 98)	22 December 1997	In Force
<b>C100</b>	Equal Remuneration Convention, 1951(No.100)	5 June 1997	In Force
<b>C105</b>	Abolition of Forced Labour Convention, 1957(No.105)	5 June 1997	In Force

<sup>228</sup> A 26 of Vienna Convention on Law of Treaties (1969).

<sup>229</sup> <https://www.ilo.org> accessed on 19 November 2018.

<b>C111</b>	Discrimination (Employment and Occupation) Convention, 1958(No.111)	5 June 1997	In Force
<b>C138</b>	Minimum Age Convention, 1973(No.138)  Minimum age specified:14 years	5 June 1997	In Force
<b>C182</b>	Worst Forms of Child Labour Convention, 1999 (No.182)	3 January 2000	In Force
<b>Governance(priority) Conventions</b>			
<b>C144</b>	Tripartite Consultation (International Labour Standards) Convention, 1976 (No.144)	5 June 1997	In Force
<b>Technical Conventions</b>			
<b>C014</b>	Weekly Rest (Industry) Convention, 1921 (No.14)	3 February 1988	In Force
<b>C019</b>	Equality of Treatment (Accident Compensation) Convention, 1925 (No.19)	3 February 1988	In Force
<b>C095</b>	Protection of Wages Convention, 1949 (No.95)  Excluding Article 11 by virtue of the ratification of Convention No.173(acceptance of part II)	5 June 1997	In Force
<b>C151</b>	Labour Relations (Public Service) Convention, 1978 (No.151)	22 December 1997	In Force
<b>C173</b>	Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No.173)  Has accepted the obligations of Part II	5 June 1997	In Force
<b>C176</b>	Safety and Health in Mines Convention, 1995 (No.176)	5 June 1997	In Force

(Source: <https://www.ilo.org> accessed on 19 November 2018)

### 3.4.2 ILO Conventions not ratified by Botswana

**Table 4: 3 of the 4 Governance (priority) Conventions not ratified by Botswana**

Convention Code	Name of Convention
<b>Governance (priority) Conventions</b>	
C081	Labour Inspection Convention, 1947 (No. 81)
C122	Employment Policy Convention, 1964 (No. 122)
C129	Labour Inspection (Agriculture) Convention, 1969 (No. 129)

(Source: <https://www.ilo.org> accessed on 19 November 2018)

**Table 5: 7 of the 171 Technical Conventions not ratified by Botswana**

Convention Code	Name of Convention
<b>Technical conventions</b>	
C118	Equality of Treatment (Social Security) Convention, 1962 (No. 118)
C130	Medical Care and Sickness Benefits Convention, 1969 (No. 130)
C131	Minimum Wage Fixing Convention, 1970 (No. 131)
C135	Workers Representatives Convention, 1971 (No. 135)
C154	Collective Bargaining Convention, 1981 (No. 154)
C156	Workers with Family Responsibilities Convention, 1981 (No. 156)
C081	Occupational Safety and Health Convention, 1981 (No. 155)

(Source: <https://www.ilo.org> accessed on 19 November 2018)

### 3.4.3 Botswana's domestication of selected ILO Conventions<sup>230</sup>

As stated earlier, by ratifying a Convention, a country undertakes to domesticate the Convention into national law and practice. For instance, the country, through

<sup>230</sup> <https://www.ilo.org>.

its Legislature, enacts legislation so that the Convention attains local enforceability status.

#### 3.4.3.1 Freedom of association, collective bargaining and industrial relations

These are the most domesticated of all the Conventions ratified by Botswana. They were domesticated through the Trade Disputes Act, 2003,<sup>231</sup> Trade Unions and Employers' Organisations (Amendment) Act, 2003,<sup>232</sup> National Industrial Relations Code of Good Practice; Code of Good Practice: Collective Bargaining;<sup>233</sup> Code of Good Practice: Strikes and Lockouts;<sup>234</sup> Code of Good Practice: Picketing;<sup>235</sup> Trade Disputes (Amendment) Regulations No. 111; Trade Unions and Employers' Organisations (Amendment) Act, 1992;<sup>236</sup> Trade Disputes Regulations;<sup>237</sup> Trade Unions and Employers' Organisations Regulations; Trade Unions and Employers' Organisations Appeal Rules; Trade Unions and Employers' Organisations Act, 1983;<sup>238</sup> and Essential Service (Arbitration) Act, 1967 No. 32.<sup>239</sup>

#### 3.4.3.2 Equality of opportunity and treatment

These Conventions were domesticated, *inter alia*, by the 2010 amendment to the Employment Act of 1982, which abolished "national extraction" and "political opinion" as prohibited grounds of termination of contracts of employment. They were also domesticated by the Public Service (Amendment) Act, 2000<sup>240</sup> and by adopting such Codes of Good Practice as the ones on Employment Discrimination;<sup>241</sup> Sexual Harassment in the Workplace;<sup>242</sup> HIV and AIDS and

<sup>231</sup> Act No. 15 of 2004(Cap. 48:02).

<sup>232</sup> Act No. 16 of 2004.

<sup>233</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 69-81.

<sup>234</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 82-86.

<sup>235</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 87-90.

<sup>236</sup> No. 24 of 1992.

<sup>237</sup> (SI.146 of 1984) (Cap. 48:02).

<sup>238</sup> Cap.48:01.

<sup>239</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>240</sup> No.14 of 2000.

<sup>241</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 23-27.

Employment<sup>243</sup> and Employees with Disabilities.<sup>244</sup> However, with respect to the latter, there is a proviso that some of the provisions in the Code need to be first published as regulations in terms of section 120 of the Employment Act in order to provide the authority to make rules regulating the employment of disabled persons in the workplace.<sup>245</sup> Section 120 of the Employment Act empowers the Minister to make regulations in relation to employment of infirm or handicapped persons.<sup>246</sup>

#### 3.4.3.3 Employment security and termination of employment

These Conventions were domesticated by the Code of Good Practice: Termination of Employment<sup>247</sup> and Employment (Miscellaneous Provisions) (Amendment) Regulations 1992 No 110.<sup>248</sup>

#### 3.4.4 Botswana's compliance with International Labour Organisations (ILO)'s Conventions

Like all ILO member states, Botswana is required to comply with the ILO Conventions it has ratified. The ILO has established a Committee, The Committee of Experts on the Application of Conventions and Recommendations (CEACR), to monitor compliance with its Conventions. Below, a brief explanation about the CEACR and how it achieves its objectives is provided. A few examples of Conventions are referred to in order to demonstrate Botswana's compliance or lack thereof of the ILO Conventions it has ratified.

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<sup>242</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 35-41.

<sup>243</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 42-43.

<sup>244</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 28-34.

<sup>245</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 28.

<sup>246</sup> Cap. 47:01.

<sup>247</sup> Department of Labour and Social Security *Codes of Good Practice, Model Procedures and Agreements* 56-68.

<sup>248</sup> <https://www.ilo.org> accessed on 19 November 2018.

#### 3.4.4.1 The Committee of Experts on the Application of Conventions and Recommendations (CEACR)

The CEACR was established in 1926 to examine the mounting number of government reports on ratified Conventions. Today, it comprises 20 eminent jurists appointed by the GB for three-year terms. The experts come from different jurisdictions, geographic regions, legal systems and cultures. The Committee's mandate is to provide an impartial and technical assessment of the application of international labour standards.<sup>249</sup>

#### 3.4.4.2 Periodic reports

Once a country has ratified an ILO Convention, it has an obligation to provide regular reports on the measures it has taken to implement the Convention. Governments are required to submit reports, once every three years, detailing the steps they have taken, in law and practice, in applying the fundamental and governance Conventions they have ratified. With respect to all other Conventions, reports must be submitted every five years, except for "shelved" Conventions that are no longer under supervision. The ILO may, however, request for the reports at shorter intervals. Governments are required to furnish employers' and workers' organisations with copies of the reports for comment. These organisations may send the comments directly to the ILO.<sup>250</sup>

An example of periodic reports is the report which the ILO released in preparation for the June 2018 Conference. In terms of the report, Botswana was held to have violated Conventions 87 and 98. Botswana was then advised to, with the involvement of employers' and workers' organisations, take appropriate measures to remedy the violation. The Conference Committee called upon Botswana to remedy the violations in several respects. First, Botswana was implored to ensure that labour and employment legislation grants members of the prison service the rights guaranteed by the Convention. Secondly, she was called upon to amend the Trade Disputes Act (TDA) so that it conforms with the Convention. Thirdly, Botswana was implored to amend the Trade Unions and Employers Organisations

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<sup>249</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>250</sup> <https://www.ilo.org> accessed on 19 November 2018.

(TUEO) Act to bring it into conformity with the Convention. Fourthly, she was advised to, in consultation with the social partners, develop a time-bound action plan towards the implementation of these conclusions. Botswana was also urged to report progress to the Committee of Experts before its next meeting. The Committee also requested Botswana to amend the Trade Disputes Bill to reduce the list of essential services. According to BOFEPUSU, Botswana has not implemented any of these recommendations. She has also neither submitted progress reports nor sought technical assistance from ILO experts.<sup>251</sup>

Below, a few Conventions are referred to in order to show how Botswana has complied with its ratified Conventions and has responded to the CEACR's observations and recommendations. This information was obtained from CEACR's Observations adopted in 2016 and published in the 106th ILC session (2017).<sup>252</sup>

#### 3.4.4.3 Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Botswana (*Ratification: 1997*)

##### (a) Amendments to the Employment Act, 1982

Following the 2010 amendment to the Employment Act of 1982, which removed the grounds of "national extraction" and "political opinion" from the list of prohibited grounds of termination of contracts of employment,<sup>253</sup> the CEACR requested the Government to ensure that section 23(d) of the Employment Act<sup>254</sup> expressly prohibits discrimination based on "political opinion" and "national extraction" and relates to all aspects of employment, including recruitment and terms and conditions of employment, not only dismissal. Government only complied to the extent of inclusion of the grounds of "political opinion" and "national extraction" but did not comply in terms of extending the prohibition to cover all aspects of employment and occupation.<sup>255</sup>

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<sup>251</sup> [www.thepatriot.co.bw](http://www.thepatriot.co.bw) accessed on 21 December 2018.

<sup>252</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>253</sup> Section 23(d) of the *Employment Act*, Cap.47:01.

<sup>254</sup> Cap.47:01.

<sup>255</sup> <https://www.ilo.org> accessed on 19 November 2018.

#### 3.4.4.4 Labour Relations (Public Service) Convention, 1978 (No. 151) - Botswana (Ratification: 1997)

Despite the CEACR's repeated statements that the exception contained in Article 1(3) of the Convention<sup>256</sup> is only applicable to the armed forces and the police and not prison officers, Government has not heeded the Committee's advice or hope to take steps to amend the relevant legislation so that prison officers also enjoy the right to organise. Government reported to the Committee that the constitutionality of the exclusion of prison officers from the coverage of the Trade Disputes Act (TDA) and the Trade Unions and Employers' Organizations Act (TUEO Act)<sup>257</sup> has been reaffirmed by the Court of Appeal. It also reported that prison support or administrative staff is, however, covered by the aforesaid legislation.

#### 3.4.4.5 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Botswana (Ratification: 1997)

Despite the CEACR's observation that essential services should be limited to those services whose interruption would endanger the life, personal safety or health of the whole or part of the population, Botswana, until recently, retained its interpretation of essential services to include diamond sorting, cutting and selling services, teaching services, government broadcasting services, the Bank of Botswana, railways operation and maintenance services and public veterinary services.<sup>258</sup> Consequently, in July 2016, BOFEPUSU reported Botswana to the ILO, accusing her of violating two core ILO Conventions being, Conventions 87 and 98, as well as having acted contrary to the ILO framework definition of essential services.<sup>259</sup> Following the report, Botswana made the list of the top aggressors and violators of the core ILO Conventions, making it into the short list of 24 countries<sup>260</sup> because as a result of the definition for essential services, which

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<sup>256</sup> Labour Relations (Public Service) Convention, 1978 (No. 151).

<sup>257</sup> Cap. 48:01.

<sup>258</sup> Kodzo and Ntuny 2015 AJPSIR 255-267.

<sup>259</sup> Correspondent 2017 <http://www.mmegi.bw>.

<sup>260</sup> Correspondent 2017 <http://www.mmegi.bw>.

is very wide, the right to strike would be curtailed, especially in the public service.<sup>261</sup>

However, Botswana has recently complied with the CEACR's recommendation. On 8<sup>th</sup> August 2019, Parliament<sup>262</sup> passed the Trade Disputes (Amendment) Bill.<sup>263</sup> This Bill removed Botswana Vaccine Laboratory Services, Bank of Botswana, Diamond sorting, cutting and selling services, Operational and Maintenance Services of the railways, Sewage services, Veterinary services in the public service, Teaching services, Government Broadcasting services as well as the Immigration and Customs services from the list of essential services. Botswana, is, therefore, now in compliance with the CEACR's view that teaching, in particular, does not constitute essential services in the strict sense of the term.<sup>264</sup> The ILO has provided certain workplace categories which should not be classified as "essential", the result being that workers therein would be allowed to exercise their right to strike or lockout. These include agricultural activities, the education sector, transport generally, banking and mining, postal services and construction, among others.<sup>265</sup> The Committee on Freedom of Association has recommended that where member states have a discretion to make legislative amendments to prohibit strikes in essential services, such must be limited in terms of the ILO's strict definition only.<sup>266</sup>

#### 3.4.4.6 Right to Organize and Collective Bargaining Convention, 1949 (No. 98) - Botswana (Ratification: 1997)

Following the CEACR's recommendation for Government to repeal section 35(1)(b) of the TDA which permitted an employer or employers' organisation to apply to the Commissioner of Labour to withdraw the recognition granted to a trade union on the ground that the trade union refuses to negotiate in good faith with the employer, the Government effected the amendment in the TDA, 2016. Government has, however, failed to amend section 20 of the TDA which allows the

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<sup>261</sup> Fashoyin 2018JIR 578-594.

<sup>262</sup> Business Update, 3rd Meeting of the 5th Session of the 11th Parliament of Botswana.

<sup>263</sup> Bill No. 17 of 2019.

<sup>264</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>265</sup> Gernigon B *et al* 1998 *ILR* 4.

<sup>266</sup> <https://www.ilo.org> accessed on 19 November 2018.

Industrial Court to refer a trade dispute to arbitration even in cases where only one of the parties made an urgent appeal to the Court. This, despite the CEACR's observation that the amendment will ensure that recourse to compulsory arbitration does not negate collective bargaining. The Committee also observed that compulsory arbitration is only acceptable in relation to public servants engaged in the administration of the State or in essential services in the strict sense of the term or in cases of acute national crises.<sup>267</sup>

Despite the Committee's request that Government take necessary measures to ensure that all union committee members, including those of unregistered trade unions, are protected from discrimination,<sup>268</sup> no such steps have been taken.<sup>269</sup> This, despite the fact that the Committee highlighted that the fundamental rights accorded to members or officers of trade unions by the Convention cover all workers wishing to establish or join a trade union. The Committee emphasised that such protection should not be dependent on the registration status of a trade union.<sup>270</sup> Anecdotal evidence suggests that the result of this is that, especially in the private sector, employees who are at the forefront of mobilising others to join a trade union are often victimised and dismissed for flimsy reasons as a way of scaring others from joining trade unions.

Government has failed to amend section 35 of the TDA, as read with section 48 of the TUEO Act, to ensure that, where no trade union represents one third of the employees in a bargaining unit, collective bargaining rights are granted to all unions in the unit. Section 37(5) of the TDA, 2016 also provides a one third minimum threshold requirement for union recognition at the industry level. This is the case even though the Committee has observed that the one third provision contravenes adequate protection against acts of interference as well as the promotion of collective bargaining.<sup>271</sup>

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<sup>267</sup> A 6 of the Right to Organize and Collective Bargaining Convention (1949).

<sup>268</sup> A 1 of the Right to Organize and Collective Bargaining Convention (1949).

<sup>269</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>270</sup> <https://www.ilo.org> accessed on 19 November 2018.

<sup>271</sup> A 2 and 4 of the Right to Organize and Collective Bargaining Convention (1949).

#### 3.4.4.7 Equal Remuneration Convention, 1951 (No. 100) - Botswana (*Ratification: 1997*)

Despite CEACR's recommendation, Government has not amended the Employment Act to give full legislative expression to the principle of equal pay for equal work for men and women as provided for in Article 1 of the Convention. This would enable an aggrieved party to easily vindicate its rights through litigation, for instance. Government's failure to make such an amendment is also despite the recommendation submitted to the Minister by the Minimum Wage Advisory Board ("the Board"). The Board has advised that this ideal can be achieved when the Minister fixes or adjusts wages in all sectors or industries in terms of the powers vested upon him.

### **3.5 Summary**

In this chapter, Botswana's ratification of and compliance with ILO Conventions were discussed. This chapter's discussion, together with the comparative perspectives provided in the next chapter, provide the standard against which the TDA, 2016 can be critiqued. It is clear from this discussion that Botswana has not been compliant with some of the fundamental Conventions, namely Discrimination (Employment and Occupation) Convention; Labour Relations (Public Service) Convention; Freedom of Association and Protection of the Right to Organise Convention; Right to Organize and Collective Bargaining Convention and the Equal Remuneration Convention. Botswana has also, to a large extent, disregarded the CEACR's recommendations for remedying its non-compliance.

## CHAPTER FOUR: COMPARATIVE PERSPECTIVES

### 4.1 Introduction

In Chapter three, Botswana's record of compliance with ILO Conventions was discussed. In this chapter, a comparative analysis between the TDA, 2016 and comparative legislation in Lesotho, Eswathini (formerly Swaziland) and South Africa is made. The reason why the researcher chose these countries is because they, like Botswana, are Roman-Dutch law jurisdictions. In the case of South Africa, its case law has and continues to influence Botswana's jurisprudence since Botswana judges often base their decisions on South African case law. A comparative analysis was conducted in terms of the four legs underpinning Botswana's trade dispute resolution framework, namely mediation, arbitration, industrial action and litigation at the Industrial Court.

### 4.2 Lesotho

#### 4.2.1 Mediation

##### 4.2.1.1 The Department of Labour and Social Security (DLSS) and the Directorate of Dispute Prevention and Resolution (DDPR)

While Botswana's Department of Labour and Social Security (DLSS), which is responsible for mediation and arbitration, is a government department manned by civil servants, Lesotho's Directorate of Dispute Prevention and Resolution (DDPR) is a juristic person, independent of Government, political parties and such social partners as trade unions and employers' organisations.<sup>272</sup> Unlike Botswana's mediators and arbitrators who are appointed solely by Government as civil servants, the DDPR's conciliators and arbitrators are appointed by the Minister on the advice of the Industrial Relations Council (IRC).<sup>273</sup> However, just like the DLSS, the DDPR is financed by Government through parliamentary votes. Just like the DLSS, the core mandate of the DDPR is the prevention and resolution of trade disputes through such alternative dispute resolution mechanisms as arbitration,

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<sup>272</sup> Section 46B of the Labour Code Order of Lesotho; Ntuny *Labour Dispute Resolution in Southern Africa* 197.

<sup>273</sup> Ntuny *Labour Dispute Resolution in Southern Africa* 197.

advice to employers and employees, statistical and educational data creation and dissemination.<sup>274</sup>

#### 4.2.1.2 Referral of disputes

While in Lesotho a dispute of right may be referred, in writing, to the DDPR, in the case of unfair dismissal within six months of such dismissal and for all other disputes within three years of such dispute arising, in Botswana in the case of unfair dismissal the referral is to be made within 30 days of the dismissal,<sup>275</sup> and for all other disputes within 30 days or a reasonable time of such dispute arising.<sup>276</sup> In both jurisdictions condonation for late referral may be granted provided there are reasonable grounds for the late referral. Also, in both jurisdictions, the offices are enjoined to first attempt resolution by mediation and/or conciliation before proceeding to arbitration or litigation.<sup>277</sup>

#### 4.2.2 Arbitration

The powers of arbitrators are almost similar in Botswana and Lesotho. In both jurisdictions, an arbitrator is required to settle a trade dispute within 30 days, though the arbitrator may extend the time where he or she considers appropriate and must provide written reasons for his or her decision within 30 days of the arbitral award. In both Botswana and Lesotho, an arbitral award has the same status as a judgment of the Industrial Court or Labour Court and is enforceable in the same manner as such judgment or order. Both the Industrial Court and the Labour Court hear review applications with respect to arbitral awards, except that while the time for review in Botswana is 14 days, in Lesotho the time 30 days.<sup>278</sup>

Like the TDA, 2016, Lesotho's Labour Code Order does not provide a detailed procedure for the execution of arbitral awards. In Botswana, the Court of Appeal, following divergent judgments of the Industrial Court by De Villiers JP,<sup>279</sup> Vergeer

<sup>274</sup> Ntuny *Labour Dispute Resolution in Southern Africa* 197.

<sup>275</sup> Section 6(2) of the *Trade Disputes Act*, 2016.

<sup>276</sup> Section 6(7) of the *Trade Disputes Act*, 2016.

<sup>277</sup> Ntuny *Labour Dispute Resolution in Southern Africa* 200.

<sup>278</sup> Section 228F of the Labour Code Order No. 24 of 1992 of Lesotho.

<sup>279</sup> *Construction Industry Trust Fund v Chongo Phiri*, IC Appeal No. 7/07.

J,<sup>280</sup> Marumo J,<sup>281</sup> Mathiba J<sup>282</sup> and Ruhukya J,<sup>283</sup> brought certainty and finality on the matter by developing the law as follows:

'...in the case of arbitral awards which sound in money or are otherwise amenable to the issue of a writ of execution, the procedure directed by the Judge President in *Chombo Phiri's* case (supra) is, *mutatis mutandis*, to be applied. So, where the successful party in an arbitration under the Act wishes to enforce this by the issue of a writ of execution, he or she should,

- (a) file a letter or affidavit with the Registrar, attaching the arbitrator's award, and setting out the fact of non-compliance, giving the necessary details, and requesting the issue of a writ of execution;
- (b) the Registrar should then register the award in his or her Register of orders and judgments of the Industrial Court...;
- (c) the Registrar should then issue the writ of execution and have it executed by the Court Bailiff or Deputy Sheriff ....<sup>284</sup>

#### 4.2.3 Industrial Action

##### 4.2.3.1 Pickets, Protest Action and Strikes and Lockouts

In Lesotho, according to the Public Services Act<sup>285</sup> public servants have no right to strike. According to Cohen and Matee, "public officers in Lesotho are deprived of the right to join trade unions or to strike, without exception or justification".<sup>286</sup> This, despite the CEACR's observation that this is a violation of Convention 98, recommending that the prohibition must be limited to public servants who 'exercise authority in the name of the State'.<sup>287</sup> Also, there are no alternative compensatory guarantees, such as arbitration procedures, for employees who have no right to strike.<sup>288</sup> Further, the law prohibits essential service employees from striking, but Government has not yet provided a list of essential services.<sup>289</sup> Just like in Botswana, the relevant legislation does not exhaustively provide for pickets and

<sup>280</sup> *Modise Ralefala v Letsatsi Sefako*, Case No. IC MISC 20/16.

<sup>281</sup> *Limkokwing University of Creative Technology v Nicholas A. K. Badasu*, Case No. IC UR. 42/15.

<sup>282</sup> *Keoagile Mantsi v Ezra Tours and Another*, Case No. IC MISC 02/16.

<sup>283</sup> *Veronica Moroka and Another v Ministry of Labour & Home Affairs & Another*, Case No. IC.142/16.

<sup>284</sup> *Veronica Moroka & 2 Others v The Attorney General and Another*, Court of Appeal Civil Appeal No. CACGB-121-17 para 28.

<sup>285</sup> Section 20(2) of the *Public Service Act 1 of 2005* of Lesotho.

<sup>286</sup> Cohen and Matee 2015 PELJ/ PR 1631-1658.

<sup>287</sup> *Ntummy Labour Dispute Resolution in Southern Africa* 201.

<sup>288</sup> *Ntummy Labour Dispute Resolution in Southern Africa* 201.

<sup>289</sup> *Lesotho Union of Bank Employees v Solicitor General and Others* CTV/APN/30/83.

protest action. In Botswana's TDA, 2016, the only time when reference is made to picketing is when conditions for its prohibition during a strike are set out.<sup>290</sup> There is no mention of protest action. Lesotho's Labour Code's reference to picketing is equally brief.<sup>291</sup> In fact, three of the four sub-sections under the section are with respect to instances where protest action would be regarded as unlawful. Just like Botswana's TDA, 2016, Lesotho's Labour Code, 1992 makes no mention of protest action. It is submitted that the opposite is true in South Africa where both picketing<sup>292</sup> and protest action<sup>293</sup> are adequately provided for. In fact, in South Africa, the right to picket is guaranteed in the Constitution.<sup>294</sup>

#### 4.2.4 *Litigation at the Labour Court*

##### 4.2.4.1 Botswana's Industrial Court and Lesotho's Labour Court

Just like Botswana, Lesotho has a specialised court with limited jurisdiction to adjudicate on labour disputes.<sup>295</sup> Both courts are courts of law and equity. The difference really lies in name since the powers of the two courts are almost similar. However, unlike Botswana's Industrial Court, Lesotho's Labour Court has the authority to commit offenders to jail terms.<sup>296</sup> The Labour Court has exclusive jurisdiction regarding disputes of right. These include trade disputes arising from the interpretation and application of the Labour Code, unfair labour practices and unfair dismissals resulting from strikes, lockouts and operational requirements.<sup>297</sup> This was confirmed by the Appeal Court.<sup>298</sup> On the contrary, the Industrial Court in Botswana does not have such exclusive jurisdiction. A party may opt to litigate the matter at the High Court, especially when he or she intends to claim damages and not just compensation in which case he or she does not need to have gone through mediation or arbitration before the DLSR. In both jurisdictions, except in urgent applications, a party must exhaust the process of conciliation, mediation

<sup>290</sup> Section 43(4) of the *Trade Disputes Act*, 2016.

<sup>291</sup> Section 233 of Labour Code Order No. 24 of 1992 of Lesotho.

<sup>292</sup> Section 69 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>293</sup> Section 213 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>294</sup> Section 17 of the *Constitution of South Africa*, 1996.

<sup>295</sup> Section 25(1) of Labour Code Order No. 24 of 1992 of Lesotho.

<sup>296</sup> Section 24 of Labour Code Order No. 24 of 1992 of Lesotho.

<sup>297</sup> *Motaung v National University of Lesotho and Others* (CIV/APN/182/06); Section 25 of Labour Code Order of 1992 of Lesotho.

<sup>298</sup> *Attorney General v Lesotho Teachers Trade Union and Others* (C of A) 1991–1996 (1). LLR 16 at 25; *Lerotholi Polytechnic and Another v Lisene* LAC/CIV/05/2009.

and arbitration before referring the dispute to the respective court.<sup>299</sup> While in Botswana, Industrial Court judges are appointed by the state President acting alone, Lesotho's Labour Court's functionaries, including the Registrar, are appointed by the Minister in consultation with the Industrial Relations Council.<sup>300</sup> While in Botswana a party may represent him or herself or itself or be represented by an attorney or a lay person, in Lesotho a party may appear in person or be represented by an officer or an employee of a trade union or of an employers' organisation. A party may also be represented by a legal practitioner, but only when all parties, except Government, are represented by attorneys.<sup>301</sup>

#### 4.2.4.2 Lesotho Labour Appeal Court

Unlike Botswana, Lesotho has a Labour Appeal Court.<sup>302</sup> In Botswana, labour appeals, like all civil and criminal appeals, lie with the Court of Appeal,<sup>303</sup> which is the apex court. The Labour Appeal Court, on its own motion, co-opts a judge of the High Court as its presiding officer, who is assisted by two assessors, all of whom are appointed in consultation with the Industrial Relations Council.<sup>304</sup> In this regard, it is submitted that the court maintains the equitable jurisdiction requisite for labour matters. To promote the court's independence and impartiality, the two assessors may not be public servants. While the judge, alone, determines matters of law, a majority decision is required for matters of fact.<sup>305</sup>

### 4.3 Eswathini (formerly Swaziland)

#### 4.3.1 Conciliation, Mediation and Arbitration

The law that regulates conciliation, mediation, arbitration and litigation in Eswathini is the Industrial Relations Amendment Act of 2000. Just like Botswana, Eswathini has a Commissioner of Labour though his mandate is conjoined with that of the Tripartite Commission on Conciliation, Mediation and Arbitration (TCCMA) which the Kingdom regards as an Alternative Dispute Resolution (ADR) mechanism.

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<sup>299</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 198.

<sup>300</sup> Section 23(1) of Labour Code Order No. 24 of 1992 of Lesotho.

<sup>301</sup> Section 28(1) of Labour Code Order No. 24 of 1992 of Lesotho.

<sup>302</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 194.

<sup>303</sup> Section 20(5) of the *Trade Disputes Act*, 2016.

<sup>304</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 194.

<sup>305</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 194.

Commendably, Eswathini, unlike Botswana has an Essential Services Commission.<sup>306</sup>

Unlike in Botswana where an unfair dismissal dispute has to be referred to the DLSS within 30 days of the dismissal and any other dispute has to be referred within 30 days or within a reasonable time, in Eswathini trade disputes must be reported to either the Commissioner or the TCCMA within six months of their occurrence. There may be no extension of time beyond thirty-six months from the occurrence of the dispute.<sup>307</sup> In Botswana there is no time limit set by legislation. It is left for judicial discretion, of course restricted by the tenets of reasonableness.<sup>308</sup>

#### 4.3.2 *Industrial Action*

##### 4.3.2.1 Pickets, Protest Action and Strikes and Lockouts

The Industrial Relations Act permits employees other than essential service workers to participate in peaceful strikes or protest action in furtherance of their socio-economic interests. For protest action to be lawful and protected, all prescribed remedies must be exhausted. Furthermore, a secret ballot must be conducted regarding the contemplated protest action.<sup>309</sup> The courts have held that the procedures for protest action in Eswathini are complicated.<sup>310</sup> A strike is a complete or partial cessation of work or slow-down of work carried out by two or more employees acting together in unison, or any other concentrated action intended to reduce work place productivity and output and thus compel the employer to accede to the workers' demand(s) or abandon a counter to such a demand. Just like in Botswana, essential services employees including the police, security forces, correctional services, fire-fighting bodies, health services and other key civil service sectors have no right to strike.<sup>311</sup>

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<sup>306</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 226.

<sup>307</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 221.

<sup>308</sup> Section 6(7) of the *Trade Disputes Act*, 2016.

<sup>309</sup> Section 40 of the *Industrial Relations Act* of 2000.

<sup>310</sup> *Swaziland Government v SFTU and SFL*, Case No IC 347/02 of 08 January 2003.

<sup>311</sup> Ntummy *Labour Dispute Resolution in Southern Africa* 213.

### 4.3.3 *Litigation at the Industrial Court*

Just like Botswana, Eswathini has an Industrial Court which is a court of law and equity.<sup>312</sup> However, in Eswathini Industrial Court judges are appointed in the same manner as High Court judges unlike in Botswana where Industrial Court judges are appointed by the President acting alone while High Court judges are appointed by the state President in accordance with the advice of the Judicial Service Commission (JSC). While in Botswana appeals from the Industrial Court lie with the Court of Appeal, in Eswathini appeals from the Industrial Court lie with the Industrial Court of Appeal. The same applies to Lesotho as pointed out heretofore at paragraph 4.2.4.2 above.

Though in Eswathini the Act provides that the Industrial Appeal Court comprises judges qualified for appointment as Appeal Court Judges, it subordinates their powers to the High Court by providing that '[a] decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law.'<sup>313</sup> This, it is submitted, is regrettable since it negates the purpose of the conciliation, mediation, arbitration and litigation provided under the trade dispute resolution framework, namely, provision of expedient and inexpensive access to justice. A litigant would have, throughout, prosecuted his or her case under a framework with both legal and equitable considerations, only to be taken to a framework, of the High Court, with no considerations for equity.<sup>314</sup> There is, therefore, need to clothe the Industrial Appeal Court with the jurisdiction to entertain review applications so that it, and not the High Court, hears reviews from arbitrators or the Industrial Court.

## 4.4 *South Africa*

### 4.4.1 *Commission for Conciliation, Mediation and Arbitration (CCMA)*

In South Africa, conciliation, mediation and arbitration are, in terms of the LRA,<sup>315</sup> the preserve of the Commission for Conciliation, Mediation and Arbitration

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<sup>312</sup> *Swaziland Government v SFTU and SFL*, Case No IC 347/02 of 08 January 2003. Ntuny *Labour Dispute Resolution in Southern Africa* 216.

<sup>313</sup> Section 19(5) of the *Industrial Relations Amendment Act* of 2000 of South Africa.

<sup>314</sup> Section 2 of the *High Court Act* (of Swaziland), 1954.

<sup>315</sup> 55 of 1995.

(CCMA).<sup>316</sup> The CCMA replaced Conciliation Boards and the Industrial Court, ushering in a shift from a highly adversarial model of labour relations to one based on enhancing greater co-operation, industrial peace and social justice.<sup>317</sup> The CCMA, unlike Botswana's DLSS, is not a government department, but an independent entity which is independent of the State, political parties, trade unions, employers' organisations, federation of trade unions and federation of employers' organisations.<sup>318</sup> The CCMA deals with all matters referred to it in terms of the LRA.<sup>319</sup>

#### 4.4.1.1 Referral of trade disputes

Just like in Botswana, for unfair dismissal disputes, a disputant has 30 days from the date of dismissal to refer the dispute to the CCMA, while for unfair labour practice disputes, one has 90 days for referral, the time- frame for referring discrimination cases is 6 months. Of course, just like in Botswana, Lesotho and Swaziland, late referral may, on good cause being shown, be condoned.<sup>320</sup>

#### 4.4.1.2 Conciliation and mediation

##### a) Conciliation

Conciliation is a form of Alternate Dispute Resolution (ADR). This is because it is an alternative to the traditional system of litigation or adjudication through the courts of law. Conciliation is a process where a Commissioner meets with the disputing parties to explore ways to settle the dispute by mutual exploration and agreement. During the conciliation process, a party may represent itself or be represented by its director, employee, member, office bearer or an official of the party's registered trade union or registered employer's organisation.<sup>321</sup> As is the case with mediation in Botswana, South Africa's conciliation proceedings are

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<sup>316</sup> Section 115 (a) and (b) of the *Labour Relations Act* 55 of 1995.

<sup>317</sup> <https://www.ccma.org.za> accessed on 19 October 2018.

<sup>318</sup> Section 113 of the *Labour Relations Act* 55 of 1995.

<sup>319</sup> Section 15(1) of the *Labour Relations Act* 55 of 1995.

<sup>320</sup> Rule 31 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>321</sup> Rule 25(1) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

private and confidential and are conducted on a without prejudice basis.<sup>322</sup> Neither party nor the Commissioner is a compellable witness before any Commission or court.<sup>323</sup>

A Commissioner is given wide powers in conciliation. For instance, he or she may contact the parties by telephone or other means before the commencement of the conciliation in an attempt to resolve the dispute.<sup>324</sup> Unlike in Botswana, in South Africa, a Commissioner may subpoena persons and documents. He or she also has the power to enter and inspect premises as well as the power to seize any book, document or object that can be of assistance in attempts to resolve the dispute.<sup>325</sup> The Commissioner has a duty to attempt to resolve the dispute before him or her within 30 days of its referral to the CCMA.<sup>326</sup> The Commissioner is required to issue a certificate indicating whether or not the dispute has been resolved in which the nature of the dispute must be identified.<sup>327</sup>

#### b) Mediation

Just like conciliation, mediation is also an ADR system. Regard being had to the fact that parties often start by trying to resolve a dispute between themselves before involving a third party, mediation may be described as the continuation of a negotiation process between the disputants, with a third person, namely the mediator, assisting the disputants in, first, identifying and understanding their underlying concerns and needs and, based on these, in negotiating a settlement that is acceptable to both parties.<sup>328</sup> Mediation has been defined as;

'a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with

<sup>322</sup> Rule 16 (1) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>323</sup> Rule 16 (2) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>324</sup> Rule 12 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>325</sup> Section 142(1) (b) of the *Labour Relations Act* 66 of 1995.

<sup>326</sup> Rule 13 (1) (b) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>327</sup> Section 135 (5) of the *Labour Relations Act* 55 of 1995; Rule 15 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>328</sup> Vettori 2015 AHRLJ 355-377.

the parties in ultimate control of the decision to settle and the terms of resolution.<sup>329</sup>

Just like conciliation, the object of mediation is on settlement as opposed to litigation whose aim is the attainment of justice.<sup>330</sup> Mediation is, by its nature, a voluntary process, not only because it is a process that is undertaken voluntarily, but also because the outcome is voluntarily attained by the parties.<sup>331</sup> Therefore, no outcome can be imposed on the parties as is the case with arbitration and litigation. Just like conciliation, mediation is a confidential process that is without prejudice.<sup>332</sup>

#### 4.4.1.3 Arbitration

When attempts to resolve the dispute through conciliation fail, a party may request the CCMA to attempt to resolve the dispute through arbitration.<sup>333</sup> During the arbitration hearing, both parties are given the opportunity to state their cases. Thereafter, the Commissioner makes an arbitration award which he or she is required to send to the parties within 14 days of the arbitration hearing. Just like in Botswana, in terms of the LRA,<sup>334</sup> an arbitration award has the same force and effect as a judgment or order of the Labour Court.<sup>335</sup> In an arbitration hearing, a party may represent itself or be represented by a legal practitioner or an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1) (a).<sup>336</sup> As a general rule, lawyers are not allowed to represent parties in arbitrations concerning dismissal disputes. In exceptional cases, however, they can be allowed if the Commissioner and the parties agree, or if the Commissioner holds that it is unreasonable to expect a party to competently deal with the dispute

<sup>329</sup> Vettori 2015 AHRLJ 355-377.

<sup>330</sup> Vettori 2015 AHRLJ 355-377.

<sup>331</sup> Vettori 2015 AHRLJ 355-377.

<sup>332</sup> Vettori 2015 AHRLJ 355-377.

<sup>333</sup> <https://www.ccma.org.za> accessed on 19 October 2018.

<sup>334</sup> 55 of 1995.

<sup>335</sup> *CCMA V.MBS Transport*, ZALAC/2016/34.

<sup>336</sup> Rule 25 (1) (b) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

without the assistance of a lawyer considering such factors as the complexity of the matter, for instance.<sup>337</sup>

#### 4.4.1.4 Pre-arbitration conference

A pre-arbitration conference may be held if the parties so agree, or when the Director or a Senior Commissioner directs that it be held.<sup>338</sup> A pre-arbitration conference assists the parties to determine facts in dispute, common cause facts, issues to be decided and the relief claimed.<sup>339</sup> Also, during a pre-arbitration conference, the parties exchange documents that will be used in the arbitration as well as drawing up and signing the minute of the pre-arbitration conference.<sup>340</sup>

#### 4.4.1.5 Pre-dismissal arbitration

This arbitration, which was introduced by amendments to the LRA,<sup>341</sup> occurs before an employer dismisses an employee. An employer may, with the concurrence of the employee, request the CCMA or Council to conduct a pre-dismissal arbitration, provided that the contemplated dismissal is in relation to the conduct or performance of the employee.<sup>342</sup> Effectively, the pre-dismissal arbitration replaces the disciplinary enquiry as well as other consequent proceedings which are ordinarily presided over by the CCMA. The statutory and regulatory provisions which apply to arbitration proceedings, apply with similar effect to pre-dismissal arbitrations.<sup>343</sup>

#### 4.4.1.6 Conciliation-Arbitration (Con-Arb)<sup>344</sup>

This procedure, often referred to as 'the section 191(5A) procedure', is compulsory for disputes relating to dismissals for any reason relating to probation

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<sup>337</sup> Rule 25 (1) (c) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>338</sup> Rule 20 (1) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>339</sup> Rule 20 (2) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>340</sup> Rule 20 of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>341</sup> Section 188A.

<sup>342</sup> <https://www.ccma.org.za> accessed on 22 November 2018.

<sup>343</sup> Section 138 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>344</sup> Section 191(5A) of the *Labour Relations Act* 55 of 1995 of South Africa.

as well as unfair labour practice relating to probation. The procedure allows for conciliation and arbitration to be conducted as a continuous process on the same day.<sup>345</sup> It is, therefore, not only faster, but it is also a one-stop process of conciliation and arbitration for individuals complaining of unfair labour practice and unfair dismissals. In the absence of an objection, Con-Arb may be used to resolve any other dispute. It may, however, not be invoked for dismissals resulting from unprotected strikes.<sup>346</sup> Invariably, these disputes must be referred to the Labour Court if conciliation fails.<sup>347</sup> Otherwise, the provisions of the Rules that apply to conciliation and arbitration, as discussed at paragraphs 4.4.1.2 and 4.4.1.3 respectively above, including on representation, apply *mutatis mutandis* to the conciliation and arbitration parts of con-arb proceedings.<sup>348</sup>

#### 4.4.2 Industrial Action

##### 4.4.2.1 Pickets

###### a) Definition

A picket is industrial action which is conducted in contemplation or continuance of a strike. The right to picket, which is guaranteed by the Constitution,<sup>349</sup> is given effect to and regulated by the LRA<sup>350</sup> and the Code: Picketing.<sup>351</sup> A picket takes place, for instance, when employees on strike stand at or near their workplace in order to persuade others, such as the employees not on a strike, customers and suppliers of the company not to deal with their employer.<sup>352</sup>

###### b) Requirements of a protected picket

Just like a strike, a picket must satisfy certain requirements for it to be protected. These requirements include authorisation by a registered trade union; being for

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<sup>345</sup> <https://www.ccma.org.za> accessed on 19 October 2018.

<sup>346</sup> Section 191(5A) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>347</sup> Section 191(5A) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>348</sup> Rule 17 (6) of the Rules for the Conduct of Proceedings before the Commission for Conciliation Mediation and Arbitration.

<sup>349</sup> Section 17 of the *Constitution of the Republic of South Africa, 1996*.

<sup>350</sup> Section 69 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>351</sup> GN 765, GG 18887, dated 15 May 1998.

<sup>352</sup> McGregor *et al Labour Law Rules* 199.

the purpose of a peaceful demonstration; and being in support of a protected strike or being in antagonism to a lock-out.<sup>353</sup>

c) Legal consequences of a protected and an unprotected picket

A person who participates in a protected picket neither commits a delict nor breaches his or her employment contract.<sup>354</sup> Therefore, no liability for damages may be suffered by a picketer or trade union involved in a picket.<sup>355</sup> Employees may also not face disciplinary proceedings for participating in a protected picket. The exception is where an employee commits an act of misconduct, for example, intimidating or threatening others. This may even result in dismissal from work. Picketers are also protected against criminal liability.<sup>356</sup>

#### 4.4.2.2 Protest Action

a) Definition

The LRA defines protest action as:

'... the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike...'<sup>357</sup>

While the purpose of a strike is to remedy a workplace grievance or to resolve a trade dispute regarding any matter of mutual interest between an employer and an employee, the purpose of protest action is the promotion and defence of the socio-economic interests of workers, for example, educational reform.<sup>358</sup> Protest action whose aim is to meet political objectives is not permissible under the LRA.<sup>359</sup>

b) Requirements for a protected protest action

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<sup>353</sup> Section 69 of the *Labour Relations Act* 55 of 1995 of South Africa; McGregor et al *Labour Law Rules* 199.

<sup>354</sup> Section 189 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>355</sup> McGregor et al *Labour Law Rules* 202.

<sup>356</sup> McGregor et al *Labour Law Rules* 202.

<sup>357</sup> Section 213 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>358</sup> Government of the Western Cape Province v COSATU [1998] 12 BLLR 1286 (LC).

<sup>359</sup> McGregor et al *Labour Law Rules* 203.

For protest action to be lawful and protected, the employees must neither be engaged in an essential service nor maintenance service; the action must be led by a registered trade union or federation of trade unions; the National Economic Development and Labour Council (NEDLAC) must be notified of the protest action, including its nature and reasons; the matter giving rise to the protest action must be considered by NEDLAC or any other appropriate forum; NEDLAC must have been given at least 14 days' notice of the intention to proceed with the action; and employees must not act in breach or contempt of an order of the Labour Court.<sup>360</sup>

c) Legal consequences of a protected and an unprotected protest action

In terms of the LRA,<sup>361</sup> protest action is protected in the same manner that strikes and lockouts are, provided the requirements for protection are satisfied. This protection includes immunity against civil claims and dismissal.<sup>362</sup> Just like an unprotected strike and lock-out, an unprotected protest action may be interdicted<sup>363</sup> and damages may be claimed from the protesters and the protesters may be dismissed from work.<sup>364</sup>

#### 4.4.2.3 Strikes and Lockouts

a) Definition of strikes and lockouts

A strike entails refusal to work as a result of concerted action by persons employed by the same or different employers to remedy a grievance or resolve a dispute regarding a matter of mutual interest between the employer and the employees.<sup>365</sup> The refusal to work must be in relation to the work that the employees are contractually obliged to perform, and it must neither be contrary to the law nor a collective agreement.<sup>366</sup> The matters of mutual interest between employer and employees may include terms and conditions of service, health and safety issues, grievance and disciplinary procedures and wage increases.<sup>367</sup> A

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<sup>360</sup> McGregor *et al Labour Law Rules* 203.

<sup>361</sup> Section 77(3) of the Labour Relations Act 55 of 1995 of South Africa.

<sup>362</sup> McGregor *et al Labour Law Rules* 204.

<sup>363</sup> Section 77(4) of the Labour Relations Act 55 of 1995 of South Africa.

<sup>364</sup> McGregor *et al Labour Law Rules* 204.

<sup>365</sup> Section 213 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>366</sup> Maserumule 2001 *ILJ* 45.

<sup>367</sup> McGregor *et al Labour Law Rules* 184-185.

lock-out entails (i) exclusion, by the employer, of the employees, (ii) with the object of forcing employees to accept a demand or counter demand regarding any matter of mutual interest between the employer and the employees.<sup>368</sup>

b) Procedural requirements for the protection of strikes and lockouts

For a strike or lock-out to be lawful and protected certain conditions must be satisfied. These requirements are that (i) the issue in dispute must fall within the definition of a strike or lock-out; (ii) there must be a certificate of outcome following an attempt by either the Bargaining Council or the CCMA to resolve the dispute through conciliation within 30 days of the referral and (iii) at least 48 hours' written notice must be given before the strike or lock-out commences.<sup>369</sup>

c) Prohibitions or limitations on strikes and lockouts

The LRA<sup>370</sup> prohibits or limits strikes or lock-outs in cases (i) where a collective agreement prohibits a strike; (ii) where an agreement prescribes arbitration; (iii) where a dispute must be referred to arbitration or the Labour Court; (iv) where employees are engaged in essential and maintenance services and (v) where an award or a collective agreement regulates the issue in dispute.<sup>371</sup>

d) Secondary strikes

South Africa's LRA, unlike the labour legislation in Botswana, Lesotho and Swaziland, provides for secondary strikes, also called sympathy strikes. McGregor et al give the following example to illustrate what a secondary strike is:

'Company A is a paper manufacturer whose main function is to process wood into pulp. A is in dispute about wages with trade union X at the workplace. Factory B fells, cuts and supplies raw wood to A. Trade union Z is the only union in the workplace of B. If the members of Z strike in support of the wage demand by members of X, that will amount to a secondary strike. The strike by members of Z will impact on B, but also put pressure on A, because B will not be able to provide A with raw wood, which may bring A's operation to a halt.'<sup>372</sup>

<sup>368</sup> Section 213 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>369</sup> McGregor et al *Labour Law Rules* 187.

<sup>370</sup> Section 65.

<sup>371</sup> McGregor et al *Labour Law Rules* 189-191.

<sup>372</sup> McGregor et al *Labour Law Rules* 192.

Just like primary strikes, secondary strikes must be protected. For a secondary strike to be protected, (i) the primary strike itself must be protected; (ii) strikers must give their employer 7 days' written notice of the commencement of the strike; and (iii) the harm to the secondary employer must not be more than what is required to make an impact on the primary employer.<sup>373</sup>

e) Legal consequences of protected strikes and lockouts

If the requirements for a protected strike or lock-out as discussed above have been complied with, an employee may not be dismissed from work except for misconduct or operational requirements of the business;<sup>374</sup> the employer's or employee's action constitutes neither a delict nor breach of contract;<sup>375</sup> an employer may not discriminate against an employee because of involvement in the strike<sup>376</sup> and no claims for compensation can be instituted against employees or employers.<sup>377</sup> It is worth noting that in South Africa, as in Botswana, the common law principle of 'no work, no pay' applies in terms of which there is no remuneration for employees during a strike or a lock-out.<sup>378</sup> However, in cases where the remuneration includes such payment in kind as food and accommodation, such may not be withheld.<sup>379</sup> The employee has to request that the payment in kind continues<sup>380</sup> and the employer may, through civil proceedings at the Labour Court, recover the monetary value after the end of the strike.<sup>381</sup> Also, employers are permitted to engage replacement labour during a protected strike, except in cases where the whole or part of the employer's business is a maintenance service. However, an employer cannot use replacement labour if they embark on an offensive lock-out, that is, a lock-out initiated before a strike

<sup>373</sup> Section 66(2) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>374</sup> Section 187(1) (a) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>375</sup> Section 67 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>376</sup> *FAWU v Pets Products (Pty) Ltd* [2000] 5 BLLR 483 (LAC).

<sup>377</sup> Section 68(1) (b) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>378</sup> *3M SA (Pty) Ltd v SACCAWU and others* [2000] 5 BLLR 483 (LAC); Section 67(3) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>379</sup> McGregor et al *Labour Law Rules* 195.

<sup>380</sup> Section 69 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>381</sup> Section 67(3) (b) of the *Labour Relations Act* 55 of 1995 of South Africa.

commences. An employer can only use replacement labour in the case of a defensive lock-out, that is, a lock-out waged as a response to a strike.<sup>382</sup>

f) Legal consequences of unprotected strikes and lockouts

An unprotected strike or lock-out has legal consequences. Such a strike or lock-out can be interdicted by the Labour Court, which has exclusive jurisdiction in such a case.<sup>383</sup> The Labour Court may order the payment of a 'just and equitable compensation' to either the employees or the employers who suffered any loss caused by an unprotected strike or lock-out,<sup>384</sup> and strikers may have their contracts of employment terminated.<sup>385</sup>

#### 4.4.3 Essential Services Committee

The functions of the Essential Services Committee are to monitor the implementation and observance of essential services determinations, minimum services agreements, maintenance services agreements and determinations; to promote effective dispute resolution in essential services; to develop guidelines for the negotiation of minimum services agreements and to decide, on its own initiative or at the reasonable request of any interested party, whether or not the whole or a part of any service is an essential service.<sup>386</sup>

The Committee may only determine a service as essential where, in terms of Section 213 of the Act, it can be shown that an interruption of that service would, '*endanger the life, personal safety or health of the whole or any part of the population*'. Moreover, it would have to be objectively established that a clear and imminent threat to the life, personal safety or health of the whole or part of the population exists.<sup>387</sup>

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<sup>382</sup> *Technikon SA v National Union of Technikon Employers of SA* (2001) 22 ILJ 427 (LAC).

<sup>383</sup> Section 68(1) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>384</sup> Section 68(1) (b) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>385</sup> Section 68(5) (b) of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>386</sup> Section 70 of the *Labour Relations Act* 55 of 1995 of South Africa.

<sup>387</sup> <https://www.ccma.org.za> accessed on 22 November 2018.

#### 4.4.4 Litigation at the Labour Court

##### 4.4.4.1 Labour Court

The Labour Court determines labour disputes. The court was established by the Labour Relations Act, 1995 and has a status similar to that of a division of the High Court. Its seat is in Johannesburg.<sup>388</sup> It has branches in Cape Town, Port Elizabeth and Durban.<sup>389</sup>

The Labour Court has the power of review. A party to a trade dispute may apply to the Labour Court based on an alleged defect in a Commissioner's ruling or award.<sup>390</sup> The party who alleges such a defect must apply to the Labour Court to set aside the award within six weeks of the award being served.<sup>391</sup> A defect means that the Commissioner committed misconduct with respect to his or her duties as an arbitrator; committed a gross irregularity in the conduct of the arbitration proceedings; acted *ultra vires* his or her powers, that is, exceeded his powers; and that the award was improperly obtained.<sup>392</sup> A review is not an appeal. It is, therefore, not related to the merits of the matter but to the Commissioner's conduct.

##### 4.4.4.2 Labour Appeal Court

The Labour Appeal Court hears appeals from the Labour Court. The court was established by the LRA and has a status similar to that of the Supreme Court of Appeal. Its seat is in Johannesburg, but it also hears cases in Cape Town, Port Elizabeth and Durban.<sup>393</sup>

#### 4.5 Summary

In this chapter, a comparative analysis between the TDA, 2016 and comparative legislation in Lesotho, Eswathini (formerly Swaziland) and South Africa was made. In the next chapter, based on the findings on Botswana's compliance with ILO

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<sup>388</sup> <https://www.justice.gov.za> accessed on 26 October 2019.

<sup>389</sup> <https://www.justice.gov.za> accessed on 26 October 2019.

<sup>390</sup> Section 145 of the *Labour Relations Act 55 of 1995* of South Africa.

<sup>391</sup> Section 145(1) (a) of the *Labour Relations Act 55 of 1995* of South Africa.

<sup>392</sup> Section 145 (2) (a) and (b) of the *Labour Relations Act 55 of 1995* of South Africa.

<sup>393</sup> <https://www.ccma.org.za> accessed on 22 November 2018.

Conventions and the comparison with comparative labour legislation of Lesotho, Eswathini (formerly Swaziland) and South Africa, the TDA, 2016 is critiqued, with a view to identify its strengths and weaknesses.

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## CHAPTER 5: A CRITIQUE OF THE TDA, 2016

### 5.1 Introduction

In this chapter, based on the findings on Botswana's compliance with ILO Conventions and the comparison with comparative labour legislation of Lesotho, Eswathini (formerly Swaziland) and South Africa, especially the latter, which has arguably the most progressive labour legislation in the world, certainly on the continent, the TDA, 2016 is critiqued.

### 5.2 Mediation

Compared to South Africa, for instance, where mediation is conducted by an autonomous entity, the CCMA, which has a Governing Board and an Executive Management, Botswana's system of mediation is, it is submitted, not independent since it is conducted by a government department, the DLSS, whose mediators and arbitrators are appointed by the Minister after consultation with the Labour Advisory Board (the Board). The mediators and arbitrators discharge their functions subject to the direction and control of the Commissioner.<sup>394</sup> This concern comes to the fore particularly when Government is a party in the mediation, especially in high profile cases which involve Government and trade unions. In terms of the TDA, 2016, as is the case with most countries' legislation, a mediator's decision is not binding on the parties. There is no doubt that this hampers effective and speedy trade dispute resolution, especially for trivial and straight forward disputes. This, it is submitted, is one of the reasons why the DLSS's trade dispute settlement rate is low, the result being that almost all disputes are referred to the Industrial Court. Anecdotal evidence suggests that the general view is that the DLSS is toothless and that parties, especially employers, participate in the process as a mere formality. Though one has sympathy for this view, it is submitted that this cannot be sustained because according mediators the power to make decisions which are binding on the parties would go against the very essence of mediation, especially because during mediation a party can disclose information which is prejudicial to its interests. The conciliation aspect,

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<sup>394</sup> Section 3(4) of the *Trade Disputes Act*, 2016.

which is provided for in both South Africa and Lesotho's legislation is not provided for in the TDA, 2016. As stated earlier, while in mediation, the mediator generally sets out alternatives for the parties to reach an agreement, conciliation involves the assistance of a neutral third party who plays an advisory role in reaching an agreement. It is submitted that the inclusion of conciliation in Botswana's trade dispute resolution process would be beneficial in that the disputants are more likely to reach an agreement if they are actively assisted as opposed to when alternatives are merely set out for them.

### **5.3 Arbitration**

Just like mediators, the independence of arbitrators in Botswana is doubtful because they are appointed by the Minister, who is a politician, after consultation with the Labour Advisory Board (LAB)<sup>395</sup>. This is especially true because the Minister is not obliged to take the advice of the Board. He or she is only obliged to make the appointments after consulting the Board.<sup>396</sup> The arbitrators' lack of independence is compounded by the fact that though they effectively have powers of judges, since their arbitral awards have the same force and effect as Industrial Court judgments and orders, they have no security of tenure. They, like mediators, can be removed by the Minister, after consultation with the LAB, for (a) inability to perform the functions of their office, whether arising from infirmity of body or mind, or from any other cause; or (b) serious misconduct.<sup>397</sup> It is respectfully submitted that the TDA, 2016's provision that arbitrators have no jurisdiction over disputes of right, but only have jurisdiction over disputes of interest, is problematic. It is respectfully submitted that this contributes to the Industrial Court having a back log of cases since most disputes are disputes of right which, if arbitrators had jurisdiction over, could be dispensed with speedily through arbitration. However, giving arbitrators, who are lay persons with no legal training, the power to adjudicate on disputes of rights, which entail interpretation of the substantive law, can have disastrous effects on the rights of the parties, especially that arbitrators' decisions are not appealable on the merits. It is submitted that even if an exception was made with respect to disputes of rights, it would still be problematic

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<sup>395</sup> Section 3 of the *Trade Disputes Act*, 2016.

<sup>396</sup> Section 3 of the *Trade Disputes Act*, 2016.

<sup>397</sup> Section 4 of the *Trade Disputes Act*, 2016.

because the Industrial Court can be inundated with appeals in relation to arbitrators' decisions.

Still on arbitration, anecdotal evidence suggests that there is discomfort with the provision in the TDA, 2016<sup>398</sup> that one cannot appeal an arbitrators' decision on the merits, but only the arbitrator's decision to join a party and the arbitrator's jurisdiction to make an award. This was confirmed by the Industrial Court when it said "... In review proceedings, the court did not concern itself with the merits of the case or whether the decision was right or wrong but only whether or not the arbitrator acted in good faith or not. The applicant had failed to make out a case for review."<sup>399</sup> To express this discomfort several rhetorical questions have been asked: is it not often the decision on the merits that is of interest to the parties?; if judges' decisions are appealable on the merits why are arbitrators' decisions not appealable?; Can arbitrators not make mistakes on the merits in the same manner that judges can and in fact do?, etcetera. The provision has also been questioned on the basis that because the Act does not make it a requirement that arbitrators should have training in law, but only provides that the Minister shall appoint mediators and arbitrators with expertise in labour law, labour relations or other specialist areas of expertise,<sup>400</sup> it is unsafe to make their decisions not appealable on the merits. The counterargument to this discomfort is that since the parties choose an arbitrator themselves, they should be bound by his or her decision. But, in terms of the TDA, 2016, the parties do not choose an arbitrator. He or she is assigned to them by the Commissioner of Labour. This is unlike under the Arbitration Act,<sup>401</sup> where parties choose their own arbitrator whose services they, in fact, pay for. There is also no professional body to which arbitrators belong, which registers them and regulates their conduct. It is submitted that the above stated discomfort notwithstanding, the fact that arbitral awards are not subject to appeal on the merits is an essential tenet of the Alternative Dispute Resolution (ADR) mechanism which cannot be tempered with.

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<sup>398</sup> Section 8(14) of the *Trade Disputes Act*, 2016.

<sup>399</sup> *African Tourism Group v. Modibedi* 2009 1 BLR 262 IC.

<sup>400</sup> Section 3 (2) (a) of the *Trade Disputes Act*, 2016

<sup>401</sup> Cap. 06:01.

Unlike South Africa's Labour Relations Act that provides for conciliation-arbitration(con-arb), the TDA, 2016 has no provision for con-arb. This is a handicap because con-arb, which combines aspects of both conciliation and arbitration, allows speedy resolution of disputes in appropriate cases. The same applies to the TDA, 2016's lack of the Pre-Dismissal Arbitration procedure. This procedure, which is a form of disciplinary hearing, could avoid or at least reduce the occurrence of patently wrongful dismissals, saving the employer the time and resources of going through conciliation, arbitration and litigation.

#### **5.4 Industrial Action**

The conspicuous absence of provisions for protest action and picketing in the TDA, 2016 is troubling. In fact, the provisions in the Trade Unions and Employers' Organisations Act<sup>402</sup> are more elaborate. The reason the Labour Relations Act of South Africa provides for protest action, for instance, is that it acknowledges that employees, like the rest of the citizenry, have the right to express their views, through peaceful and protected protest action, in relation to such socio-economic issues as the provision of quality education. Also, the right to the freedom of expression, which in this case is exercised through protest action, is enshrined in the Botswana Constitution.<sup>403</sup> Of course, employees cannot be accorded the right to protest action for purely political purposes, but they should be accorded such right in relation to economic factors, e.g. anti-labour economic policies which would inevitably affect their jobs, resulting in company closures, retrenchments, etcetera. Obviously, in introducing the provision for protest action, regard must be given to the fine line between economic and political issues, lest some employees, especially the unionised, take advantage of the provision to further their political interests. Also, though the Act provides a definition for action short of strike,<sup>404</sup> it does not have a section which regulates a method of working which slows down normal production or the execution of the normal function, commonly known as 'go slows', under employees' contracts of employment.

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<sup>402</sup> Section 53(1) and (2) of the *Trade Unions & Employers' Organizations Act*, Cap.48:01.

<sup>403</sup> Section 12 of the *Constitution of Botswana*.

<sup>404</sup> Section 2 (1) (l) of the *Trade Disputes Act*, 2016.

There has been disquiet, especially within the public service trade union movement<sup>405</sup> regarding the classification of certain services, for example, teaching as an essential service,<sup>406</sup> and, therefore, taking away their right to strike by employees<sup>407</sup> and the right to lock-out by employers.<sup>408</sup> BOFEPUSU has intimated that Government, in an effort to minimise the impact of strikes, can, as it did following the 2011 public sector strike, increase the list of essential services.<sup>409</sup> No doubt, this concern would have been assuaged by government's recent amendment of the Trade Disputes Act<sup>410</sup> which removed Botswana Vaccine Laboratory Services, Bank of Botswana, Diamond sorting, cutting and selling services, Operational and Maintenance Services of the railways, Sewage services, Veterinary services in the public service, Teaching services, Government Broadcasting services as well as the Immigration and Customs services from the list of essential services. That notwithstanding, the TDA, 2016's lack of a provision for an Essential Services Committee to decide on matters related to essential services, including classification of essential services, remains a concern since government can always widen the definition of essential services when it is convenient to do so. In South Africa, for instance, there is an Essential Services Committee whose functions include monitoring the implementation and observance of essential services determinations, minimum services agreements, maintenance services agreements and determinations; promoting effective dispute resolution in essential services; developing guidelines for the negotiation of minimum services agreements; and deciding whether or not the whole or a part of any service is an essential service.<sup>411</sup> The problems caused by the absence of the Essential Services Committee are further compounded by the TDA, 2016's failure to provide for a body with a mandate similar to South Africa's NEDLAC. Dinokopila's discussion on the justiciability of socio-economic rights in Botswana<sup>412</sup> would perhaps be useful in assisting government to realise the importance of prioritising socio-economic rights for workers, something which can

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405 Correspondent 2017 <http://www.mmegi.bw>.

406 Section 46 (1) (l) of the *Trade Disputes Act*, 2016.

407 Section 47 (a) of the *Trade Disputes Act*, 2016.

408 Section 47 (b) of the *Trade Disputes Act*, 2016.

409 Correspondent 2017 <http://www.mmegi.bw>.

410 Trade Disputes (Amendment) Bill, 2019(Bill No.17 of 2019).

411 Section 70 of the *Labour Relations Act* 55 of 1995 of South Africa.

412 Dinokopila 2013 JAL 108-125.

be achieved through NEDLAC. According to Dinokopila, the enactment of socio-economic rights makes their judicial enforcement easy since there would be judicial remedies available to a litigant, even in public interest litigation. He further argues that the enactment of socio-economic rights would provide an institutional, legal and constitutional framework which is requisite for the promotion, protection and fulfilment of socio-economic rights.<sup>413</sup> It is respectfully submitted that there is disparity of treatment between employers and employees because while there is punishment for essential service employees who engage on a strike no punishment is prescribed for essential service employers who engage in lockouts.<sup>414</sup>

Though it is incontrovertible that the prohibition of strikes and lock-outs for essential services is necessary for the protection of essential services, life and property, it is equally incontrovertible that some employers have exploited essential service employees knowing that a strike, which is, no doubt, the most effective tool for employees,<sup>415</sup> is not legally available to them. Also, this provision notwithstanding, some essential service employees have engaged in strike action resulting in employee dismissals as it happened during the 1995 manual workers strike<sup>416</sup> and the 2011 public sector strike.<sup>417</sup>

It is disconcerting that the TDA, 2016 has no provision for secondary strikes, also referred to as sympathy strikes. Especially in a situation where a company monopolises an industry to the extent that it has companies in all layers of the industry, the absence of sympathy strikes may make a primary strike almost meaningless since the employer's business would hardly feel its effect. Take for example, where one employer in the poultry industry has businesses from chickenfeed production plants to chicken selling retail outlets. Such an employer can only feel the pinch of a strike, forcing it to come to the negotiation table, if there are secondary strikes by employees in the other businesses in its chain or

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<sup>413</sup> Dinokopila 2013 JAL 108.

<sup>414</sup> Section 48(1) of the *Trade Disputes Act*, 2016.

<sup>415</sup> Friedman-Rudovsky (2001) *Botswana Power Corporation Workers Union: A historical analysis. Directed Independent Study Project*. Gaborone: Pitzer College.

<sup>416</sup> *National Amalgamated Local Central Government Workers Union v Attorney General* 1995 BLR 48 (CA).

<sup>417</sup> *The Attorney General v. Botswana Land Boards & Local Authorities Workers Union and 3 Others*, Civil Appeal No. CACGB-053-12.

empire. The TDA, 2016's failure to provide for picketing as a corollary to strike action, for instance, is another eyesore. Its absence makes it impossible for strikers to persuade others, such as non-striking employees, customers and suppliers of the company not to deal with their employer. The result is that the strike's impact is diminished or impaired, making it unlikely for the employer to be forced to come back to the negotiation table.

### **5.5 Litigation at the Labour Court**

With respect to litigation, BOFEPUSU<sup>418</sup> has questioned the independence of Industrial Court judges who are appointed by the President acting alone.<sup>419</sup> The basis for its discomfort is that, as a politician, who, in the case of Botswana, is invariably the leader of the ruling party, the President's appointments are likely to be influenced by political considerations. Molatlhegi seems to agree, stating this as a paradox of saving the Industrial Court.<sup>420</sup> However, it is respectfully submitted that this is tempered by the TDA, 2016's provision which engenders security of tenure for Industrial Court judges<sup>421</sup> in the same manner that the Constitution does with respect to High Court judges.<sup>422</sup> It is submitted that the fact that non-citizen judges and contract citizen judges are appointed on renewable contracts<sup>423</sup> may compromise their independence because they may end up being sympathetic to the Executive in an effort to 'buy' contract renewals. The researcher is of the opinion that this is worsened by the fact that the Judicial Service Commission (JSC) is not involved in the decision to renew their contracts. It is further submitted that the TDA, 2016 provision that the President, notwithstanding the provision that an Industrial Court judge shall vacate office on attaining the age of 70 years,<sup>424</sup> may permit an Industrial Court judge who has attained the age of 70 years to continue in office for such period as may be necessary to enable him or her to deliver judgment or to do any other thing in relation to proceedings that were commenced before him or her before he or she attained that age<sup>425</sup> is a threat to

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<sup>418</sup> Ganetsang 2017 <http://www.sundaystandard.info>.

<sup>419</sup> Section 15 (1) of the *Trade Disputes Act*, 2016.

<sup>420</sup> Molatlhegi 2009 JAL 64-79.

<sup>421</sup> Section 19 of the *Trade Disputes Act*, 2016.

<sup>422</sup> Section 97 of the *Constitution of Botswana*.

<sup>423</sup> Section 15 (14) of the *Trade Disputes Act*, 2016.

<sup>424</sup> Section 18 (1) of the *Trade Disputes Act*, 2016.

<sup>425</sup> Section 20 (4) of the *Trade Disputes Act*, 2016.

judicial independence. This provision, especially its latter part, it is submitted, may be abused since a judge who is sympathetic to the Executive may, towards his or retirement age, be overloaded with cases, especially those in which Government has vested interest, so that he or she continues handling such cases beyond his or her normal retirement age. Trade unions have complained of what they refer to as 'executive minded' judges.<sup>426</sup> The former Chief Justice, Dibotelo CJ ( as he then was) has, on the other hand, accused some attorneys of forum shopping,<sup>427</sup> implying that some attorneys file their cases in a manner they know is likely to have their case allocated to a judge who is likely to grant them a favourable judgment. If this is true, it would be regrettable because it would mean that such judges are beholden to certain interests and are, therefore, not independent. That an Industrial Court judge selects the nominated members from organisations representing employers and employees is a concern.<sup>428</sup> This compromises their independence since a nominated member is unlikely to disagree with the judge who appointed him or her and under whom he or she serves at his or her pleasure. Equally concerning is the provision<sup>429</sup> that a judge may, alone, exercise the court's jurisdiction in the absence of the nominated members of the court.<sup>430</sup> This prejudices employers and employees since the judge would decide without the input, on the factual determination of the case, from representatives from their organisations. Similarly disconcerting is section 20(4) of the Act which provides that where there is no majority decision on matters of fact the judges' decision shall prevail.<sup>431</sup> According to the researcher, this prejudices litigants because the best arbiter of fact is not a judge, but a lay person or a peer.

The TDA, 2016's failure to provide for an Industrial Court of Appeal is another limitation. It is submitted that if a country as small as Lesotho has a Labour Appeals Court, there is no reason why Botswana does not have an Industrial Court of Appeal. Lack of resources, for example, court rooms, cannot be an excuse for the court's absence. It is respectfully submitted that the court's

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<sup>426</sup> Reporter 2015 [www.sundaystandard.info](http://www.sundaystandard.info).

<sup>427</sup> Reporter 2015 [www.sundaystandard.info](http://www.sundaystandard.info).

<sup>428</sup> Section 15 (15) of the *Trade Disputes Act*, 2016.

<sup>429</sup> Section 20 (15) of the *Trade Disputes Act*, 2016.

<sup>430</sup> Section 15 (6) of the *Trade Disputes Act*, 2016.

<sup>431</sup> Section 18 (1) of the *Trade Disputes Act*, 2016.

establishment does not need extra resources, especially at its formative stages. It can start by sitting during the Industrial Court's vacations and use judges of the Industrial Court and the Industrial Court's premises and support staff. It can even adopt the Lesotho type Labour Appeals Court and have a judge of the High Court sitting with two nominated members. It is submitted that the current situation where appeals from the Industrial Court lie with the Court of Appeal is prejudicial to disputants in many respects. First, disputants, who would all along have been subjected to principles of law and equity, suddenly have their dispute referred to a court which only applies principles of law. Secondly, a disputant which may have, at the Industrial Court, been represented by a labour consultant because of lack funds to retain an attorney, suddenly must either engage an attorney or represent him or herself. Some litigants end up not proceeding with their appeals not because they have no prospects of success, but because they have no funds to retain an attorney and are not comfortable to represent themselves at the Court of Appeal, a court which, in the researcher's experience as a practising attorney, even attorneys find intimidating. It is submitted that in the same manner that lay persons, in terms of the current Act, have audience at the Industrial Court, a court of law and equity, legislation enabling the establishment of the Industrial Court of Appeal, which would also be a court of law and equity, can provide for representation by lay persons.

#### ***5.6 Execution and Enforcement of settlement agreements, default awards, arbitral awards and Industrial Court orders***

The TDA, 2016's failure to provide for Deputy Sheriffs of the Industrial Court is another limitation of the Act. This delays the execution of settlement agreements, default awards, arbitral awards and Industrial Court orders because successful litigants rely on execution by Deputy Sheriffs of the High Court and Industrial Court Bailiffs. In the researcher's experience as a practising attorney, the fees charged by Deputy Sheriffs of the High Court are high, making it costly, to execute orders, especially because the practice is that the Deputy Sheriffs require an upfront payment which they call mobilisation fee. In some cases, the fee is even higher than the execution amount, making it not worthwhile to execute such orders.

## **5.7 Summary**

In this chapter, based on the findings on Botswana's compliance with ILO conventions and the comparison with comparative labour legislation of Lesotho, Eswathini (formerly Swaziland) and South Africa, the TDA, 2016 was critiqued. In the next chapter, conclusions and recommendations for the TDA, 2016's reform are made.

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## CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

### 6.1 Introduction

In chapter five, based on the researcher's findings on Botswana's compliance with ILO Conventions and the TDA, 2016's comparison with comparative labour legislation of Lesotho, Eswathini (formerly Swaziland) and South Africa, especially the latter, the researcher critiqued the TDA, 2016. In this chapter, the researcher draws conclusions regarding the TDA, 2016's strengths and weaknesses and makes recommendations for reform.

### 6.2 Major research findings and conclusions

#### 6.2.1 Mediation

Botswana's system on mediation is not independent since it is conducted by a government department, the DLSS, whose mediators and arbitrators are appointed by the Minister responsible for Labour, a politician, after consultation with the Labour Advisory Board ('the Board'). Though there is a duty on the Minister to consult the Board, the Minister is not obliged to act in accordance with the Board's advice.<sup>432</sup> There is, therefore, a risk that, being a politician who invariably belongs to the ruling party, the Minister's appointments may be influenced by political considerations and other irrelevant and/or irrational considerations. Also, the lack of the conciliation aspect in the TDA, 2016 is a *lacuna* in the framework governing alternative dispute resolution in the labour sector.

#### 6.2.2 Arbitration

Just like mediators, the independence of arbitrators is doubtful because they are appointed by the Minister, who is a politician, after consultation with the Board.<sup>433</sup> This is especially true because the Minister is not obliged to act in accordance with the advice of the Board.<sup>434</sup> The arbitrators' lack of independence is compounded by the fact that though they effectively have powers of judges, since their arbitral

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<sup>432</sup> Section 3 (2) of the *Trade Disputes Act*, 2016.

<sup>433</sup> Section 3(2) of the *Trade Disputes Act*, 2016.

<sup>434</sup> Section 3 (2) of the *Trade Disputes Act*, 2016.

awards have the same force and effect as Industrial Court judgments and orders, they have no security of tenure. They, like mediators, can be removed by the Minister, after consultation with the Board, for (a) inability to perform the functions of their office, whether arising from infirmity of body or mind, or from any other cause; or (b) serious misconduct.<sup>435</sup> The argument that the TDA should empower arbitrators to have jurisdiction over disputes of rights is without merit. It is submitted that because arbitrators are not trained in law, they should not determine matters that touch on the parties' substantive legal rights, especially that their arbitral awards cannot be appealed on the merits. The same applies to the argument that the TDA should empower the Industrial Court to have jurisdiction over disputes of interest. It is respectfully submitted that because disputes of interest (e.g. disputes over wage increments) involve matters which cannot be determined through legal rules it would not be appropriate for an Industrial Court judge to decide them. They are, it is submitted, best dealt with by an arbitrator, failing which industrial action.

It is respectfully submitted that the TDA, 2016's lack of a provision for conciliation-arbitration(con-arb), which combines aspects of both conciliation and arbitration, delays speedy resolution of disputes in appropriate cases. Also, the TDA, 2016's lack of the Pre-Dismissal Arbitration procedure, a form of disciplinary hearing, contributes to the occurrence of patently wrongful dismissals, wasting the employer and employee's time and resources of going through conciliation, arbitration and litigation.

### 6.2.3 *Industrial Action*

The absence of provisions for protest action and picketing in the TDA, 2016 is troubling. This denies employees the right to express their views, through peaceful and protected protest action, in relation to such socio-economic issues as better conditions of service and improved wages, thereby violating their right to freedom of expression as enshrined in our Constitution.<sup>436</sup> The TDA, 2016's failure to provide for 'go slows' is likely to perpetuate strikes because even in instances

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<sup>435</sup> Section 4 of the *Trade Disputes Act*, 2016.

<sup>436</sup> Section 12 of the *Constitution of Botswana*.

where employees could have resorted to 'go slows' to resolve their disputes, they may end up resorting to strike action.

The absence of a provision for an Essential Services Committee to decide on matters related to essential services, including classification of essential services, is detrimental to labour relations in the country since conflicts may arise, as it did in the *Essential Service* case,<sup>437</sup> because of Government's unfettered power in determining the list of essential services. The same applies to Government's failure to create an institution similar to South Africa's NEDLAC. This, in effect, deprives employees of the opportunity to, in a tripartite forum, discuss, through their trade unions, socio-economic development issues touching on their welfare. The fact that in terms of the TDA, 2016 there is punishment for essential service employees who engage in a strike, but no punishment is prescribed for essential service employers who engage in a lockout, is a concern.

The TDA, 2016's failure to provide for secondary strikes, also referred to as sympathy strikes, has the effect of rendering primary strikes less effective for employees, especially in situations where a company monopolises an industry to the extent that it has companies in all layers of the industry. The TDA, 2016's failure to provide for picketing as a corollary to strike action, for instance, is another limitation. Its absence makes it impossible for strikers to persuade others, such as non-striking employees, customers and suppliers of the company not to deal with their employer. The result is that the primary strike's impact is diminished and impaired, making it unlikely for the employer to be forced to come back to the negotiation table. This is especially true because of the TDA, 2016's 'no work, no pay' principle which has the effect of discouraging employees from engaging in strike action.

#### 6.2.4 *Litigation at the Industrial Court and Industrial Court of Appeal*

The fact that unlike High Court judges who are appointed by the President acting in accordance with the advice of the JSC, Industrial Court judges are appointed by

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<sup>437</sup> *Botswana Land Boards & Local Authorities Workers Union v The Attorney General*, Case No. MAHLB-000631-11; *The Attorney General v Botswana Land Boards & Local Authorities Workers Union*, Case No. CACGB-053-12.

the President acting alone<sup>438</sup> has brought their independence into question considering that the President, who is a politician, may be influenced by politics in making his appointments. This is, however, tempered by the TDA, 2016's provision which provides for security of tenure for Industrial Court judges<sup>439</sup> in the same manner that the Constitution does with respect to High Court judges.<sup>440</sup> However, the situation is not promoted by the fact that non-citizen judges and contract citizen judges are appointed on renewable contracts,<sup>441</sup> something which, in the researcher's opinion, compromises their independence because they may end up being sympathetic to the Executive in an effort to 'buy' contract renewals.

This is especially true considering that the JSC is not involved in the decision to renew their contracts. The TDA, 2016's provision that the President, despite the provision that an Industrial Court judge shall vacate office on attaining the age of 70 years,<sup>442</sup> may permit an Industrial Court judge to serve beyond the age of 70 to enable him or her to deliver judgment or to do any other thing in relation to proceedings that were commenced before him or her<sup>443</sup> does not help the situation either. This may be abused since a judge who is sympathetic to the executive may, towards his or retirement age, be overloaded with cases, especially those in which Government has vested interest, so that he or she continues handling such cases beyond his or her normal retirement age. This is, however, mitigated by the use of the computerised case management system which allocates cases to judges indiscriminately without human intervention. That an Industrial Court judge selects the nominated members from organisations representing employers and employees may compromise the nominated members' independence<sup>444</sup> since, it is the belief of the researcher that a nominated member is unlikely to disagree with the judge who appointed him or her and under whom he or she serves at his or her pleasure. The provision<sup>445</sup> that a judge may, alone, exercise the court's jurisdiction in the absence of the nominated members of the court <sup>446</sup> prejudices

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<sup>438</sup> Section 15 (1) of the *Trade Disputes Act*, 2016.

<sup>439</sup> Section 19 of the *Trade Disputes Act*, 2016.

<sup>440</sup> Section 97 of the *Constitution of Botswana*.

<sup>441</sup> Section 15 (14) of the *Trade Disputes Act*, 2016.

<sup>442</sup> Section 18 (1) of the *Trade Disputes Act*, 2016.

<sup>443</sup> Section 20 (4) of the *Trade Disputes Act*, 2016.

<sup>444</sup> Section 15 (15) of the *Trade Disputes Act*, 2016.

<sup>445</sup> Section 20 (15) of the *Trade Disputes Act*, 2016.

<sup>446</sup> Section 15 (6) of the *Trade Disputes Act*, 2016.

employers and employees since the judge would decide without the input, on the factual determination of the case, from representatives from their organisations. The provision that in the absence of a majority decision on matters of fact the judges' decision shall prevail<sup>447</sup> prejudices litigants because, it is submitted, the best arbiter of fact is not a judge, but a lay person or a peer. It is submitted that the TDA, 2016's failure to provide for an Industrial Court of Appeal is prejudicial to disputants in many respects. First, disputants, who would all along have been subjected to principles of law and equity, suddenly have their dispute referred to a court which only applies principles of law and has no equitable jurisdiction. Secondly, a disputant who may have, at the Industrial Court, been represented by a labour consultant or trade union representative because of lack of funds to retain an attorney, suddenly must either engage an attorney or represent him or herself. Anecdotal evidence shows that some litigants end up not noting appeals not because they have no prospects of success, but because they have no funds to retain an attorney and are not comfortable to represent themselves at the Court of Appeal, a court which even attorneys find intimidating.

The TDA, 2016's failure to provide for Deputy Sheriffs of the Industrial Court is another limitation of the Act. This delays the execution of settlement agreements, default awards, arbitral awards and Industrial Court orders because successful litigants rely on execution by Deputy Sheriffs of the High Court and Industrial Court Bailiffs. The fees charged by Deputy Sheriffs of the High Court are high, making it costly, to execute orders, especially because the practice is that the Deputy Sheriffs require an upfront payment which they call mobilisation fee. In some cases, the fee is even higher than the execution amount, making it not worthwhile to execute such orders.

#### *6.2.5 Compliance with ILO Conventions and recommendations*

As shown at paragraph 3.4.4 above, Botswana has not been compliant with some of the fundamental Conventions, namely Discrimination (Employment and Occupation) Convention; Labour Relations (Public Service) Convention; Freedom of Association and Protection of the Right to Organise Convention; Right to

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<sup>447</sup> Section 18 (1) of the *Trade Disputes Act*, 2016.

Organize and Collective Bargaining Convention and the Equal Remuneration Convention. Botswana has also disregarded the CEACR's recommendations for remedying its non-compliance.

For instance, as shown at paragraph 3.4.4 above, Botswana has not complied with Conventions 87 and 98 in that she failed to take appropriate measures to ensure that labour and employment legislation grants members of the prison service the right to unionise. She has also failed to amend the TU&EOA to ensure that all union members, including those of unregistered trade unions, enjoy adequate protection against anti-union discrimination. She has also failed to amend the Employment Act to give full legislative expression to the principle of equal remuneration for men and women for work of equal value as provided for in Article 1 of Convention 100. Generally, the ILO has held that Botswana has failed to amend the TDA and the TU&EOA to bring them into conformity with the relevant Conventions. Specifically, she has, until 8<sup>th</sup> August 2019, failed to amend the TDA, 2016 to reduce the list of essential services.

### **6.3 Recommendations**

#### *6.3.1 Mediation*

In view of the foregoing, it is clear that the introduction of conciliation as one of the functions performed by mediators may go a long way in strengthening Botswana's trade dispute resolution framework. Further that mediators should be given the power, as in South Africa, to contact the parties telephonically or otherwise before the start of mediation or conciliation in an attempt to resolve the dispute. The Commissioner or any person delegated by him or her should, as in South Africa, be given subpoena as well as search and seizure powers. It is also incontrovertibly true that if Botswana's trade dispute resolution framework is to be more effective, there is need for the establishment of an independent entity similar to South Africa's CCMA. The entity will also deal with arbitration. Further that establishing a committee that advises the Minister with respect to the appointment, discipline and removal of mediators will go a long way in enhancing their independence.

### 6.3.2 Arbitration

The independence of arbitrators is integral for effective arbitration. It is submitted that this can be ensured by introducing security of tenure for arbitrators. It is further submitted that effective arbitration is not only dependent on independence of arbitrators; it is also influenced by intellectual capacity and temperament. It is submitted that in order to ensure that arbitrators have the required intellectual capacity and temperament, there is need to set not only minimum educational and/or academic requirements, but also to provide, in the Act, for the fit and proper requirement for arbitrators. However, these requirements, even if fulfilled, will amount to naught if there is no entity that regulates the conduct of arbitrators. There is, therefore, a need to establish a professional body responsible for the registration and regulation of arbitrators. For this regulatory entity to perform its function optimally, there is need for the promulgation of the rules for the conduct of arbitrators as provided for in the Act.<sup>448</sup> There is also need for the Judge President of the Industrial Court to, as empowered by the TDA, 2016,<sup>449</sup> after consultation with the Minister, publish rules for the conduct of arbitrations. There is also need for establishing a committee that will deal with the appointment, discipline and removal of the arbitrators.

Besides making the aforesaid improvements, there is a need to make institutional changes in relation to arbitration itself. Introduction of Con-Arb, which combines conciliation and arbitration, will go a long way in promoting the settlement of disputes at arbitration stage. The same applies to the introduction of the Pre-Dismissal Arbitration procedure. In the researcher's view, A provision, in the Act, for a pre-arbitration conference, in terms of which parties meet to determine disputed facts, common cause facts, issues to be determined by the arbitrator, reliefs claimed; exchange documents; and draft and sign the minute of the pre-arbitration conference, will go a long way in shortening the time taken in arbitration proceedings. This would also increase the chances of settlement of disputes outside the arbitration hearing. In view of the *Veronica Moroka* decision,<sup>450</sup>

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<sup>448</sup> Section 11 of the *Trade Disputes Act*, 2016.

<sup>449</sup> Section 53(3).

<sup>450</sup> *Veronica Moroka & 2 Others v The Attorney General and Another* Court of Appeal Civil Appeal No. CACGB-121-17.

amending the Act to provide for the execution of arbitral awards as at paragraph 28 of the judgment is imperative.

### 6.3.3 Industrial Action

In addition to strikes and lockouts, there is need to amend the Act to explicitly provide for protected protest action, picketing and 'go slows' as part of the industrial action process. This will avoid or at least minimise the chances of employees, for instance, resorting to the extreme in the industrial action continuum, that is strike action. To address the concern that in terms of current legislation, Government has unfettered power in the categorisation of essential services, there is need to amend the Act to provide for the establishment of an Essential Services Committee to deal with, *inter alia*, the classification of essential services. This Committee, which should include Government, Labour and Business, would go a long way in promoting parity of treatment between employers and employees in as far as essential services are concerned. For instance, it could address the disparity in terms of which the Act prescribes punishment for essential service employees who engage in a strike but does not prescribe punishment for essential service employers who engage in a lock-out. Amending the Act to provide for the introduction of the equivalent of South Africa's NEDLAC will go a long way in assisting employers and employees to deal with, *inter alia*, policy formulation and economic issues that have a bearing on employer-employee relations, as well as the regulation of protest action considering the prevailing economic circumstances of not only the company involved, but also the country at large.

It is recommended that to mitigate the effects of the 'no work, no pay' principle in relation to strikes or lock-outs, the Act be amended to, like South Africa's Labour Relations Act, provide that where an employee's remuneration package includes such payment in kind as food and accommodation, such may not be withheld. The employee, however, must request that the payment in kind continues and the employer may recuperate the monetary value after the strike ends through civil action before the Industrial Court.

#### 6.3.4 *Litigation at the Industrial Court and Industrial Court of Appeal*

Judicial independence is one of the tenets of any democracy. In order to ensure that this value prevails, the Act must be amended to the effect that, just like High Court judges, Industrial Court judges are appointed by the President acting in accordance with the advice of the Judicial Service Commission (JSC). However, even if the Act is amended in that regard, the independence of Industrial Court judges will remain questionable if the Act still provides for renewable contract-based judges and the President's sole action in the renewal or lack thereof of a judge's contract and extension of a judge's contract beyond the prescribed retirement age. The Act must be amended to the effect that the President has to act in accordance with the advice of the JSC in acting as such. The Act also must be amended to provide for the establishment of a Tribunal to advise the President on the discipline and/or removal of Industrial Court judges.

Considering the quasi-judicial role they play as arbiters of fact, the independence of nominated members is equally important. Just like in the case of arbitrators, this can be ensured by introducing security of tenure for them and setting, not only minimum educational and/or academic requirements, but also providing, in the Act, for the fit and proper requirement for them. There is also the need to provide for a statutory body that regulates their conduct. This will necessitate the establishment of a professional body responsible for their registration and regulation. For this regulatory body to perform its function optimally, there is need for the promulgation of rules of conduct for nominated members. The Act also must be amended to provide for the establishment of a Committee and a Tribunal that will deal with the appointment and discipline and/or removal of nominated members respectively. To avoid a situation where a judge may, for irrational and/or irrelevant considerations, side-line a 'non-conforming' nominated member, the provision that a judge may, alone, exercise the court's jurisdiction in the absence of the nominated members of the court has to be repealed. The provision that where there is no majority decision on matters of fact the judges' decision shall prevail<sup>451</sup> should also be repealed. It should be replaced with a provision that provides for a discussion until the court reaches an unanimous or majority

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<sup>451</sup> Section 20(4) of the *Trade Disputes Act*, 2016.

decision, failing which a mistrial is declared and a re-hearing by a bench of two judges and two assessors is ordered.

To avoid a situation where litigants, who would have had their dispute dealt with in terms of both law and equity, go to the Court of Appeal, a court of law, there is need to amend the Act to provide for the establishment of an Industrial Court of Appeal. To cater for litigants who cannot afford the costs of retaining an attorney, provision should be made that in the same manner that a party can be represented by a lay person at the Industrial Court, parties could be represented by lay persons at the Industrial Court of Appeal.

Regarding the enforcement of settlement agreements, default awards, arbitral awards and Industrial Court judgments and orders, it is recommended that the Act be amended to provide for the appointment of Deputy Sheriffs of the Industrial Court. To make the Deputy Sheriffs affordable, their execution fees should be set at the rate of execution for magistrates' court orders as is the case in South Africa. This is because the Industrial Court, as a court of law and equity, should be accessible. Regard being had to this fact, under the Act, litigants should not be required to pay stamp duty.

#### *6.3.5 Compliance with ILO Conventions and recommendations*

As shown at paragraph 6.2.5 above, Botswana's record of compliance with ILO Conventions leaves a lot to be desired. As a way of ensuring that there are checks and balances on Botswana's compliance which is in the hands of the Executive, there is need to provide, as one of the mandates of the Parliamentary Standing Committee on Foreign Affairs, the oversight role on compliance with ILO Conventions.

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